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Howard E. Watkins v. Utah Poultry and Farmers Cooperative : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HAROLD E. WATKINS

Plaintiff and Appellant

— vs. —

UTAH POULTRY AND FARMERS
COOPERATIVE, a Corporation

Defendant and Respondent

Case No. 7774

RESPONDENT'S BRIEF

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HAROLD E. WATKINS

Plaintiff and Appellant

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Defendant and Respondent

} Case No. 7774

RESPONDENT'S BRIEF

NATURE OF CASE

A jury with all of the evidence before them, including the injuries which plaintiff has taken pains to call to the court's attention and with an opportunity to observe the demeanor of the witnesses, decided the issues of fact in the present case in defendant's favor. Our inquiry at this time should not be to search out that evidence which might sustain the plaintiff's theory, as plaintiff has so artfully done in his brief, but to determine if there is sufficient evidence upon which the jury might reasonably have found as they did.

In that part of his brief having to do with the issues of fact, plaintiff argues that there was no evidence that intoxication was a proximate or contributing cause of the collision. The great preponderance of the evidence sustains the conclusion that plaintiff's intoxication was the proximate cause of the collision. It should be pointed out, however, that the issue of plaintiff's negligence should not be so limited. Plaintiff alleged in his complaint that "the defendant recklessly, carelessly and negligently drove its heavily loaded international truck against the left front end of plaintiff's car," (R. 1) and that the injuries to the plaintiff occurred as a result of this negligence. Defendant denies that "this defendant or said Matherson (defendant's driver) was negligent as alleged therein or negligent in any manner whatsoever." And alleges "that said accident was solely caused, or the cause thereof was proximately contributed to by the negligent acts, conduct and omissions of the plaintiffs." (R. 3-4) Therefore, the issues of fact in this case are not limited to whether or not the intoxication of the plaintiff was a proximate or contributing cause of the accident but are whether a jury might reasonably find from the evidence that there was no negligent conduct on the part of the defendant which was a proximate cause of any injury to the plaintiff or, the jury having found that there was such negligence, whether they, as reasonable men, might also have found that the injuries to the plaintiff were proximately contributed to by the negligent acts, conduct and omissions of the plaintiff himself.

For convenience, we will follow the same breakdown

as the plaintiff in discussing the evidence and will first discuss the evidence pertaining to the intoxication of the plaintiff and then the evidence pertaining to the proximate cause of the automobile collision out of which this action arose.

STATEMENT OF FACTS

A. Evidence pertaining to intoxication.

The behavior and condition of the plaintiff was first observed by Mr. Jack Scott as the plaintiff entered Mr. Scott's store in Cedar City at about 5:30 in the afternoon of the day of the accident. Mr. Scott testified that "he was intoxicated, very much so . . . he was untidy in his appearance, his clothing. His eyes were quite bloodshot, his tongue was thick, his conversation was a gabblous character, and he couldn't hardly hold himself up." (R. 126-127) After a short conversation (R. 128) Mr. Scott found it necessary to help plaintiff to the door and out of his store because he was annoying a boy who worked for Mr. Scott. (R. 129)

A short time later, Mr. Scott encountered the plaintiff for a second time. This time on the street in front of his store about three or four doors south of his establishment. Mr. Scott was engaged in a conversation with a Mr. Tuckett and a Mr. Christensen when the plaintiff approached the group and directed the remark "Hi stupid" toward them. (R. 131-135) Mr. Tuckett, who most closely observed the plaintiff at this time, stated that he told Mr. Watkins, the plaintiff, to go get lost. At that point plaintiff raised the "22" calibre rifle he was

carrying and pointed it toward the three conversants. Mr. Tuckett told him "he would look silly as hell with that gun sticking out of his body" (R. 135) whereupon, as testified by Mr. Tuckett, plaintiff "staggered over to his automobile on the south side of the car, and he then reached into the window of his car and pulled the window up, and stuck the rifle out, pulled the bolt back, raised the gun up at the three of us, the backs of Mr. Scott and Mr. Seegmiller, and toward my face." The group separated at that time. (R. 132-135)

Mr. Layron Christensen, the manager of Reed's Riteway store, whose premises adjoin those of Mr. Scott's, testified that plaintiff was in his establishment at about 5:30 p.m. the same afternoon and offered to sell Mr. Christensen a gun. This witness stated that plaintiff appeared wobbly and talked in jerks and that the plaintiff stated to him "well I am drunk, but don't think I am proud of it." "I am really ashamed. I am just having a good time." (R. 137)

One hour later, approximately 6:30 p.m., plaintiff entered "Ted's Bar" in Cedar City. The proprietor, Mr. Kent Farnsworth, a witness for the defendant, on cross examination testified as follows concerning plaintiff's condition at that time: "As he came in the door he straightened up. Sat down and ordered a beer. Then after he ordered the beer I could see he was incapacitated because the minute he went to get it he tipped it over, and I wouldn't sell him any more" . . . "After he tipped the beer over he was in no condition for another glass of beer." (R. 140) Plaintiff had been in Ted's Bar earlier

in the day and Farnsworth had told him at that time to go back to St. George because he would only get in trouble. (R. 139) Mr. Farnsworth finally escorted plaintiff out of his establishment because of his unruly conduct. (R. 139)

Between 8:00 and 8:30 p.m. plaintiff was in Milt's Circus Lounge, as testified to by Mrs. Orissa Hirshi, the bartender. He had been in the lounge earlier in the day and Mrs. Hirshi had been warned by her brother not to sell him any beer. (R. 143) Mrs. Hirshi stated that the plaintiff was insulting and had been drinking. (R. 143) A short conversation followed Mrs. Hirshi's refusal to sell plaintiff any more beer. (R. 144) Mr. Robert E. Cooley, a patron, who entered the establishment at the same time as the plaintiff, stated to Mrs. Hirshi, "This fellow had had too much to drink," and offered to summon the police. (R. 144) Thereafter, police officer William Hills arrived and took plaintiff into his custody. (R. 164) Mr. Cooley watched plaintiff leave with officer Hills and stated that the plaintiff staggered as he walked up the stairs to the street entrance (R. 164)

