

1979

Rachel Armelinda Cintron v. Elma J. Milkovich : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RACHEL ARMELINDA CINTRON,)

Plaintiff and)
Respondent,)

vs.) Case No. 16440

ELMA J. MILKOVICH,)

Defendant and)
Appellant.)

APPELLANT'S BRIEF

APPEAL FROM THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY,
THE HONORABLE ERNEST F. BALDWIN, JR., JUDGE

L. L. SUMMERHAYS
STRONG & HANNI
Attorneys for Defendant/Appellant
604 Boston Building
Salt Lake City, Utah 84111

J. KENT HOLLAND
HANSON, RUSSON, HANSON & DUNN
Attorneys for Plaintiff/Respondent
702 Kearns Building
Salt Lake City, Utah 84101

FILED

OCT 10 1979

GLENN C. HANNI
LAWRENCE L. SUMMERHAYS
HENRY E. HEATH
PHILIP B. FISHLER
FRANK O. NOEL
ROGER B. BULLOCK
ROBERT A. BURTON
B. SCOTT WILLIAMS
DENNIS M. ASTILL
S. BAIRD MORGAN

LAW OFFICES
STRONG & HANNI
A PROFESSIONAL CORPORATION
SUITE 904 BOSTON BUILDING
SALT LAKE CITY, UTAH 84111

TELEPHONE 532-7080
AREA CODE 801
GORDON B. STRONG
(1900-1909)

October 11, 1979

Clerk of the Supreme Court
State Capitol Building
Salt Lake City, Utah

Re: Cintron v. Milkovich
Supreme Court No. 16440

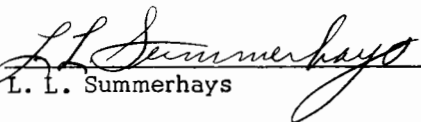
Dear Sir:

On October 10, 1979, copies of Appellant's Brief were delivered to your office.

Please be advised that on Page 16, Line 8, the word "absolute" should be deleted. That line should read, "was approaching from the right, he had the right of way".

Very truly yours,

STRONG & HANNI

By 
L. L. Summerhays

LLS:lge
cc: J. Kent Holland

IN THE SUPREME COURT OF THE STATE OF UTAH

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Attorneys for Defendant/Appellant
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Salt Lake City, Utah 84111

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HANSON, RUSSON, HANSON & DUNN
Attorneys for Plaintiff/Respondent
702 Kearns Building
Salt Lake City, Utah 84101

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Plaintiff and)	
Respondent,)	
vs.)	Case No. 16440
ELMA J. MILKOVICH,)	
Defendant and)	
Appellant.)	

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action to recover damages for injuries arising out of an automobile accident which occurred on Saturday, February 14, 1976, at about 5:00 p.m. on Center Street in Midvale, Utah.

DISPOSITION IN LOWER COURT

The case was tried before The Honorable Ernest F. Baldwin, Judge, sitting with a jury. In answering a special verdict, the jury concluded that defendant was negligent in that she failed to keep a proper lookout and failed to yield the right-of-way to plaintiff. The jury also concluded that plaintiff was negligent in that she failed to keep her vehicle under reasonable, safe and proper control, and drove at a speed that was not safe, reasonable and prudent under the circumstances. The jury entered a finding of 60 percent causal negligence

on the part of the defendant and 40 percent causal negligence on the part of the plaintiff. Defendant filed and argued a motion for a new trial, which motion was denied by the court.

RELIEF SOUGHT ON APPEAL

The defendant/appellant seeks reversal of the judgment of the lower court and judgment in defendant's favor as a matter of law or, in the alternative, a new trial.

STATEMENT OF FACTS

The accident upon which plaintiff premises her cause of action occurred at approximately 5:00 p.m. on Saturday, the 14th day of February, 1976, approximately 26 feet west of the intersection of Center and Allen Streets in Midvale, Utah. Center Street runs east and west, consisting of two through lanes in each direction. Allen Street runs north and south with one lane in each direction. As Center Street approaches the intersection with Allen Street, it becomes wider so as to include left turn lanes in each direction of travel to accomodate traffic turning on to Allen Street from Center Street. The eastbound and westbound lanes on Center Street are separated by a raised island on each side of the intersection with Allen Street. (See Exhibits 5-P and 8-D). The speed limit on Center Street as it approaches the intersection with Allen Street is 35 miles per hour. Traffic approaching Center Street from the south on Allen Street is required to stop at a stop sign before entering or crossing Center Street.

The accident involved in this litigation occurred during a daylight hour. The surface of Center Street was dry. Immediately prior to the accident plaintiff, who was 19 at the time, was traveling west on Center Street in the inside lane. Plaintiff was accompanied by a friend, Lonnie Miyagishima, who was seated in the front seat on the passenger side, and plaintiff's sister, Tanya Salazar, who was sitting in the back seat. At this same time defendant was approaching Center Street from the south on Allen Street. Defendant was accompanied by her son, Ray Hinckle, who was sitting in the middle of the back seat and her daughter, Lynnette Lemmon, who was sitting in the front seat on the passenger side.

At trial plaintiff testified that when she last observed the speedometer of her car, a few moments before the accident, she was traveling at 30 miles per hour (Tr. 46). Plaintiff's sister, Tanya Salazar, testified that she observed plaintiff's speed at about the same time and that such speed was between 30 and 35 miles per hour (Tr. 90). Grant Elsby, the Midvale City policeman who investigated this accident, testified that plaintiff stated, in a conversation with Officer Elsby at the scene shortly after the accident, that she was traveling at approximately 40 miles per hour at the time of the accident (Tr. 32,41). Defendant's daughter, Lynnette Lemmon, testified that in this conversation plaintiff stated that she was traveling between 40 and 45 miles per hour (Tr. 110). Defendant also stated that in

this conversation plaintiff stated her speed was between 40 and 45 miles per hour (Tr. 122). Plaintiff stated that she had told Officer Elsby that she was going between 30 and 40 miles per hour at the time of the accident (Tr. 60). Plaintiff also testified that she accelerated her automobile after she last observed the speedometer prior to the accident so as to maintain her speed up a rise in the grade of Center Street as it approaches the intersection with Allen Street (Tr. 59).

