

1953

# Henrietta Smith v. Golden J. Bennett : Brief of Appellant

Utah Supreme Court

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W. D. Beatie; Attorney for Plaintiff and Respondent;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

MAY 2 - 1953

Clerk, Supreme Court

HENRIETTA SMITH,  
*Plaintiff and Appellant,*

— vs. —

GOLDEN J. BENNETT,  
*Defendant and Respondent.*

Case  
No. 7972

## Appellant's Brief

W. D. BEATIE

*Attorney for Plaintiff  
and Appellant.*

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of the collision. There is a marked pedestrian lane running in a northeasterly, southwesterly direction across the street and it is contended by the plaintiff that she proceeded in the pedestrian lane to the center of the highway, then proceeded easterly approximately 45 feet, then proceeded in a southeasterly direction toward her home which is designated on the map as 937 West 2nd South, and that the accident occurred when she was in the second traffic lane on the south side of the street.

Harold A. Peterson, Jr., called as plaintiff's witness testified that he investigated the accident as a Salt Lake City Police Officer, and made certain measurements at the scene. He testified that the left side of the automobile was just over, by a matter of inches or a foot of the first yellow line south of the center lane at a point 306 feet east of the 9th West intersection and 14 feet from the south curb and 13 feet from the south center lane of traffic, and that there were light scuff marks on the street approximately 3 feet from where the automobile came to rest (R. 11). He did not recall any blood stains on the street, and the injured person had been removed by police ambulance prior to the investigation. (R. 12). He saw no indications of brake marks. (R. 13).

W. O. Cowden, Salt Lake Police Officer testified for plaintiff that he investigated the accident with Officer Peterson and discussed the accident with the defendant at the scene. That defendant told him he would estimate that he was approximately 50 feet from the pedestrian when he realized the danger first and that he had been

traveling 25 miles per hour and his estimated speed at the time of impact was one mile per hour; that he had just pushed the pedestrian ahead of the automobile (R. 15).

Golden J. Bennett, the defendant was called by plaintiff as a witness and testified that on the date of the accident he was 18 years of age. (R. 18). That he was employed at Lang Co. and had left his work shortly after 6:00 o'clock. (R. 19). That upon proceeding from his work easterly on West 2nd South, he entered lane No. 1 which is the southerly most traffic lane on the south side of the street and proceeded in that lane. (R. 21).

Q. "As you hit the intersection, that would be the west side of the intersection of 9th West and 2nd South Street, how fast were you traveling, Mr. Bennett?

A. I could not tell you for sure, I was not watching my speedometer, but I wasn't going very fast.

Q. What is your best judgment of your speed?

A. Oh, 25 miles an hour, maybe 20 - 30, somewhere around there." (Tr. 22)

\* \* \*

Q. (By Mr. Beatie) "Will you mark that please, then, let's mark it 'D 1' the position. Now when you were at point 'D 1' will you mark on the diagram where Mrs. Smith was, please, Mr. Bennett?

A. Well, when I first saw Mrs. Smith it seemed to me like she was walking into these yellow lines right approximately here.

Q. Just mark that then with a circle, say, and mark that 'S'. Now when you were at point 'B 1' and you observed Mrs. Smith at point 'S', how fast was your car travelling?

A. Approximately 25 miles an hour."

\* \* \*

Q. Between point "B 1" and the west edge of the cross walk marked upon Exhibit B, did you reduce your speed by applying your brakes at any point?

A. Yes. (R. 25)

Q. (By Mr. Beatie) Now will you tell me, Mr. Bennett, how far west of the west line of the cross walk point "B 1" is in your best judgment.

A. I could not tell you for sure, I do not know the distance from the crosswalk to the map here. I imagine it was 50 or 75 feet, something like that. (R. 26)

Q. I want to know what your judgment is of where you first observed her starting to run across the street and at what point on the south portion of the highway were you at that time.