Officer William Hills of the Cedar City Police testified he first noticed the plaintiff as he entered the Circus Lounge in response to Mr. Cooley's call and saw the plaintiff leaning heavily on the bar, face flushed and his eyes quite glassy and with the appearance of being intoxicated. (R. 150) Officer Hills requested Mr. Watkins to follow him outside which the plaintiff did, although, the officer had to help him up the stairs to the street because of plaintiff's wobbly condition. (R. 151) Once out-

side both men entered the police car. As officer Hills backed away from the curb he remarked to plaintiff, "Well, pal, it looks like you have got kind of a pretty good load on." The plaintiff replied, "Yes, I have been drinking." (R. 151) Officer Hills drove the police car around Cedar City for a short time and then drove to plaintiff's car and informed him that he would not book him if he would not drive the car. Mr. Watkins promised not to drive and stated that he was waiting for another man who had the keys to the car and who would drive. (R. 153) Plaintiff stated, "Oh, I know you are giving me a break . . . and you could probably book me with justification." (R. 153-154) Officer Hills left the plaintiff in his automobile sitting on the right hand side of the driver's seat. The officer waited a few minutes and responded to another call. When he returned between 8:57 and 9:24 o'clock p.m., at the most 33 minutes before the accident occurred at a point 32 miles distant, the plaintiff was still sitting in his vehicle as the officer had left him. (R. 171) The officer's testimony as to the time was verified by the radio log. (Exhibits 1 and 2)

Ernest Pearce, a state highway patrolman who assisted in the investigation of this accident, testified that when he arrived at the scene of the accident, shortly after 10:00 o'clock p.m., and about an hour after the accident, the plaintiff was still lying on the seat of his car "profaning in a belligerent state of mind." (R. 203) It was his opinion from his observation of the plaintiff that he was intoxicated. (R. 206)

Thomas H. Semmons, the highway patrolman who

was in charge of the investigation, who incidentally was called as a witness by the defendant and not the plaintiff, testified that he could smell the odor of liquor about plaintiff's car and that in his opinion the plaintiff was under the influence of liquor at the time.

Dr. Broadbent, the doctor who treated the plaintiff at the Iron County Hospital at about 11:30 o'clock the night of the accident, testified that the plaintiff was antagonistic, objected to treatment and was very abusive in his language (R. 289). While he admitted that there were some elements of plaintiff's injury which possibly could have explained the plaintiff's behavior (R. 297), it was the opinion of this witness, specially trained to diagnose the physical condition of persons, that the plaintiff was intoxicated. (R. 291) The following morning, plaintiff apologized to the doctor for his conduct and "said he was sorry for the way he had acted because when he drank he wasn't exactly responsible." (R. 290)

Phyllis Nelson, the nurse at the Iron County Hospital who assisted Dr. Broadbent, testified that the first thing she noticed about the patient, plaintiff, was the smell of liquor about him (R. 352) and that "he was profaning . . . he was belligerent and uncooperative in every way. His language was . . . well, it isn't what we would expect from a patient in the hospital in his condition." (R. 353) Her opinion was that he was under the influence of liquor. (R. 354) The following morning the plaintiff asked if he had given them a hard time during the night and said, "If I did, I am sorry, because I was drinking. I had been drinking." (R. 355)

B. Evidence pertaining to the proximate cause of the accident.

By their verdict in favor of the defendant, the jury must necessarily have decided either that the defendant had not been shown by a preponderance of the evidence to have been guilty of any negligence which was the proximate cause of the collision or, if they did believe defendant was guilty of such negligence, then the plaintiff was also guilty of some negligent conduct which was a proximate cause of his own injuries. Let us examine the record to determine if they might have reasonably so found.

There is little, if any, evidence of any negligence on the part of the defendant. Plaintiff testified that the defendant's truck appeared to be overlapping his side of the highway as the two vehicles approached the point of collision near a bridge about seven miles north of Paragona, Utah on US Highway 91 from opposite directions. (R. 60) Highway Patrolman, Ernest Pierce, testified that the tire marks left by plaintiff's vehicle started about 10 to 20 feet north of the bridge (R. 32) and that they swung across the road and back and then way over." (R. 33) Exhibit G was received for the limited purpose offered, that was, merely to illustrate the officer's testimony as to the beginning of the alleged tire marks, and for no other purpose. (R. 39) Officer Pierce admitted that he didn't make any extensive investigation in the area north of the bridge by reason of the fact that he and State Trooper Semmons had already concluded that the point of impact was south of the bridge; (R. 43) and,

for the further reason, that Officer Semmons was the principal investigating officer and that he was merely assisting by regulating traffic and holding the measuring tape. (R. 364) He testified that he was dissatisfied with the investigation made on the night of the accident and suggested to Officer Semmons that he go out the next morning, "and maybe he could find more definite about where they hit." (R. 42-364) Theodore Atherly, another witness for plaintiff, testified that he observed these tire marks starting about four feet east of the center line and continuing to the plaintiff's car. (R. 114) He further testified that he observed two fresh gouge marks on the highway west of the center or on the defendant's side of the road. (R. 362)