As plaintiff, traveling west on Center Street, approached the intersection of Center Street and Allen Street, defendant was approaching this same intersection from the south on Allen Street. Plaintiff first observed defendant's vehicle as defendant was approaching the stop sign on Allen Street (Tr. 46). According to the plaintiff, defendant appeared to stop at the stop sign but in fact did not stop (Tr. 46,47,57). However, at trial it was noted that plaintiff stated in her deposition that defendant's vehicle appeared to stop at the stop sign (Tr. 62). Defendant testified that she stopped at the stop sign, looked to see if any vehicle was approaching, and then asked both her son and daughter to look also (Tr. 114). Defendant's son (Tr. 98) and daughter (Tr. 105) both testified that defendant stopped at the stop sign and that defendant asked both to look for oncoming vehicles.

Defendant (Tr. 115), her daughter, Lynnette (Tr. 105), and her son, Ray (Tr. 98), all stated that, upon checking for oncoming vehicles approaching from either direction, they saw

nothing. Because Center Street immediately east of the Allen Street intersection dips as it passes under Interstate 15, it is difficult for westbound traffic on Center Street to get an unobstructed view of the Allen Street intersection as it approaches such intersection from the east. (See Exhibits 5-P and 10-D). For this same reason, it is difficult for traffic at the intersection to see such westbound traffic. Believing the way to be clear, defendant proceeded into the intersection and turned into the inside westbound lane. Defendant estimated her speed to be approximately 10 miles per hour when the accident occurred (Tr. 78).

Upon observing defendant proceeding into the intersection, plaintiff slammed on her brakes (Tr. 47). In doing so, plaintiff's vehicle, according to Officer Elsby, left skid marks approximately 37 feet 6 inches in length (Tr. 34). Realizing that she would be unable to stop in time to avoid a collision, plaintiff released her brakes and swerved to the right (Tr. 47). Officer Elsby indicated that the skid marks left by plaintiff's vehicle ended at the west boundary of the intersection (Tr. 34,35). Officer Elsby determined by measurement that the probable point of impact was approximately 26 feet 1 inch from this same boundary (Tr. 35). Plaintiff acknowledged that this point was indeed the probable point of impact (Tr. 64).

At trial plaintiff called as a witness one Dr. Rudy Limpert, an accident reconstruction expert. For purposes of exa-

mining Dr. Limpert, plaintiff's counsel asked Dr. Limpert to assume that a vehicle was traveling at 35 miles per hour under circumstances similar to those encountered by plaintiff. (Tr. 78) Dr. Limpert also assumed that the surface of the highway upon which this vehicle was traveling had a coefficient of friction of 0.65 (Tr. 781), the coefficient of friction of Center Street as determined by a skid test performed by Officer Elsbey (Tr. 19) Based on this assumption, Dr. Limpert testified that vigorous braking of a vehicle traveling at 35 miles per hour would cause that vehicle to stop within 63 feet (Tr. 781). Because the length of the skid marks of plaintiff's vehicle was 37 feet 6 inches and the distance from the termination of said skid marks to the probable point of impact was 26 feet 1 inch, Dr. Limpert testified that a vehicle traveling 35 miles per hour would have stopped by the time it reached the probable point of impact (Tr. 78n).

Dr. Limpert testified that defendant's vehicle had traveled approximately 90 feet from the time it entered the intersection to the time of impact (Tr. 78o). Since defendant's speed at the point of impact was approximately 10 miles an hour, and because defendant reached this speed from a standing start, Dr. Limpert estimated that the average speed of defendant's vehicle, assuming a uniform acceleration, was 5 miles per hour during this time span (Tr. 78o). Assuming this average speed, Dr. Limpert concluded that it would have taken defendant approximately 12 seconds to cover the distance from the stop sign to the probable

point of impact (Tr. 78o). Dr. Limpert then testified that the driver of a vehicle, traveling at a speed of 35 miles per hour, would have first observed a vehicle entering the intersection from the stop sign approximately 615 feet prior to reaching the intersection (Tr. 78o). By comparison, the Interstate 15 viaduct is 357.0 feet east of the east boundary of the intersection. (See Exhibit 1-D). Finally, Dr. Limpert testified that, assuming an average reaction time, and given the probable point of impact and the length and location of the skid marks left by plaintiff's vehicle, plaintiff first reacted approximately 115 feet from the probable point of impact (Tr. 78p).

ARGUMENT

POINT I.

BECAUSE PLAINTIFF'S VEHICLE WAS NOT AN
"IMMEDIATE HAZARD" WITHIN THE MEANING
OF UTAH CODE ANN. §41-6-72.10(2),
DEFENDANT COULD NOT BE GUILTY OF FAILING
TO YIELD THE RIGHT OF WAY TO PLAINTIFF.

According to Utah Code Ann. §41-6-72.10(2) (1953), a driver stopped at a stop sign, "shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways." [Emphasis added.] According to this statute, defendant was required to yield the right of way to plaintiff only if plaintiff's vehicle constituted an "immediate hazard" during the time defendant was moving across or within the

intersection.

This court, in Richards v. Anderson, 9 Utah 2d 17, 337 P.2d 59 (1959), addressed the definition of the term "immediate hazard". This case involved an intersectional collision between vehicles driven by Anderson and Richards. After stopping at a stop sign, Anderson proceeded into the intersection after two drivers, traveling in the same direction as Richards, had deferred to Anderson. After traveling 38 feet, Anderson's and Richards' vehicles collided. In discussing the term "immediate hazard", as it pertained to Richards' claim of right of way, this court said:

[T]he Supreme Court of Delaware has said that an "immediate hazard" is created when a vehicle approaches an intersection on a favored street at a reasonable speed under such circumstances that, if the disfavored driver proceeds into the intersection, it will force the favored driver to sharply and suddenly check his progress or stop in order to avoid collision. (Citing Fusco v. Dauphin, 47 Del. 140, 88 A.2d 813 (1950). Conversely, if the disfavored driver has made his stop and deferred to all vehicles that would be required to go into a sharp or sudden braking to avoid collision, the cars far enough away have a clear margin to observe and make a smooth and safe stop are not an "immediate hazard" and are required to yield to the driver already at the intersection. 337 P.2d at 61. [Emphasis added.]