A. I first observed her when she started to run across the street approximately right here.

Q. You are indicating in the area of "S 4", is that correct?

A. That is correct. (R. 31)

Q. Will you make below "B 5" then, please, 25-30 feet? Now at point "B 5" how fast were you travelling, Mr. Bennett.

A. I have no idea, sir. At that point I had already slowed down for Mrs. Smith once and I thought I had the right of way. (R. 32)

Q. And was she walking at all times between point "S 1" and "S 4" in a southeasterly direction?

A. Well she stopped when I honked my horn, you see, she was then at point "S 4".

Q. She was then at a point "S 4", is that correct, when you honked your horn?

A. Approximately, yes. (R. 36)

THE COURT: From the time you honked your horn until she started to run in front of your car as you say she did, how far did you travel?

THE WITNESS: Approximately 25 or 30 feet, maybe, I don't know. (R. 37)

Q. (By Mr. Beatie) Mr. Bennett, would you say that as you have diagrammed here at point "B 5" that you travelled a distance then of 25 to 30 feet while Mrs. Smith ran 13 feet, is that correct?

A. Well, sir, I don't know, that is just an approximate diagram I put there. I have no measurements or anything to go by there, I don't know. (R. 38)

Q. Now let me ask you from point "B 5" on the Exhibit B did your car vary in its path from that point to the point of impact?

A. Yes.

Q. Very much?

A. I just turned a little.

Q. In which way did it turn?

A. It turned right a little, it skidded right a little.

Q. Skidded right?

A. Yes, kind of. (R. 40)

Ross J. Smith, the husband of plaintiff testified:

Q. And it is your best estimate it is between 80 and 85 feet east of the east side of the cross walk to the point at which you first found your wife's body.

A. Yes.

Q. Now how could you identify that particular spot, or was there anything that would indicate what that spot was when you first arrived there.

A. You mean when I first got out to the scene of the accident?

Q. Yes, the scene of the accident.

A. There was a puddle of blood on the end of the white line. (R. 53)

Plaintiff testified in her behalf that she had resided at 937 West 2nd South for about seven years and had been employed at the Western Co-op for about ten years as a cashier (R. 61). That plaintiff has never had any injuries to her body of any kind but has worn glasses since she was about 20 years old; that she is now 55 years of age and had not had a doctor in attendance in the last ten years. (R. 62); that on the evening of the accident she came out of the Western Co-op with a fellow employee, Mrs. Ostberg and Mr. Wright, her employer was at the door and saw her walk easterly from the entrance of the Western Co-op to the driveway with Mrs. Ostberg. (R. 53).

Q. Take the pencil so you can mark it from where you left Mrs. Ostberg and what path you took in going home.



A. I left Mrs. Ostberg here by the truck and I came down here and come down here to the curbing.

Q. All right. Now at the curbing let me ask you this. At the curbing did you make any observation of traffic on 2nd South Street?

A. I looked eastward. (R. 64)

Q. Did you look west at all?

A. No, sir.

Q. What did you observe as far as your traffic was concerned toward the east?

A. There was a car coming.

Q. How you any opinion as to how far the car was away?

A. It was up toward 8th West.

Q. Now where did you go from the point you were at the curbing, Mrs. Smith?

A. I came across—

Q. Just make a mark with the pencil.

A. I came in through here and came to the center lane where the yellow line is in the middle.

Q. At that particular point did you make any observation of the traffic on 2nd South Street?

A. I stopped there, sir, and looked west.

Q. Which way did you look?

A. Westward, sir.

Q. What did you observe in reference to the traffic situation west of you on 2nd South Street at that point? Was a car or cars coming down the street?

A. A car was coming way down the street.

Q. Now when you say way down the street, which way?

A. Almost to 10th West.

Q. What next did you do?

A. Then after I stopped there I walked up—

Q. Just mark with the pencil where you walked.

A. I walked up this yellow line in through here.

Q. Now have you any opinion as to how far you walked from the point in the center of the street in an easterly direction? (R. 65)

A. I guess about 45 feet.

Q. You had proceeded from a point in the cross walk in an easterly direction, I understand, between the yellow line easterly about 45 feet?