Contrast this evidence of negligence on the part of the defendant with that on the part of the plaintiff. Plaintiff had a history of being drunk from five o'clock on the afternoon, four and one-half hours before the accident at 9:30 p.m. (R. 1) to 11:30 that night. Plaintiff testified that after he observed the lights of the approaching truck east of the center line or on his side of the road, he continued to drive toward those lights for some distance without making any attempt to stop his vehicle except to slightly touch the brakes with his foot when he saw the bridge. (R. 108) LaMar W. Matheson, the driver of the defendant's automobile, testified that the overall length of the truck was 23 feet 6 inches and that the truck measured 94 inches in over-all width. (R. 218) The truck had amber clearance lights on both corners of the bed (R. 219) and all lights were burning when

the truck made its last stop at Beaver, Utah. (R. 220) He stated that the speed of the truck as it approached the bridge where the collision occurred was between 45 and 50 miles an hour, (R. 220) and that he was traveling on the west side of the highway. (R. 221) He first noticed the lights of the plaintiff's automobile approximately two miles away and observed that they were approaching him much faster than the other traffic on the highway. (R. 221) At the time the plaintiff's automobile passed the cab of the truck the right wheels of the truck were on the west edge of the hard surface. (R. 221-222) The only warning he had of the impending collision was just a moment before the impact when the plaintiff's automobile seemed to come toward him or to turn toward the truck. (R. 229) Matheson brought the truck to a stop about 200 feet south of the point of collision and then drove the truck another hundred feet forward to get it completely off of the highway. (R. 222) As he walked back along the highway to the point where plaintiff's car had come to rest, he observed the jack and tools of the truck just about half way in the west lane of the highway, close to the north side of the bridge. (R. 223) (The location of the jack is marked "K" with a circle around it on the diagram drawn on the board labeled P.A.J.) This was a twelve ton hydraulic jack weighing about 25 pounds, (R. 223) which had been in the tool box under the left front corner of the truck bed prior to the accident. (R. 224) The tool box was broken and scattered about the road. (R. 224) It is reasonable to assume that the box was broken by the impact of the two cars and the

heavy jack came to rest on the highway somewhere near the point of impact.

The passenger in defendant's automobile, Glen Garfield, had aerial gunnery training in the army and qualified as an expert in aerial fire which required that he be able to judge the relative speeds of different objects. (R. 175) He testified defendant's truck was traveling south approximately 45 miles per hour (R. 176), and the speed of the approaching car "appeared to be considerably faster because you noticed in the distance it was coming at a very rapid rate. You can't tell how fast, but you just know, from watching any car coming out on the open highway, that it is coming at a high rate of speed. That is, as far as judging, you know it is coming fast if the distance between you closes very rapidly." (R. 176) He testified he was watching the side of the highway and it appeared to him the truck was almost off the oiled surface of the road and that the truck continued to travel near the very edge of the highway up until the time of impact. (R. 177)

On the night of the accident the officers determined the point of impact to be a raspberry smear south of the bridge. (R. 41) Mr. Garfield and Mr. Matheson had procured six cases of raspberries in Orem, Utah, which were being carried in the tool box. When the tool box was shattered by the impact, the berries were apparently scattered all over the highway. (R. 184). The raspberry smear extended south from the bridge and was predominantly on the west side of the road. (R. 279) The center of the smear was 65 feet south of the bridge and

seven feet ten inches from the west shoulder of the hard surface of the highway and eleven feet ten inches from the east shoulder. (R. 306) The morning following the accident the investigating officer, Thomas H. Semmons, returned to the scene of the collision and re-examined the marks on the highway. At that time he found two gouge marks on the west side of the highway. He testified the most southerly gouge marks were two feet from the center of the road on the west side about five to seven feet north of the bridge. (R. 307) It was roughly about two inches across and four inches long and about an inch and a half to two inches deep. (R. 307) The second gouge mark was a foot and a half north and about six inches east of the first gouge mark still on the west side of the road. (R. 308) There were tire marks in the vicinity of the gouge marks which the officer took to be the left side of the Ford. These marks continued in a straight line out from these two gouge marks in a northeasterly direction commencing in the center of the road. They then crossed over to the east and followed the course testified to by Officer Pearce. The officer identified point 1 on Exhibit 2 as the southerly most gouge mark, point 2 on Exhibit 2 as the next gouge mark and point 3 as the beginning of the tire marks. (R. 338) William C. Dalton, who accompanied Deputy Sheriff Arch Benson, to the scene of the accident, (R. 244) followed the course of plaintiff's Ford car back from the place where it came to rest down along the tire marks which zig zagged across the highway to two gouge marks on the

west side of the road. (R. 248) (See photograph of diagram on board labeled "Dalton.")

Sheriff Arthur Nielson of Iron County placed these gouge marks six or seven feet north of the bridge (R. 264) and a couple of feet west of the center. (R. 265) He did not locate the tire marks made by what he assumed was the left wheel of the Ford automobile for about four or five feet from the gouges, but he was able to locate what he considered the right wheel marks four or five feet east of the center line. (R. 267)

There can be little doubt but that the actual point of impact was in the immediate vicinity of the gouge marks six or seven feet north of the bridge and two feet over on the west or defendant's side of the highway. The plaintiff himself puts the point of impact in the immediate vicinity of the bridge. (R. 60-61, R. 81) The passenger in the defendant's automobile, Glen Garfield, from his own observations at the time of the collision fixed the point of impact as just north of the bridge. (R. 200) The driver of the truck, Matheson, testified that the truck was in the close vicinity of the west bridge abutment at the time of the impact. (R. 221-222)

Claude E. Burton, a garage owner from Parowan, Utah, called to the scene of the accident with his wrecker, (R. 257) testified that when he towed plaintiff's car in that night, there was no tire on the left front wheel rim. (R. 262) He returned the next morning and picked up the tire which had come off the broken rim. "The tire was blowed out, or it had a gouge in it, a big hole in the tire and tube . . . Oh, I would say from three to four

inches approximately. I didn't measure it." (R. 259) Glen Garfield testified he noted what appeared to be part of a fender of plaintiff's vehicle was stuck in the left corner of the truck bed, (R. 182) and that a piece of tire was imbedded between the tire and the rim of the left rear dual wheel on the truck. (R. 182) Matheson also observed a piece of tire imbedded between the bead of the truck tire and the rim of the left rear wheel. (R. 221)

The investigating officer, Semmons, testified that the picture, Exhibit F, depicted the damage to the truck and that he noted scrapping marks on the tire and his attention was called to a piece of rubber wedged in the rim of the outside left tire. (R. 272)

STATEMENT OF POINTS

POINT NO. I

THE SOLE PROXIMATE CAUSE OF THE COLLISION WAS THE NEGLIGENCE OF THE PLAINTIFF.