Defendant submits that plaintiff's vehicle was not "an immediate hazard" within the definition given this term by this court. To begin with, plaintiff was not operating her vehicle at

a reasonable speed. Moreover, the fact that Officer Elsby determined the probable point of impact to be more than 26 feet west of the west boundary of the intersection at issue is prima facie evidence that plaintiff's vehicle was not an "immediate hazard" while defendant was moving across or within the intersection.

Plaintiff's expert witness, Dr. Rudy Limpert, testified that the accident occurred 12 seconds after defendant had entered the intersection. Dr. Limpert also testified that defendant's vehicle had traveled 90 feet during such time span. Finally, Dr. Limpert testified that plaintiff, had she been traveling at the speed limit of 35 miles per hour, would have been 615 feet east of the intersection when defendant entered the intersection. Yet the evidence, according to Dr. Limpert, indicated that plaintiff did not react until she was 115 feet from the point of impact. Under these circumstances, defendant finds it difficult to comprehend how plaintiff's vehicle could constitute an "immediate hazard" so as to require defendant to yield the right of way to plaintiff.

In support of her position defendant directs this court's attention to its opinion in Richards, 330 P.2d at 61, where, in holding in defendant's favor, it said:

It is clear that the defendant entered the intersection considerably ahead of the plaintiff. The question then becomes whether plaintiff's automobile was so close to the intersection to constitute an "immediate hazard" to defendant when the latter entered the intersection. There is, of course, no precise set of measurements by which an immediate hazard can be

guaged. It must be judged on the basis of common sense in the light of existing circumstances.

* * *

An analysis of the time, speed and distance factors shows plainly that the plaintiff had more than ample time to observe the defendant and avoid colliding with him.

Defendant maintains that the above quoted language conclusively shows that plaintiff's vehicle was not "an immediate hazard" within the meaning of the statute. Plaintiff testified that she saw defendant's vehicle approach the intersection and proceed into the intersection. Notwithstanding her observations plaintiff proceeded to travel at the same speed and in the same lane. It is apparent that plaintiff had ample opportunity to avoid this accident. It is equally apparent that she failed to avail herself of this opportunity. As was said by this court in Richards, 337 P.2d 15 at 61,62, "the plaintiff seemed to have been guilty of the all too common fault of modern drivers of assuming that because they are on a through highway they have the absolute right of way, and that one desiring to enter or cross it must do so at his peril."

POINT II.

THE LOWER COURT ERRED IN REFUSING DEFENDANT'S JURY INSTRUCTION THAT, UNDER MIDVALE CITY ORDINANCE §187(b), THE DRIVER OF ANY VEHICLE TRAVELING AT AN UNLAWFUL SPEED SHALL FORFEIT ANY RIGHT OF WAY WHICH SHE MIGHT OTHERWISE HAVE.

Assuming arguendo that plaintiff's vehicle was an "immediate hazard" as contemplated in Utah Code Ann. §41-6-72.10(2)

(1953), defendant still could not be guilty of failure to yield the right of way to the plaintiff because plaintiff forfeited, under Midvale City Ordinance §187(b), any right of way to which she might be entitled.

Prior to trial, defendant filed a certified copy of Midvale City Ordinance §187(b), which provided:

LOSING RIGHT OF WAY

* * *

(b) The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have.

Pursuant to this provision, defendant submitted to the court its requested jury instruction no. 18 which provided as follows:

Under the ordinances of Midvale City it is provided that the driver of any vehicle traveling at an unlawful speed shall forfeit any right of way he might otherwise have. If, therefore, you find from the evidence in this case that the plaintiff's vehicle was being driven at an unlawful speed, then I instruct you that the right of way which she might otherwise have had at such intersection would be forfeited.

This instruction was a proper statement of the law as it existed in Midvale City at the time of the accident. Furthermore, this instruction was warranted in view of the evidence received at trial. The issue as to whether the speed at which plaintiff was operating her vehicle at the time of the accident was reasonable and prudent under the conditions was framed at trial and properly submitted to the jury. (See Jury Instruction No. 17). Nevertheless, the court, without explanation, refused defendant's

jury instruction no. 18 and gave no instruction pertaining to a forfeiture of plaintiff's right of way or the effects thereof in the event the plaintiff was traveling at an unlawful speed.

Defendant took exception to the court's failure to give the requested instruction and filed and argued a motion for a new trial, which motion the lower court refused. Defendant asserts that the lower court committed prejudicial error in failing to instruct the jury on the applicable law, for as the lower court said in its second instruction to the jury, "It is the duty of the court to instruct you in the law that applies to this case.. Defendant is confident that this court, upon an examination of the applicable law, will find that the lower court did commit prejudicial error in refusing defendant's requested jury instruction no. 18.

Utah law with regard to traffic rules and regulations is found in Utah Code Ann. §§41-6-1 to 179 (1953). With regard to rights of way, as applied to this case, the statute reads as follows:

Except when directed to proceed by police officer, every driver of a vehicle approaching a stop sign shall mark at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or if none, at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. After having stopped, the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to cause an immediate hazard during the time which such drive

is moving across or within the intersection or junction of roadway. Id. §41-6-72.10(2) (Supp. 1979)

Defendant acknowledges that the operation of her automobile as she approached and entered Center Street from Allen Street was governed by the above quoted statute, and that by such statute she was bound to yield the right of way to any vehicle on Center Street having such a right of way. Because the jury specifically found that plaintiff was operating her vehicle at an unlawful speed at the time of the accident, defendant asserts that plaintiff, under Midvale City Ordinance §187(b), forfeited any right of way to which she might otherwise be entitled. Accordingly, plaintiff had no right of way to which defendant was obligated to yield.

It is well established in Utah that a city has the right to legislate on the same subject as a state statute under its general police powers or as a result of an express grant of authority from the legislature. See, e.g., Salt Lake City v. Allred, 20 Utah 2d 298, 437 P.2d 434 (1968); Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1938). Notwithstanding this principle, defendant recognizes that the traffic rules and regulations set forth by statute are required, by statute, to be applied on a uniform basis statewide.