A. That's right. (R. 66)

Q. Mrs. Smith, the last question asked last night was, was the white apron, a portion of the butcher's apron which you had on clear around your body below the hips, and the answer was "Yes". It is my impression that the previous position at which that question was asked, was that you were in the center of the street, between the marked lines, east of the crosswalk; is that correct?

A. Yes.

Q. Now then, you were at that position which you have said in your judgment was approximately 45 feet east, between the marked center line, did you make any observation of traffic to the west which would be coming easterly?

A. Before I crossed the street I stopped and looked.

Q. Now, Mrs. Smith, will you just listen to the question, please and we will get along faster. When you were in the center lines, you had gone 45 feet east; I understand you to say you stopped?

A. I did, sir.

Q. All right. When you were at that portion of the highway between the lines, when you came to the stop, did you observe the condition of traffic on the south portion of West Second South Street?

A. There was a car—parked cars west of 9th West. (R. 102)

Q. Was there any other traffic that you observed on the south portion of 2nd South?

A. There wasn't anything between 9th West and where I was.

Q. What next did you do? Withdraw that. Did you leave that particular point after having made that observation?

A. Yes.

Q. What did you do?

A. I saw the car down there, and started to cross the street.

Q. Which way did you walk?

A. I walked over to the south side.

Q. Did you run at all?

A. Not that I know of.

Q. Well you were there; did you walk or did you run?

A. Well I have always walked rather quickly.

Q. Which direction did you walk?

A. I walked south.

Q. Why were you walking in that direction, Mrs. Smith?

A. Because my home is just there. (R. 103)

Q. (By Mr. Beatie) Now when you say, Mrs. Smith, that you were proceeding toward your home, in what general direction were you walking from the center lines of West 2nd South Street?

A. South-southeast to my home.

Q. Now how far did you walk from the center cross lines on the south portion of 2nd South Street?

A. I was in the center one—in the second line. (R. 105)

Q. Which lane were you in?

A. Lane 1.

Q. You were in Lane 1?

A. Yes.

Q. What happened, if anything?

A. All I can remember is that I heard an awful grinding noise and it felt like my body was whirling around, and I hit. That is all. (Tr. 106)

The witness then described in detail the nature of her injuries and the places in her body which were injured and the pain and suffering she still has. (R. 126).

## CROSS EXAMINATION

Q. Mrs. Smith, as I understand your testimony, you said that when you got about 45 feet east of the center of the street, east of the center of the pedestrian lane, and center of the street, that you looked toward the west; is that right?

A. Yes.

Q. And then you started across the street?

A. Yes.

Q. And were you walking fast or hurrying, as you went across the street, or running?

A. I walked, the way I have always walked. I didn't walk slowly, sir.

Q. Well, did you walk faster than you usually did?

A. No; faster than I do now. I cannot walk as fast; faster than I do now.

Q. Would it be fair to say, Mrs. Smith, that the last time you—that your testimony in court is, that the last time you looked to the west was when you were in the center of the street, at this point 45 feet east of the pedestrian lane?

A. I looked there before I started crossing the street.

Q. Then you walked southwesterly across the first lane of traffic?

A. Wouldn't be southwest, —my home.

Q. Southeasterly—I mean southeasterly. You walked southeasterly toward your home? Is that right? (R. 126)

A. Yes.

Q. So you walked from the center line here, to the point where the impact occurred, without looking back again?

A. I can't say whether I happened to look that way again or not. It is too long ago for me to remember. (Tr. 127)

Edwin W. Wright testified for the plaintiff as follows:

Q. Now will you just tell the court and the jury please, what you observed from that particular position, Mr. Wright, on that night?

A. The first thing that happened, that I paid any attention to, was a serious screeching of some automobile brakes, and then that stopped. It stopped as if it had hit, or probably be going to hit something or someone, and I went over toward that direction, and there on the ground, about, oh I would say 15 or 20 feet from the south sidewalk, was my employe there, lying on the ground, and her head was bleeding on the rear, and she called for her glasses. Somebody had them and she got them. And I stayed there a few minutes, and then I went back to my place of business.