POINT NO. II

EVIDENCE OF PLAINTIFF'S INTOXICATION WAS PROPERLY SUBMITTED TO THE JURY AS AN ELEMENT OF PLAINTIFF'S NEGLIGENCE.

POINT NO. III

PLAINTIFF WAS NOT DEPRIVED OF A FAIR AND IMPARTIAL TRIAL BY THE IMPROPER ADMISSION OF EVIDENCE.

POINT NO. IV

THE COURT PROPERLY INSTRUCTED THE JURY UPON THE PLAINTIFF'S THEORY OF THE EVIDENCE.

ARGUMENT

POINT NO. 1

THE SOLE PROXIMATE CAUSE OF THE COLLISION WAS THE NEGLIGENCE OF THE PLAINTIFF.

As was pointed out at the outset, the ultimate issue of fact in this case was not whether plaintiff's intoxication was a proximate cause of the collision. Intoxication was merely one of the elements which the jury might have considered in determining the ultimate question of negligence.

A Utah case which bears striking similarity to the case at bar is *Moser v. Zion's Cooperative Mercantile Institution*, 114 Utah 58, 197 P2d 136. Two vehicles approached each other on U.S. 91 approximately one and a half miles south of Logan, Utah. The accident occurred 66 feet south of the bridge. The issue was stated by the court as follows on page 67 of the Utah Report:

"The ultimate question of fact in this case is, of course, which of the two drivers failed to keep his vehicle on the proper side of the road." The court held:

"The determination of this ultimate fact was for the jury. And the jury having determined this question in plaintiff's favor, and the trial court having denied defendant's motion for new trial, this court cannot say that the trial court abused its discretion unless there was no substantial evidence to support the verdict, or in other words, that all reasonable minds must agree that it was plaintiff, and not defendant, Rogers, who transgressed the center line of the highway."

"The testimony of plaintiff, corroborated by the passengers in his automobile, is sufficient

basis for the jury's verdict, unless that testimony is contrary to admitted physical facts."

In this case, one of the ultimate questions of fact for the jury was: Which vehicle crossed the center line of the highway? The jury determined that issue in favor of the defendant and the testimony of the passengers in defendant's automobile, and the physical facts support that determination.

Mr. Matheson, driver of the defendant's truck, and Mr. Garfield, his passenger, testified the truck was as near the west edge of the oiled surface of the highway as possible without actually being on the shoulder. (R. 177-222) The speed of the truck was not excessive, being 45 to 50 miles per hour. (R. 176-220) The automobile of plaintiff approached the truck in an apparently normal manner (R. 176-221) except for its relative speed which was considerably faster than the defendant's truck was traveling.

The physical facts consist of the debris left by the collision and the path of the Watkins vehicle from the two rim gouges at the point of impact. Three witnesses testified that they observed two gouge marks approximately five to seven feet north of the bridge and about one and a half to two feet west of the center of the highway. Mr. Dalton stated that the path left by the tires of plaintiff's vehicle could be easily traced from the gouge marks to where the vehicle came to rest. (R. 252) Sheriff Nelson testified that the gouge marks were as Mr. Dalton placed them in his diagram and appeared to have been freshly made. (R. 265) Patrolman Semmons closely examined

the gouge marks and described the first and most southerly one as being about an inch to two inches deep and about two inches wide with a smooth interior (R. 307), and the second gouge mark to the north as being longer and more jagged and sharply dipped at its southern extremity and sloping out as it ran north. (R. 313) This is not the mark of a piece of the debris from the wreck or a tool from the truck being pressed into the highway by passing vehicle as plaintiff contends, but rather shows the sharp impact of an object in forward motion.

Plaintiff contends that inasmuch as the left front tire of the Ford was not thrown until just before the vehicle came to rest, the gouges could not have been made by the rim of the vehicle. However, Mr. Burton testified that a piece of the tire and tube had been gouged out of the side and bottom of the tire (R. 261), and several witnesses observed a piece of tire was embedded between the rim and tire of the left rear dual wheel of the truck, indicating that when the car hit the left front corner of the truck bed, the tremendous force of the impact caused the left front wheel of the car to go underneath the bed and forced the wheel rim through the tire and into the surface of the highway making the gouge marks. After the car had passed underneath the truck bed, its rolling motion caused the tire to go back on the rim, hence the tire marks commencing a few feet north of the gouge marks.

The oiled portion of the highway at the point of impact is approximately 19 feet wide. (R. 311) The bed of the truck is 94 inches wide. The truck was traveling

with its wheels on the edge of the oiled portion. This would place the left corner of the truck bed approximately one and a half feet from the center of the road. The testimony showed the gouge marks were approximately that distance from the center of the highway.

Plaintiff places great stress upon the tire burns pictured in Exhibit "G." Both Sheriff Nelson and Patrolman Semmons testified in rebuttal that Exhibit "G" does not accurately depict the path of plaintiff's vehicle. (R. 269-327).

The weight of the evidence clearly shows plaintiff's vehicle was traveling to the left of the center of the highway. The jury had an extensive and plausible basis for its determination as to who was traveling to the left of the center of the highway.

The courts which have passed upon the question presented by this appeal have followed the rule announced in the Moser case, cited above. In the case of Hellwig v. Lomeliono, 33 N.E. 2nd 174 (Ill.), the collision occurred between two approaching vehicles on a bridge. The court held the question of negligence was a question of fact for the jury. The plaintiff received a verdict below and the defendant contended contributory negligence should have been found by the jury. The court pointed out the verdict of the jury would not be disturbed on appeal unless the evidence was so clearly insufficient to establish due care that all reasonable minds must conclude that there was contributory negligence.

In Ward v. Martin, 147 S.W. 2nd 1027 (Ky.), the collision occurred between two approaching vehicles.

Both parties claimed they were traveling to the right of the center of the highway. The jury returned a verdict for the plaintiff. The court held the question of who was traveling to the left of the center is a question of fact for the jury and their determination would not be set aside on the appeal.