The provisions of this act shall be applicable and uniform through the state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this act unless expressly

authorized herein. Local authorities may, however, adopt regulations consistent with this act and additional traffic regulations which are not in conflict therewith. U.C.A. §41-6-16 (1953). **【Emphasis added.】**

It is defendant's contention that the statutory language emphasized immediately above is an express grant of authority to Midvale City to adopt Midvale City Ordinance §187(b). In further support of this proposition, defendant directs this court to other statutory provisions. In Utah Code Ann. §10-8-1 to 91 (1953), with regard to traffic regulations, the Legislature has provided:

【The boards of commissioners and city councils of cities】 may regulate the movement of traffic on the streets, sidewalks and public places, including the movement of pedestrians as well as of vehicles, and the cars and engines of railroads, street railroads and tramways, and may prevent racing and immoderate driving and riding. Id. §10-8-30

Defendant submits that by this provision the legislature has made an express grant of authority to the City of Midvale to regulate the movement of traffic within its boundaries.

Finally, the legislature has recognized the inherent general police power of local authorities to regulate traffic within the political confines of their cities.

The provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power. . . . Id. §41-6-17 (Supp. 1979).

It is apparent from the statutes cited above by defen-

dant that Midvale City Ordinance §187(b) was adopted by Midvale City pursuant to authority granted to it by the legislature and pursuant to its general police power. In support of her position, defendant directs this court's attention to the fact that other municipalities within this state have adopted provisions identical to Midvale City Ordinance §187(b). See, e.g., Salt Lake City Traffic Code §46-12-206(2) (1974), "The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have"; Murray Traffic and Motor Vehicle Code §18-146 (1975), "The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have".

Defendant maintains that Midvale City Ordinance §187(b) does not conflict with, and is indeed consistent with, the letter and spirit of the statutory traffic rules and regulations adopted by the legislature. This court has on numerous occasions been asked to declare a local ordinance void as being in conflict with a state statute. See, e.g., Bate v. Salt Lake City, 21 Utah 2d 318, 445 P.2d 691 (1968); Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1938). In both cases this court said that no conflict exists where the city does not attempt to authorize by its ordinance what the legislature has forbidden, or forbid what the legislature has expressly licensed, authorized or required. It is apparent that Midvale City Ordinance §187(b) passes these tests.

It is well established in Utah that a right of way conferred by statute is not an absolute right of way, but that it is relative and that the rights and duties with respect to such a right of way must be examined in light of conditions existing at the time. See, e.g., Hughes v. Hooper, 19 Utah 2d 389, 431 P.2d 983 (1967); Bullock v. Luke, 98 Utah 501, 98 P.2d 350 (1940). In Hughes, 431 P.2d at 984, this court said, "Inasmuch as plaintiff was approaching from the right, he had the absolute right of way over the defendant. However, this right is not absolute... ." In Bullock, 98 P.2d at 352, this court recognized that a statutorily conferred right of way may be lost when it said, "Circumstances may be such, that by his own conduct, he who has the apparent right of way has lost the benefit of that right..."

This court's recognition of the relative nature of a statutorily conferred right of way is consistent with the positions taken by a majority of courts in this country, as evidenced by the following language from 3 Blashfield, Automobile Law and Practice §§114.107 and 109 (1965):

General rules as to right of way at intersections, as based on position of the vehicles or priority of approach to the intersection, assume the normal, reasonable, and lawful operations of both vehicles, and a vehicle may be entitled to preferential right of way only where it proceeds in a lawful manner. So, where the driver of a vehicle approaching an intersection operates his automobile in an unlawful manner or in violation of law, he loses his statutory preferential status, and the relative rights and duties of vehicles are governed by the common law.

* * *

Statutes governing the rate of speed on approaching an intersection may affect the question of the right of way, the statutory right of way not being applicable if one or both vehicles are exceeding the speed limit... .

Defendant directs this court's attention to Utah Code Ann. §41-6-46 (Supp. 1979), wherein the legislature acknowledged that speed that is not reasonable and prudent under the conditions is speed that is prima facie unlawful.

(1) No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual potential hazards that exist. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection... .

(2) Where no special hazards exist the following speed shall be lawful but any speed in excess of said limit shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful... .

It is apparent from the above quoted language that the legislature has made it unlawful for a driver to approach an intersection at a speed that is not reasonable and prudent under the conditions. But what are the ramifications when a driver does approach an intersection at a speed that is not reasonable and prudent? Defendant submits that because a statutorily conferred right of way in Utah is not absolute and may be lost under appropriate circumstances, it necessarily follows that a driver who enters an intersection at a speed that is not reasonable and

prudent under the circumstances has lost the benefit of any right of way to which she might otherwise be entitled. From this it follows that Midvale City Ordinance §187(b), as well as the identical ordinances adopted in Salt Lake City and Murray, are local codifications of the non-inviolable nature of a statutorily conferred right of way. These ordinances simply remove the benefit of the right of way conferred by the statute when the driver seeking to avail himself of a statute is operating his motor vehicle in an unlawful manner.

Defendant emphasizes that other jurisdictions recognize that a statutorily conferred right of way may be forfeited. In Dorey v. Myers, 211 Or. 631, 317 P.2d 585 (1957), an accident occurred at an intersection when the plaintiff's vehicle, approaching the intersection from the north, collided with the defendant's vehicle, approaching the intersection from the west. Because of the respective directions of the parties, plaintiff had a statutorily conferred right of way. At trial, the court gave the following jury instruction.

Drivers, when approaching highway intersections, shall look out for and give the right of way to vehicles on the right, simultaneously approaching a given point, whether such vehicle first enters and reaches the intersection or not. Any driver entering the intersection at an unlawful speed shall forfeit any right of way he would otherwise have under this subsection. 317 P.2d at 588.