Q. Now at any time from your point of observation, from where you were at Western Co-op, did you hear any warning signal given, such as a horn honk or anything, immediately prior to the screeching of the brakes.

A. No, sir. (R. 97)

Helen Ostberg testified for the plaintiff as follows:

Q. What next did you hear or observe there that evening?

A. Well I was half in the truck, a closed-panel truck, and I heard a loud noise, so I drew back,

to see what it was, and at that time I saw a body about two or three feet in the air, and it then rolled along the pavement, much like a sack of potatoes, and gave the resemblance somebody had fallen out of a car—really (R. 99) rolled quite fast.

Frank W. Bonner, testified for the plaintiff that he witnessed the accident at a point about 75 feet east of the cross walk. (R. 134).

Q. Then you only noted her in the center of the street first?; had she ever crossed before you—let's start again. She crossed the street then in front of your car; is that correct?

A. That is right.

Q. And was she walking or what you say between a walk and a trot?

A. She was hurrying.

Q. So you were how many feet east of her would you say when she left the center of the street?

A. I imagine about 40 feet by that time, —40 or 50 feet.

Q. And did she continue right on as she passed the center line on the south portion of the highway?

A. She hesitated.

Q. She hesitated?

A. Yes.

Q. And what do you mean by "hesitated"? (R. 137)

A. I don't know what anybody would stop in the middle of the road for unless to look.

Q. Would you say then she just hesitated and looked and started off again; is that it?



A. Yes.

Q. Now at the time she hesitated in the center of the street, did you observe any car coming east, Mr. Bonner?

A. Yes. (R. 138)

Q. Now while this particular car came in an easterly direction, which you observed with two lights, did you follow it to know that it was the Bennett car and the one involved in the accident?

A. I seen Mr. Bennett hit the object.

Q. And from the point which you have initialed here, as being west of the crosswalk, did that car vary at all from one lane to another as it approached in an easterly direction?

A. Well, it seemed like it wanted to go just a little bit to the number 2 lane, and then it switched back in,—not too much. I was slowing down at the time. I had a feeling something was going to happen; something just told me something was going to happen. (R. 139).

Q. Did you hear the honking of a horn just before the accident happened?

A. No.

\* \* \*

Q. And do you have any estimation of how fast he was traveling before the impact of his automobile?

A. I was going west, and it is pretty hard for me to judge. I thought maybe between 30 and maybe a little faster; not much. Maybe I might be wrong there too. It is hard to tell which way you are going, and how fast a man is going inside of your own car. (R. 140)



Q. Then from that position in which these left wheels were five feet, he then cut back into Lane No. 1; is that correct?

A. That is right.

Q. Now will you just mark from this mark here, where he cut back into Lane No. 1? Will you just draw it to the best of your ability?

A. He just started in a little, and came back into here, you know, in this vicinity here; he straightened up. (R. 145)

Charles Henry Sweat testified for the plaintiff as follows:

Q. She was bleeding from the head?

A. Yes, there was a little blood there, I noticed.

Q. Did you observe any particular marks on it—traffic marks on it—from the Bennett car?

A. Yes, I noticed his brake.

Q. In other words, as we call it—burning rubber; did you notice any marks from his burning rubber just prior to the accident?