In *Brown v. Wyoming Butane Gas Company*, 205 P2d 116 (Wyo.), an accident occurred on a bridge between two gasoline tankers traveling in opposite directions. Both parties contended the other was on the left or wrong side of the road. The jury returned a verdict for the plaintiff. The Court held:

“There was other conflicting evidence upon the location of these units when the collision occurred, but sufficient has been recited to indicate that it was the duty of the jury to resolve these contradictions and under the rules of law mentioned above we are necessarily bound in this Court by its conclusions.”

Plaintiff argues that there was insufficient evidence on which the jury might reasonably predicate a finding that the intoxication of plaintiff was a proximate result of the collision. In support of this proposition he cites the case of *Fleming v. McMillan*, 26 S.E. 2nd 8 (W. Va.) where the only evidence of intoxication was that various witnesses smelled liquor on his breath. Otherwise, there was nothing unusual in the conduct or conversation of defendant indicating intoxication. In another case cited, *State v. Johnson*, 76 Utah 84, 247 P. 909, the only evidence of intoxication was that an officer observed a considerable odor of liquor on defendant's breath three

hours after the accident. Moreover, that case involved a criminal charge where a different burden of proof exists; that is, proof beyond a reasonable doubt. In *Rogers v. Silverfleet System of Memphis*, 180 S. 445 (La.), cited on page 26 of plaintiff's brief, the only evidence of intoxication was that Rogers, the plaintiff, drank a glass of beer and may have been drinking four or five hours before the accident.

While the jury need not have found intoxication to be a proximate cause of this accident in order to decide this case as they did, they might have reasonably so found from the evidence. We have a record of plaintiff's intoxicated condition from the time the defendant was first observed by Mr. Jack Scott at about 5:00 o'clock p.m. on the day of the collision. (R. 127) From that time on a succession of witnesses testified to the intoxication of the plaintiff. Mr. Christenson observed plaintiff at about the same time as Mr. Scott and testified plaintiff was drunk and plaintiff admitted to him that he was drunk. (R. 137) Plaintiff had been in Ted's Bar earlier in the day. He returned about 6:30 p.m. Mr. Farnsworth, the proprietor, stated he sold plaintiff a beer which plaintiff tipped over and Mr. Farnsworth saw he was in no condition for more beer. (R. 140) Plaintiff was in Milt's Circus Bar between 8:00 and 8:30 p.m. Mrs. Hirshi stated plaintiff was insulting and had been drinking. (R. 143) Mr. Cooley made the statement that at that time plaintiff had had too much to drink. (R. 144) Mr. Hills testified plaintiff had the appearance of being intoxicated, (R. 150) and outside the tavern in the officers

car plaintiff admitted he had been drinking. (R. 151) The accident occurred shortly after the officer left plaintiff in his car at Cedar City. (R. 167-R. 1) Officer Semmons who conducted the major part of the investigation stated in his opinion the plaintiff was under the influence of intoxicating liquor when he observed him after the accident. Both Dr. Broadbent (R. 291) and nurse Nelson, (R. 354) stated plaintiff was intoxicated and the following morning plaintiff admitted to them he had been drinking. (R. 290 R. 355)

Plaintiff contends that the fact that plaintiff's automobile approached defendant's automobile in a normal manner except for the speed of the automobile shows the sobriety of the plaintiff. The logical extension of that argument is that every vehicle which is being propelled by a drunken driver must necessarily show some marked aberration. Such is not the case. The fact merely shows Mr. Watkins did not change the course of his vehicle up to the time of impact even though under his own testimony a collision appeared imminent. He claimed that he observed defendant's truck approaching his automobile partially on his side of the road for some distance but he took no action to avoid a collision other than to touch his brakes slightly. This action is illustrative of the conduct which might be expected from an individual in a drunken stupor rather than the conduct one would expect from an alert individual conscious of the impending danger.

Intoxication, in and of itself, is not the immediate direct cause of any accident. But it is a matter of common knowledge that persons in an intoxicated condition are

not competent to drive automobiles because of their impaired physical condition. They lack the power of observation, judgment, and ability to cope with the conditions which are likely to be encountered upon the highway. It is the acts or omissions of persons in the impaired condition caused by the intoxication which directly causes automobile accidents.

In this case the defendant drove his automobile from Cedar City to the point of the collision in at most, 33 minutes since Officer Hill's testimony, verified by the radio log, places him in Cedar City between 8:57 p.m. and 9:24 p.m., and the accident happened at a point some 32 miles distance at 9:30 p.m. In order to cover that distance in 33 minutes, plaintiff must necessarily have averaged 60 miles per hour. If allowance is made for time lost slowing for other traffic and curves in the road, it becomes evident that plaintiff was exceeding 60 MPH on straight stretches of highway. He approached the automobile of the defendant at a high rate of speed. Under his own testimony he failed to do anything whatsoever to avoid the accident even though he had an opportunity to do so and the great preponderance of the evidence shows he either drove his automobile onto the west or wrong side of the highway into and against the automobile of the defendant or lost control of it with the same result. It is submitted that there was ample evidence from which the jury might reasonably have found as it did that the negligent conduct of the plaintiff, as aforesaid, was the sole or proximate cause of his own injuries.

POINT NO. 11

EVIDENCE OF PLAINTIFF'S INTOXICATION WAS PROPERLY SUBMITTED TO THE JURY AS AN ELEMENT OF PLAINTIFF'S NEGLIGENCE.

As has been pointed out, there was sufficient evidence from which the jury might reasonably have concluded the intoxication of the plaintiff was a proximate cause of the accident. This being the case, it was proper for the court to submit this issue to the jury as the court did in his instruction No. 5, which instruction we will have occasion to deal with in greater detail later.

In *Western States Grocery Company et al v. Mirt*, 123 P 2d 267, (Okla.), a collision occurred between two vehicles approaching each other. Defendant requested that the court give an instruction on intoxicating liquor. The court refused to give an instruction which read as follows:

"You are instructed that under the testimony the defendants have plead as one of their defenses of (Sic) contributory negligence, that is to say, that the plaintiff, Roy Mirt, was under the influence of intoxicating liquor at the time of this accident."