The latter portion of this instruction was given in accordance with Or. Rev. Stat. §483.202(1), which provided, "Any driver

entering an intersection at an unlawful speed shall forfeit any right of way he would otherwise have... ." Plaintiff, who had the benefit of the statutory right of way, challenged the trial court's instruction of forfeiture of rights of way on the ground that in its initial instruction the lower court failed to tell the jury that forfeiture of right of way due to unlawful speed does not transfer the right of way to the other party. The Oregon Supreme Court, in affirming the trial court, noted that the lower court, upon the jury's request for further instructions, did in fact inform the jury that forfeiture of a right of way by operation of the above quoted statute did not transfer the right of way to the other party. The court concluded that the trial court fully covered the issue of forfeiture of right of way and that the trial court's instructions given thereon were proper.

In Dawson v. Olson, 95 Idaho 295, 507 P.2d 804 (1973), the Idaho Supreme Court, by implication, acknowledged that where the law so requires, a driver who is operating her vehicle at an unlawful speed shall forfeit any right of way to which she otherwise might be entitled. In the Dawson case, which involved an intersectional collision, the evidence showed a failure to stop at the stop sign by the driver of the first vehicle and speeding by the driver of the second vehicle. At trial the lower court gave the following instruction, "You are instructed that the driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have." 507 P.2d

at 805. The representatives of the occupants of Vehicle 2 excepted to this instruction as prejudicial error in that no law existed in support of such instruction. Accordingly, they moved for a new trial, which motion was granted by the lower court. The representatives of the occupants of Vehicle 1 appealed to the Supreme Court of Idaho. On appeal the court said,

None of the relevant statutes in effect at the time of the accident in question mention forfeiture of right of way due to excessive speed. Instruction No. 26, having no statutory authority to support it, was an improper instruction of the law existing at the time of the accident.

Although a statute providing for forfeiture of right of way in cases of unlawful speed may have a salutary effect on discouraging excessive speed in connection with open and possibly even favored intersections, no such provision exists in the Idaho Code presently.* * * Even if such a statute were in force in Idaho, however, the fact that a favored driver under a right of way statute could forfeit his right of way by excessive speed would not transfer the right of way to the other driver. 507 P.2d at 806,807.

That the above quoted language is an implicit recognition of the rule which defendant now seeks to have adopted by this court is apparent in light of the Idaho Supreme Court's decision in Bell v. Carlson, 75 Idaho 193, 270 P.2d 420 (1954), wherein the court said:

Furthermore, at the time of the accident, the Carlson car was admittedly traveling at an unlawful speed and under section 49-520, I.C., in force at that time, this driver thereby forfeited any right of way he might otherwise have had. 270 P.2d at 424.

Defendant notes that a substantial weight of authority supports her position. See e.g., Ziegler v. Carley, 156 Cal.App.2d 643, 320 P.2d 165 (1958); Amos v. Remington Arms Company, 117 Colo. 399, 188 P.2d 896 (1948); Zemo v. Louviere, 349 So.2d 420 (La.App. 1977); Holloway v. Cronk, 76 Mich.App. 577, 257 N.W.2d 175 (1977); Merrill v. Kjelogren, 160 N.W.2d 155 (Minn. 1968); Vavrina v. Greczanik, 40 Ohio App.2d 129, 318 N.E.2d 408 (1974); Rickets v. Tusa, 214 N.W.2d 77 (S.D. 1974).

Defendant submits that because plaintiff was determined to have been traveling at a speed that was not reasonable and prudent under the circumstances, plaintiff was traveling at an "unlawful speed" within the meaning of Midvale City Ordinance §187(b). Therefore, plaintiff, under this ordinance, forfeited any right of way to which she was otherwise entitled. Because the trial court refused defendant's requested jury instruction which stated the operation and effect of Midvale City Ordinance §187(b) and subsequently denied defendant's motion for a new trial based on the court's refusal to give such an instruction, defendant submits that the court twice committed prejudicial error.

POINT III.

BY ENGAGING IN EXTENSIVE EXAMINATION OF
PLAINTIFF'S WITNESSES AND USURPING THE
FUNCTION OF PLAINTIFF'S COUNSEL, THE COURT
BELOW DENIED DEFENDANT'S RIGHT TO A FAIR
AND IMPARTIAL TRIAL.

Defendant submits that the court below prejudiced defendant's right to a fair and impartial trial by its extensive

examination of plaintiff's witnesses. A review of the transcript of testimony given at trial reveals that the lower court asked less than 95 questions of witnesses during the trial (See Appendix). Of these 95 questions, 90 were asked of plaintiff's witnesses during examination by plaintiff's counsel or simply during examination of witnesses by plaintiff's counsel. The remaining 5 questions were asked during examination of witnesses by defendant's counsel.

This court's most recent statement on this issue is found in State v. Mellen, 583 P.2d 46 (Utah 1978), a criminal proceeding wherein this court said:

【T】he judge should and normally does exercise restraint in examining witnesses, so that he does not unduly intrude into the trial or encroach upon the function of counsel.

* * *

Notwithstanding what has just been said, the judge does have a function beyond sitting as a comparatively silent monitor of proceedings. In order to discharge his responsibility of carrying out the above stated objective, it is within his prerogative to ask whatever questions of witnesses as in his judgment is [are] necessary or desirable to clarify, explain or add to the evidence as it relates to disputed issues. 583 P.2d at 48. 【Emphasis added.】

It is evident from the above quoted language that extensive examination of witnesses is not contemplated as being within the proper function of a trial court. Examination of witnesses by the trial court should be restricted to the purposes of clarifying, explaining or adding to evidence already accepted.

Defendant submits that the lower court abused its discretion by surpassing the limits on this discretion as set forth in the Mellen case. At one point, during direct examination of Officer Elsbey by plaintiff's counsel, the court below asked 22 consecutive questions. (See Appendix, pp. 28-31). Examination of the questions submitted to witnesses by the trial court reveals that they were directed towards the introduction of evidence which plaintiff's counsel was capable of establishing without the help of the lower court. It is evident that the trial court did in fact encroach upon the functions of plaintiff's counsel. Because such conduct on the part of the trial court was an abuse of its discretion, defendant submits that such conduct denied her a fair and impartial trial.

CONCLUSION

Plaintiff's vehicle was not "an immediate hazard" within the meaning of the statute so as to require defendant to yield the right of way to plaintiff. Should this court agree with the lower court's determination that plaintiff's vehicle was, in fact, an "immediate hazard", defendant still could not be guilty of failure to yield the right of way to plaintiff because plaintiff, because she was operating her vehicle at a speed that was not reasonable and prudent under the circumstances, forfeited, under Midvale City Ordinance §187(b), any right of way to which she might otherwise be entitled. Because the lower court failed to instruct the jury as to the operation and effect of this ordi-

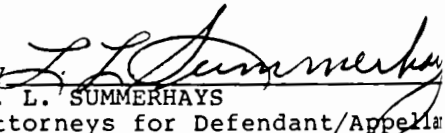
nance, despite defendant's request to do so, the lower court committed reversible error in failing to instruct the jury on the applicable law. Finally, the lower court committed reversible error by its extensive examination of witnesses and by usurping the function of plaintiff's counsel.

Inasmuch as the lower court denied defendant's motion for a new trial based upon such prejudicial errors, it is respectfully submitted that the judgment of the lower court should be reversed with instructions to enter judgment in favor of the defendant or, in the alternative, that a new trial be granted.

Dated this 10th day of October, 1979.

Respectfully submitted,

STRONG & HANNI

By 
L. L. SUMMERHAYS
Attorneys for Defendant/Appellant
604 Boston Building
Salt Lake City, Utah 84111

MAILING CERTIFICATE

Mailed two copies of the foregoing Appellant's Brief to J. Kent Holland of Hanson, Russon, Hanson & Dunn, Attorneys for Plaintiff/Respondent, 702 Kearns Building, Salt Lake City, Utah 84101, this 10th day of October, 1979.



APPENDIX

Excerpts from transcript of testimony taken in lower court showing examination of witnesses by lower court. Excerpts are indexed to page and line of such transcript.

WITNESS: GRANT W. ELSBY

DIRECT EXAMINATION BY MR. HOLLAND

* * *

Page 8

1 THE COURT: Let's ask him this. Did you make
2 various measurements, Sir?

3 A. You mean at the time of the accident, or--

4 THE COURT: You made measurements I say, measure-
5 ments of the street and other points of significance when
6 you arrived?

7 A. Yes.

* * *

15 THE COURT: Alright. How did you make the measure-
16 ments?

17 A. The measurements are made by a contraption that
18 has a wheel and it is metered and it reads it off in feet
19 and inches.

20 THE COURT: You pole [roll] that from one point to another?

21 A. We role it from one point to another, yes.

22 THE COURT: I think he--can you tell us what measure-
23 ments you did make and what they were. What you put on the
24 map.

25 A. The measurements we made was basically where both
26 cars were situated in the road.

* * *

Page 9

1 THE COURT: The record may show he has referred to
2 the defendant. That is car mark marked on your diagram, S
3 with any marks or just a car?

4 A. On the diagram, it is marked as Vehicle No., I
5 believe 1, let me just check.

* * *

Page 10

17 THE COURT: The answer will be stricken and I
18 sustain the objection. Did you measure the streets, Office
19 the width of the street, each side of the street?

20 A. As far as the width of the street, no, I did not.

21 THE COURT: You didn't measure either side of the
22 street?

23 A. The only measurement I made was using this curb as
24 a base line to put the cars in this position or from here
25 but as far as measuring the width of the street, I did not
26 measure the width of the street.

27 THE COURT: Do you have a judgment from your observa-
28 tions and opinion how wide the travelled portion of that
29 street is in the area of the accident?

* * *

Page 11

3 THE COURT: How wide is it?

* * *

10 THE COURT: The north half of the street, alright.
11 How far is it from what you call PI to where the defendant's
12 car came to a stop, Sir, or did you measure from the manhole
13 cover?

14 A. We have from the manhole cover.

* * *

18 THE COURT: To the rear of the car.

19 A. To the rear of the car from this point here to the
20 rear of the car is approximately 94 feet 9 inches.

* * *

24 THE COURT: How far was it to the other car, what
25 we have called the Plaintiff's Car?

26 A. This car here?

* * *

29 THE COURT: From the manhole cover?

30 A. From the manhole cover.

Page 12

1 THE COURT: How far from what you have called the
2 PI from the manhole cover?

3 A. From the probable PI to our reference point, the man-
4 hole cover is 11 feet 6 inches.

5 THE COURT: That is 11 feet 6 inches East?

6 A. Yes.

7 THE COURT: So those cars would be an additional
8 approximately 7 feet farther west than the measurements, t
9 the probable point of impact to wher they came to stop,
10 the distance you measured plus approximately 7 feet?

11 A. Seven feet, correct.

12 THE COURT: Where was the impact of the Defendant's
13 car, did you observe?

14 A. On the Defendant's car?

15 THE COURT: Yes.

16 A. Was the right rear area.

17 THE COURT: Well, was it on the rear to the right
18 side of the rear or the rear of the right side, do you
19 recall, Sir?

20 A. Basically--

21 THE COURT: The back of the car to the right side
22 or the side of the car to the back side if you recall?

23 A. Around the rear fender and to the--I call it the
24 right rear which would take in bumper and fender in area
25 in here.

26 THE COURT: Did you observe ever the damage to the
27 Plaintiff's car?

28 A. Yes. The damage to that car was the left rear.

29 THE COURT: The left rear fender. What did you
30 find at the probable point of impact, you say you found d

Page 13

1 anything else?

2 A. Dirt and broken glass.

3 THE COURT: And in your experience as a police
4 officer investigating accidents have you observed what
5 happened when two vehicles collided, when a moving vehicle
6 collides with another car, two moving vehicles, what happens
7 to the dirt on the under side of the car?

8 A. When they collide the dirt from the under carriage
9 of the vehicles are jarred loose.

10 THE COURT: That is called debry [debris] of the accident.
11 And where does the glass come from?

12 A. The glass from the taillight and the taillights
13 from both vehicles were broken out and we found those lying --

14 THE COURT: In the general area of the probable
15 point of impact?

16 A. In the general area.

17 THE COURT: What is the surface of this street?

18 A. The surface is asphalt, extremely well travelled,
19 polished as we would call it.

20 THE COURT: Old asphalt then.

21 A. Yes.

22 THE COURT: And is the entire north half of the
23 street asphalt?

24 A. You mean this section here?

25 THE COURT: Yes.

26 A. Yes, it is.

27 THE COURT: Are there dividing lines, dividing lanes
28 of traffic for west bound traffic on the north half of the
29 street?