"You are instructed that under the phrase 'under the influence of intoxicating liquor' means that if intoxicating liquor has so far affected the nervous system or the brains or muscles that will tend to impair the ability of one to operate an automobile in the manner of an ordinarily cautious man, in the full possession of his faculties would operate or drive under like conditions, then the driver is under the influence of intoxicating liquor."

“If you should find that the plaintiff was under the influence of intoxicating liquor as above defined and that that constituted negligence on his part and if that directly or proximately caused or contributed to the accident and resulting injuries, then you are instructed you should return a verdict for defendants, even though you should find that they were also guilty of negligence.”

The Court held:

“We think the defendants were entitled to have said requested instruction or a similar one given. If plaintiff was driving his car on a public highway while under the influence of intoxicating liquor, he was guilty of negligence per se (citations given). The requested instruction did not tell the jury that such negligence, if established, constituted contributory negligence, but it properly defined intoxication and told the jury that if it found that plaintiff was guilty of such negligence, and further found that such negligence directly and proximately caused or contributed to the injury, he could not recover. This did not invade the province of the jury. It left to the jury the determination of the vital factors, negligence and proximate cause or contributing cause.”

In *State v. Kendall*, 203 N.W. 807 (Iowa), which was a case involving criminal prosecution for driving while intoxicated, the facts as stated by the court were:

“Briefly stated, this case arose under the following circumstances: About or after midnight on the night of November 19, 1923, the defendant was driving south on Main Street in the City of Council Bluffs in a Ford automobile. His car collided with a street car approaching from

the opposite direction. Several witnesses testified against the defendant and several testified for him. Some of the witnesses on behalf of the State testified the defendant was intoxicated at the time. Others that he staggered when he attempted to walk; that he used abusive language toward the motorman and conductor and that they smelled intoxicating liquor on his breath. The undisputed testimony shows that after the collision the defendant alighted from his car and said, in addressing the motorman: 'Didn't you see me coming? Why the hell didn't you turn out?' To say the least, this inquiry could not come from a mind that was properly functioning."

The Court held:

"At most there is a sharp conflict in the testimony as to whether or not the defendant was intoxicated. It was wholly a question for the jury and the nisi prius court was right in submitting it to the jury."

Burgett v. Saginaw Logging Company et al, 85 P 2d 271 (Wash.), concerned an accident between a truck being driven in a southerly direction and a bicycle traveling north. Plaintiff, a three year old child, was riding on the crossbar of the bicycle. The complaint charged the driver of the truck for driving in excess of the lawful rate of speed and that he was under the influence of intoxicating liquor to such an extent that he did not have control of his automobile. Plaintiff received the verdict below. The evidence of intoxication amounted to a statement by one witness that the truck driver was noticeably drunk about four and one-half hours prior to the accident. The court below instructed in substance that vio-

lation of the statute prohibiting the driving of vehicles upon public highways while intoxicated is negligence per se. The court held the instruction was properly given and said:

“If the condition of intoxication was established then the only remaining question was whether the existence of that condition was a proximate cause of the collision. In the instruction to the jury the trial court defined proximate cause; the jury was instructed that the burden of proof is upon the respondent to establish by a fair preponderance of the evidence that appellant was negligent in the manner and way alleged by respondent at the time and place of the accident; and that such negligence, if any, was the proximate cause of the injuries received by respondent.”

The lower court concluded the issue of intoxication and proximate cause was a jury question. Instruction No. 5 given by the court in this case reads as follows:

“You are instructed that it is a violation of the law of this state for any person who is under the influence of intoxicating liquor to be in actual physical control of any motor vehicle. ‘Under the influence of intoxicating liquor’ means in such condition from the use of intoxicating liquor so as to impair the person’s ability to drive an automobile in the manner that an ordinarily prudent and cautious person in full possession of his faculties would operate a similar vehicle under like conditions.

“If you find from a preponderance of evidence in this case that the plaintiff, while driving his car immediately before and at the time of said accident, was under the influence of intoxicating

liquor as hereinbefore defined, then he was guilty of negligence as a matter of law, and if you find from a preponderance of the evidence that his condition was the sole or a proximate contributing cause of the collision with defendant's truck, then plaintiff cannot recover and your verdict must be for the defendant."

Said instruction is a correct statement of the law applicable under the evidence of this case. The instruction merely informs the jury that it is against the laws of this state to drive an automobile while under "the influence of intoxicating liquor." It then proceeds to define the term "under the influence of intoxicating liquor." The burden of proving intoxication on part of the plaintiff was placed upon the defendant by the term "if you find from a preponderance of the evidence in the case." The court did not instruct the jury that the plaintiff was under the influence of intoxicating liquor but merely that if the jury so found then the defendant was guilty of negligence. Nor did the court instruct the jury that this negligence precluded a recovery on the part of the plaintiff unless the jury further found also from "a preponderance of the evidence" that the intoxicated condition was the "sole or a proximate contributing cause of the collision."

Plaintiff complains of the court's refusal to give his requested instruction No. 1 to the effect that they should disregard the evidence in the case pertaining to the consumption of the beer by plaintiff is being immaterial. Such an instruction on the part of the court would have constituted a finding by the court that the

plaintiff was not intoxicated or that his intoxication was not a proximate or contributing cause of this accident. We have seen this is an issue for the jury which was properly submitted to the jury by the court in this case under instruction No. 5.

POINT NO. III

PLAINTIFF WAS NOT DEPRIVED OF A FAIR AND IMPARTIAL TRIAL BY THE IMPROPER ADMISSION OF EVIDENCE.

The proposition that evidence is not admissible because one of the parties does not remember, or chooses not to remember, which ever the case may be, events which are probative of the issues to be decided is a novel one. If such a rule were adopted a party could control admission of adverse evidence simply by feigning ignorance. The plaintiff in this case had no difficulty remembering those events necessary to make a *prima facie* case of negligence against the defendant but very conveniently failed to remember his "drinking activity" in Cedar City before the accident.