30 A. The center lines, yes, they are divided.

Page 14

1 THE COURT: How many? How many lanes is it
2 divided into by lanes?

3 A. Oh, by lanes.

4 THE COURT: By marking.

5 A. We have two. There is two lanes for west bound
6 traffic.

7 THE COURT: One is wider than the other I take it
8 from looking at the diagram?

9 A. It appears the north section is a little bit wider.

10 THE COURT: Which would include would it generally
11 be a parking area?

12 A. Yes. There are parking stalls here.

13 THE COURT: And which lane was the probable point
14 of impact in which lane, Sir?

15 A. It was on the inside lane closest to the island.

16 THE COURT: Alright, you may continue, Mr. Holland.

17 MR. HOLLAND: Thank you very much, Your Honor.

Page 15

* * *

6 Q. Alright. In your training as a police officer,
7 were you ever trained to make a coefficient of friction

8 test?

9 THE COURT: On the surface of a highway.

10 Q. On the surface of a highway?

11 A. Yes, I have.

VOIR DIRE EXAMINATION BY MR. SUMMERHAYS

Page 16

* * *

18 THE COURT: Was there any difference in the surface
19 of the highway that you could observe between where the
20 test was made and the area where the accident occurred?

21 A. I could tell no difference in the surface of the
22 road.

DIRECT EXAMINATION BY MR. HOLLAND

Page 17

* * *

9 THE COURT: He is going to tell us what he did.
10 How did you make the test, Sir?

11 A. The test, I drove my police vehicle at a given
12 speed and at a given point I applied the brakes.

13 THE COURT: Do you recall what speed you drove at?

14 A. Thirty miles an hour.

15 THE COURT: At thirty, alright.

16 A. At thirty miles an hour and then we applied the
17 brakes at a given point, measured the amount of skid marks
18 and in that way were able to determine the coefficiency or

19 the drag factor of the roadway.

20 THE COURT: Based upon the length and time it took
21 to stop by--where did you get the figures you used?

22 A. North Western University, they publish a book and
23 scale that we use.

VOIR DIRE EXAMINATION BY MR. SUMMERHAYS

Page 18

* * *

13 THE COURT: You have got a length of time he is
14 asking you, after you apply the brakes, it takes some time
15 to get the brakes to take hold and get applied?

16 A. You mean the reaction time from the time you take
17 your foot off the gas to the brake?

* * *

23 THE COURT: What he is talking about you don't leave
24 a tire mark until the wheels lock?

25 A. That is correct.

26 THE COURT: If there is any slowing down of the
27 wheels before they lock you are not leaving a tire mark, or
28 skid mark at that time?

29 A. That would be correct.

DIRECT EXAMINATION BY MR. HOLLAND

Page 19

* * *

11 THE COURT: What is the coefficient of friction
12 you determined from the brake marks you made at thirty mil

13 an hour?

14 A. We came up with sixty-five, sixty-five coefficient
15 of friction.

16 THE COURT: Sixty-five. Is that generally used
17 with sixty-five percent, is that the general terminology
18 or what is it, .65?

19 A. I believe so.

* * *

Page 20

1 THE COURT: What do you have tire marks or were
2 they skid marks could you determine?

3 A. They were skid marks.

4 THE COURT: Leave black rubber on the lawn?

5 A. Not black rubber but, you could tell where the
6 tires had bounced up and they drug through the snow.

* * *

Page 21

* * *

17 THE COURT: How many brake marks did you measure
18 prior to the point of impact, Sir?

19 Q. How many wheel marks did you mark as--

20 A. There was two distinct lines showing the left and
21 the right tires.

22 THE COURT: Both the front and rear tires, could
23 determine from observation of the skid marks whether all were

24 locked or not?

25 A. In my opinion it appeared that all four were locked

26 THE COURT: They tracked pretty well into each other
27 then?

28 A. Both cars were tracking fairly straight.

29 THE COURT: So you feel you had--you couldn't tell
30 though--which ones locked first, the front or the back?

Page 22

1 A. I could not tell that no.

2 THE COURT: Could you tell whether they all four
3 left actually the same amount of mark or were you able to
4 determine how much each wheel left?

5 A. I did not determine. I just determined the overall
6 from the start to the stopping.

7 THE COURT: You couldn't determine how far the
8 front locked or how far the back locked, a total of all
9 of them?

10 A. No.

11 THE COURT: Including the total of the front, the
12 total of the back is that correct, Sir?

13 A. That is all it is, yes.

14 THE COURT: Alright.

15 Q. Now, this possible point of impact that you have
16 marked on here, do you recall how far it was from the end
17 the island to that portion?

18 A. From the probable point of impact to the end of

19 the island is 4'5".

20 THE COURT: Which direction, Sir?

21 A. The point of the island or the end of the island
22 would be 4'5" farther east.

23 THE COURT: The impact then was 4' West of the
24 end of the island?

25 A. That is correct.

26 THE COURT: How far from the north of the island
27 was it did you measure that or from the manhole?

28 A. To the north of the island?

29 THE COURT: Yes. Everything is north of the island
30 isn't it?

Page 23

1 A. Well, the accident--what was your question--no, we
2 brought our other measurements as far as putting this car
3 off this curb here and came this way. I don't come out this
4 way.

* * *

Page 26

* * *

14 THE COURT: Was that stop sign there the day of the
15 accident, Sir?

16 A. Yes, it was, yes.

* * *

26 THE COURT: Let's see that, Sir. You are standing

27 on the island aren't you, Sir?

28 A. In relationship to the end of the island.

29 THE COURT: You are standing west of the island
30 where you determined the probable impact. You are standing

Page 27

1 on the island in an area east and west of the end of the
2 island?