It may be true that evidence which tends to prove *facts which are admitted or are not controverted* will be more likely excluded where, if admitted, it would probably prejudice and mislead the jury. This rule, however, has no application to this case for the plain and simple reason that the intoxication of the plaintiff—the issue to which all of the evidence complained of was addressed—was not admitted and was controverted or denied by the plaintiff.

"A party cannot be deprived of the benefits of evidence which is relevant and material because it may also have a tendency to prejudice the adverse party in the eyes of the jury." 31 CJS 907, Sec. 186.

It is contended the evidence of plaintiff's intoxication prior to the accident and after the accident was too remote. Whether evidence of intoxication should be submitted to the jury is not determined by whether that evidence is exactly in point of time with the collision. The rule is illustrated by the following cases:

The action of *Stuart v. McVey*, 87 P 2d 446, (Idaho), involved the collision of two approaching vehicles. Defendant sought to introduce evidence of plaintiff's intoxication approximately three hours prior to the accident. This was excluded by the trial court. The appellant court held:

"The evidence sought to be elicited in the instant case referred to a period of time during the afternoon and up until 6:00 in the evening of the day of the collision, a period ending about three hours previous to the collision. There would seem to be no room for argument that evidence of the drinking intoxicating liquors and the condition of a person with reference to intoxication is admissible upon the question of intoxication, if such evidence is not too remote in point of time, the fact of remoteness in point of time going rather to the weight of the evidence, than to its admissibility, and evidence remote in point of time to the extent of 8 to 10 hours has been held properly admissible. Cases cited from Philadelphia, Oklahoma, Texas, Massachusetts, California, Iowa, Missouri, and New Mexico.

“The evidence sought to be elicited was admissible, not appearing to be too remote.”

In *Maier v. Minidoka County*, 105 P 2d 1076 (Idaho), the evidence sought to be introduced was the odor of alcohol on the motorist's breath at the hospital two and one-half hours after the accident. It was contended that inasmuch as the evidence was after the accident in point of time that *Stuart v. McVey* (supra) would not apply. The court held that evidence of intoxication after the accident was just as relevant as such evidence before the accident and its remoteness too, went to the weight to be given it and not to its admissibility.

In *Callahan v. Prewitt*, 13 N.W. 2nd 660 (Neb.), the accident occurred on a bridge between two approaching vehicles. Evidence that the plaintiff had been drinking shortly before the accident was admitted. Verdict was for defendant and plaintiff assigns as heir the admission of drinking. The court held:

“Assignments 4, 5 6 and 7 relate to the use of intoxicating liquors by Doerfler at a tavern at about 500 feet west of the Nebraska State Line in Wyoming immediately before proceeding to the point where the fatality occurred. The distance from the scene of the accident was but a few miles and the interval between was evidently but a matter of minutes. In the light of the other evidence this could not be considered evidence of intoxication, but we have no doubt, because of the brief interval of time and the closeness of this relationship to the accident and the incidents leading to it, of its admissibility as a circumstance proper to be considered by the jury in determining whether or not Doufler was guilty of negligence which was

the proximate cause of the accident which contributed to it."

Nor was the testimony about the very belligerent, obstreperous behavior of the plaintiff and his use of profane language inadmissible. A seriously injured person in a normal condition realizing his condition and that he might die is appreciative of the help of others and not resentful. In *Lynn v. Stinnette*, 31 P 2d 764 (Ore.), plaintiff's intestate was struck and killed while pushing a bicycle on the side of a road. There was evidence introduced of the consumption of alcohol beverage by the decedent and his conduct shortly before the accident. The court said:

"Evidence that the decedent, while at Mrs. Campbell's house, talked in a loud voice was relevant as tending to show what, if any, effect the beer had on him. It is common knowledge that intoxicating liquor has varying effects on different individuals. Some it impells to boisterousness and loud talking; others, to quarrelsomeness and sullenness."

Jones v. State, 92 S.W. 2nd 246 (Texas) involved a prosecution for driving while intoxicated. At the hospital appellant became violently loud and obscene in his talk, so much so that the sheriff was called. He testified that the appellant was drunk. Another witness who saw him a short time before the wreck also testified that from appellant's conduct and talk he thought appellant was intoxicated. The court said:

"Appellant brings forward a complaint because the court, over the objection, permitted the

sheriff to testify that when he saw appellant at the hospital and that appellant was drunk, the objection being that it was an hour or an hour and a half after the wreck before the sheriff saw appellant, and that the doctor had given him two or three strong hypodermics, in connection with which he had probably used denatured alcohol.

The court was not in error in admitting the sheriff's testimony. The objections went to the weight and not the admissibility of the evidence."

And so in the case at bar, it is submitted that the evidence of plaintiff's conduct before the accident, at the scene of the accident and in the Cedar City Hospital was admissible even though it might have had a tendency to prejudice the plaintiff in the eyes of the jury. The evidence was neither too remote or extraneous to the issue of the intoxication but had a definite bearing on the question of the negligence of the plaintiff. It was proper for the court to admit that evidence for the jury's consideration in their determination of that question.

POINT NO. IV

THE COURT PROPERLY INSTRUCTED THE JURY UPON THE PLAINTIFF'S THEORY OF THE EVIDENCE.

It is true that a party to a lawsuit is entitled to have his theory of the evidence submitted to the jury to the extent that his theory is supported by the evidence and pleadings in the case. While this is true, this does not mean that the court must give the exact instruction requested by the plaintiff; that the court must follow the exact language of the requested instruction;

or give an instruction which is not supported by the evidence, is confusing, or does not correctly state the law applicable to the case. In *Toone v. O'Neill Construction Company*, 40 Utah 265, 121 P. 10, cited on page 36 of plaintiff's brief, the appellant complains of the court's refusal to give a certain instruction. The court said on page 285 of the Utah Report:

"Without now passing upon the question of whether the foregoing instruction was too broad in view of the evidence, we concede that a party is entitled to have his case submitted to the jury upon the theory of his evidence as well as upon the theory of the whole evidence. One way the court might have followed in charging the jury would have been to charge them in separate instructions, first in accordance with respondent's evidence; and, second, in accordance with appellants' evidence which related to the proposition covered by the instruction in question, and each instruction have directed the jury to return a verdict in accordance with their findings upon that question. The court was not bound to charge the jury in separate instructions, but could cover the question in one without offending against appellant's right.