3 A. Correct.

* * *

12 THE COURT: How far west is that from the end of
13 the island generally?

14 A. I am approximately here because I am showing since
15 Mr. Summerhays' diagram is to scale, I am looking approximately
16 just like this, this is what I am looking at this--

* * *

Page 28

* * *

22 THE COURT: We are only concerned about the plaintiff
23 Was she injured, did you observe whether she was or was not

24 A. Yes, I observed she was injured.

25 THE COURT: You can tell us what you observed as to
26 to her condition.

27 Q. What did you observe as to her condition?

28 A. At that point I determined there was some type of
29 either back or neck type or spinal injury.

* * *

Page 29

* * *

26 THE COURT: Do you recall, driver No. 2 you talked
27 to you say?

28 A. Yes.

* * *

Page 30

* * *

19 THE COURT: Where did it take place?

20 A. It took place, I can't really remember the exact
21 location we were but it ws in the general area of the acci-
22 dent.

23 THE COURT: Who else was present?

24 A. Whoever was in the defendant's vehicle, the--
25 a police officer and there were several firemen around.

26 THE COURT: Were they involved in the conversation
27 or just in the general area?

28 A. I think they were just in the general area trying
29 to hear and see what was going on.

30 THE COURT: And how long after you arrived did it

Page 31

1 take place, just your general, best estimate.

2 A. Maybe ten, fifteen minutes.

CROSS-EXAMINATION BY MR. SUMMERHAYS

* * *

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* * *

26 THE COURT: All of the debry [debris] of impact was
27 within that lane, that is what you are saying.

28 A. Are you asking me that question?

29 Yes, it was.

* * *

WITNESS: RACHEL ARMELINDA CINTRON DOYLE

DIRECT EXAMINATION BY MR. HOLLAND

* * *

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* * *

29 THE COURT: Where was your car when, you said you
30 observed she wasn't going to stop is your testimony. When

Page 47

1 was your car at that time in relation to the intersection?

2 A. I was approximately right about where the left
3 hand turn--just above that, not quite--I don't know how to
4 explain it.

* * *

Page 56

* * *

28 THE COURT: Where did you first see the defendant's
29 vehicle, the automobile driven by the defendant, where was
30 it when you first saw it?

Page 57

1 A. I first seen her when she was back in here.

* * *

6 THE COURT: Did you watch her continue to proceed
7 from--

8 A. From the stop sign?

9 THE COURT: Yes.

10 A. Yes, I did.

* * *

WITNESS, RUDOLF LIMPert

DIRECT EXAMINATION BY MR. HOLLAND

* * *

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* * *

4 THE COURT: Does that include perception you say?

5 A. Yes.

6 THE COURT: Perception and reaction?

7 A. Yes, Your Honor.

* * *

12 THE COURT: Let's help the jury this way. At
13 thirty-five miles per hour how far does--how fast does a car
14 travel say--you have told us a second, Sir.

15 A. Yes.

* * *

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* * *

19 THE COURT: Based on the thirty-five mile per hour
20 assumption, what is the total reaction time?

21 A. The total time consists of the reaction time of
22 one second, the sliding time during which the vehicle
23 slides and that is entirely out of control of the driver,
24 is a function of the deceleration of the vehicle and the
25 distance it slid and it take .9 seconds to slide from thirty
26 five miles an hour a distance of 37.5 feet at a coefficient
27 of friction of .65 and then at the end of the 37.5 feet slide
28 we have 26 feet unbraked travel and that takes .8 seconds,
29 .8 seconds. So if we add the .8 during the unbraked sliding
30 from it where the skid marks stop to the point of impact,

Page 78d

1 plus the sliding time of .9 gives us 1.7 plus the one second
2 reaction time gives us 2.7 seconds during which Plaintiff
3 had to react to lock the wheels, to take evasive action.

* * *

Page 78e

* * *

10 THE COURT: Let's ask him do you have any experience
11 Dr. Limpert, in acceleration speeds of automobiles from a
12 stopped position with a, say up to ten miles an hour, the
13 acceleration speed?

14 A. Yes, Your Honor.

* * *

Page 78g

* * *

30 THE COURT: When she reacted, that is--would that

Page 78h

1 be proper? At the time she reacted, the Defendant would
2 have been twenty feet back at the average of five?

3 A. To make it exactly clear 2.7 seconds prior to the
4 time of impact at the time the Plaintiff had to recognize
5 the hazard.

* * *

10 THE COURT: Her reaction based upon the facts you
11 had was at that point.

12 A. Yes. When her brake began to react.

* * *

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* * *

WITNESS: LONNIE M. HIYAGISHIMA

DIRECT EXAMINATION BY MR. HOLLAND

22 THE COURT: Don't lead her, Sir. Just tell us where
23 you were sitting what direction you were facing.

24 A. Well, I was turned.

* * *

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* * *

13 THE COURT: Did you talk to Mrs. Doyle?

14 A. No, I did not.

* * *

28 THE COURT: Had you ever travelled on that Street
29 before?

30 A. Oh, Yes.

* * *

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* * *

26 THE COURT: Where was it in relation to the car
27 you were in?

28 A. I don't know.

29 THE COURT: Front, along side or behind?

30 A. It might have fell behind, I am not sure.

* * *

Page 87

* * *

30 THE COURT: Did you observe whether there was any

Page 88

1 in the car other than the driver?

2 A. I could see a passenger in the front.

WITNESS: TANYA SALAZAR

DIRECT EXAMINATION BY MR. HOLLAND

* * *

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* * *

26 THE COURT: What was your sister's condition at
27 that time?

28 A. Well, she says that her--

29 THE COURT: No, how did she appear looking to you?

30 A. Well, she was pale and she was waiving--

WITNESS: LYNNETTE LEMMON

RE CROSS-EXAMINATION BY MR. HOLLAND

* * *

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* * *

5 THE COURT: Ask--don't--where was Rachael's car
6 in relation to your mother's car when you looked around?

7 A. When I looked around she was in the lanes like I
8 described that was when it was just seconds before the impact,
9 just really fast.

* * *

WITNESS: MRS. MILKOVICH

CROSS-EXAMINATION BY MR. HOLLAND

* * *

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19 THE COURT: Did you ever see the other car, ever
20 see it before the collision?

21 A. No.