Appellant's theory of the evidence was sufficiently covered by what the court told the jury and hence it was not prejudiced by the court's modification referred to.

In *Miller v. Utah Consolidated Mining Co., et al.*, 53 Utah 366, 178 P. 771, the court said at page 378 of the Utah Reports:

"The defendant was entitled to have its theory of the case submitted to the jury upon

proper instructions so long as the theory was based on some substantial testimony, not necessarily by separate instructions, but by instructions covering the question involving both the plaintiff's and the defendant's theories. From the foregoing instructions given by the trial court it is obvious that this is not only what the trial court attempted, but substantially did as fully and fairly as it might have done by the giving of the request denied the defendant."

In *Platt v. Utah Light and Traction Company*, 57 Utah 7, 169 P. 868 the court in reviewing instructions which in its opinion should have been given on page 13 of the Utah Reports says:

"Had the court given either of the instructions as requested or in substance and effect, we would be inclined to hold that the issue presented by the defendant's answer was sufficiently called to the attention of the jury, and its findings on that particular issue sufficiently determined."

As was said in *Potts v. Armour and Co.*, 39 Atlantic 2d 552 (Md.):

"Trial court may instruct jury upon the law of the case either by granting requested instructions or by instructions of its own on particular issues, or on the case as a whole, or by several or all of such methods."

The test is not whether the court gave the instructions requested by the defendant but whether the court properly instructed the jury upon the theory of plaintiff's case in those instances where a request was made and the evidence warranted the giving of an instruction.

Plaintiff complains of the court's refusal to give plaintiff's requested instruction No. 3 which reads as follows:

"You are instructed that you must disregard the evidence in this case pertaining to the drinking of beer by the plaintiff prior to the time of the accident involved in this matter, if you shall find and believe from a fair preponderance of the evidence that such drinking of beer by the plaintiff did not so impair his physical and mental faculties as to constitute a proximate or contributing cause to the collision."

The requested instruction was not supported by the evidence, was confusing, and did not accurately or correctly state the law applicable to the evidence in this case. The instruction assumes that the plaintiff's condition of intoxication was induced by the consumption of beer. While the evidence shows that the plaintiff was intoxicated, there is no evidence in the record that this state was induced by the consumption of beer. The instruction is confusing in that the jury is instructed that it must disregard the evidence pertaining to drinking before they are told the condition under which they should disregard this evidence. A much more logical sequence would be to first state the condition and then what it might do if it found that condition to exist. The instruction was obviously intended to cover the question of intoxication, but does not legally define intoxication nor instruct the jury on the defendant's burden to prove intoxication by a preponderance of the evidence.

As has been pointed out previously, the court's instruction No. 5 was a correct instruction of the law applicable to the evidence in this case. In that instruction the court defined the term "under the influence of intoxicating liquor," informed the jury that it required a preponderance of the evidence to find that the plaintiff was under the influence of intoxicating liquor, and further informed the jury that it must also find from a preponderance of the evidence that his condition was a sole or proximate contributing cause of the collision in order to deny plaintiff's recovery on this ground.

Plaintiff alleged in his complaint that the defendant drove his car onto the wrong side of the highway. The only assertion of negligence on defendant's part was the evidence of the plaintiff that the defendant's automobile overlapped the center of the highway as it approached the point of impact (R. 60). There is no evidence that the defendant did not observe plaintiff's automobile that is, failed to keep a proper lookout, likewise there is no evidence that the defendant had an opportunity to alter the course of his automobile. Plaintiff testified he turned in or toward the west just before entering the bridge. Defendant's driver said the lights of plaintiff's car seemed to come toward his truck after the cab of the truck had passed the Ford automobile. The two cars were approaching each other at an extremely high closing speed, probably in excess of 100 miles per hour. Under either party's evidence, defendant's driver would not have sufficient time to react to the danger of the collision soon enough to make any attempt to avoid it.

Thus it is seen that in his requested instruction No. 6, plaintiff sought to enlarge the issue of defendant's negligence in a manner which was not supported by any of the evidence in the case.

In its instruction No. 1, the court instructed the jury in part as follows:

"Plaintiff contends that the defendant company was negligent in the operation of the truck in that the driver of the truck was then and there operating said truck upon the east portion of the said highway while driving south, and that such act constituted negligence on the part of the defendant and occasioned the injuries and damages allegedly suffered."

In instruction No. 3, the court instructed the jury in part as follows:

"In this regard you are instructed that it is the duty of anyone operating a motor vehicle on the highway of this state to drive such motor vehicle upon the right hand side of the road, particularly when another vehicle is approaching from the opposite direction.

If, therefore, you find from a preponderance of the evidence, that defendant at the time and point of the collision with plaintiff's automobile and immediately prior thereto was operating its truck to the left of the mid-point of the highway, then you are instructed that the defendant was negligent; and if you further find from a preponderance of the evidence that such negligence proximately caused injuries and damages to the plaintiff, then you are instructed that you should return a verdict in favor of the plaintiff and against the defendant and award damages

to the plaintiff as in these instructions set forth, unless you further find that the negligence of the plaintiff, if any, contributed to cause his injuries as in these instructions set forth."

It is submitted that the court did not err in denying plaintiff's requested instruction No. 6 and that the court properly and adequately instructed the jury upon the plaintiff's theory of the evidence, that is, the manner in which the defendant may have been negligent, in the court's instructions No. 1 and 3.

CONCLUSION

In conclusion it appears that the jury after a fair and impartial trial in which no improper prejudicial evidence was admitted and after having been properly instructed upon the plaintiff's theory of the evidence as well as upon the theory of the whole evidence, decided the issues of this case in favor of the defendant. Not only is there sufficient evidence from which the jury might have reasonably so determined the issues of this case, but their judgment is overwhelmingly sustained by the preponderance of the evidence.

Respectfully submitted,

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