A. Yes, I did. I noticed that, the length he skidded. I noticed that.

Q. How far would you estimate that was, Mr. Sweat; was it west of the crosswalk? The brake marks?

A. No, definitely right against the woman, right close to the woman. As a matter of fact, the time I heard the brakes was the time I saw the collision; I don't know if he applied his brakes at the time the impact was. (R. 155)

At the conclusion of the evidence for plaintiff Rex J. Hanson, attorney for defendant, made a motion for a non-suit. The Court then stated:

THE COURT: "Members of the Jury in this case it is the opinion of the Court that the plaintiff was contributorily negligent in two respects; in failing to keep a proper lookout for vehicles, and also in depriving the defendant-driver of the right-of-way." (R. 161)

"In that event, the pedestrian is obligated to yield the right-of-way to the vehicle. In this case, that observation was not made and that would have to be a failure to observe because the vehicle was there, where it would reach that point at the same time as the pedestrian. However, the pedestrian did not observe it, and the only way that you could say that the vehicle did not have the right-of-way, would be to say he was so far back he was traveling at a high rate of speed, and the pedestrian could not observe it.

"There is some evidence of speed here, and some conflicting evidence. The evidence might be sufficient to show negligence on the part of the defendant, in which event we would have to decide, but I do not think the evidence is sufficient to show that the automobile did not have the right-of-way." (R. 163)

Mr. Rex J. Hanson then withdrew his motion for non-suit and made a motion for a directed verdict which was granted and a verdict signed by the foreman of the jury.

## STATEMENT OF POINT RELIED UPON

### POINT I.

THAT THE COURT ERRED IN DIRECTING A VERDICT THAT THE PLAINTIFF WAS GUILTY OF NEGLIGENCE AS A PROXIMATE CAUSE OF THE ACCIDENT.

### ARGUMENT

### POINT I.

THAT THE COURT ERRED IN DIRECTING A VERDICT THAT THE PLAINTIFF WAS GUILTY OF NEGLIGENCE AS A PROXIMATE CAUSE OF THE ACCIDENT.

In *Hess v. Robinson*, (Utah) 163 Pac. (2d) 510.

Justice Larson said at page 512:

“As to what the circumstances were at the time plaintiff entered the intersection, and as to whether entering under such circumstances was an act from which a person of ordinary prudence and caution would have foreseen that some injury would likely result, are matters upon which reasonable minds may differ. As such they are properly for the jury. Proximate cause and contributory negligence are ordinarily questions of fact for the jury to determine under all the circumstances. (Citing Cases). Questions of negligence do not become questions of law for court except where the facts are such that all reasonable men draw the same conclusions. \* \* \*

“Since in this cause there is a question as to what were the circumstances existing when plaintiff entered the intersection, and where those circumstances may be found by the trier of the fact to be such that reasonable men might differ as to whether plaintiff’s conduct in entering the intersection was such as an ordinarily prudent and careful man might do under the circumstances, there was a question for the jury as to whether plaintiff’s negligence was contributory, that is, was the proximate cause of the injury.”

In *Hickok v. Skinner*, (Utah) 190 Pac. (2d) 514.

Justice Wolfe said at page 519:

“Even if it be conceded that plaintiff was contributorily negligent as a matter of law, the question of whether or not such negligence was a substantial causative factor in producing the collision was one of fact. Even if plaintiff had taken a second or third look, such might not have revealed to him that defendant would not yield the right-of-way to him, until too late for plaintiff to avert the accident. This case is somewhat similar to *Hess v. Robinson*, 109 Utah 60, 163 P. (2d) 510. In that case plaintiff was driving on a through highway and did not see the defendant’s ambulance approaching from the right. The ambulance went through the stop sign and crashed into plaintiff’s automobile. The trial court held both parties negligent as a matter of law, but submitted the case to the jury on the question of whether or not plaintiff’s contributory negligence was a proximate cause of the damage. From a verdict and judgment for plaintiff, defendants appealed. We affirmed. Although the court divided on the question of whether or not plaintiff was guilty of contributory negligence as a matter of law, we

agreed unanimously that the question of proximate cause was one for the jury. I recognize that the facts of this case are somewhat different from those in the Hess case, but the underlying reasoning should be the same."

In *Hunter v. Michaelis*, (Utah) 198 Pac. (2d) 245.

Justice Wolfe said at page 253:

"I am also in accord with the view that it is a jury question as to whether the plaintiff exercised due care in keeping a lookout while she was crossing the street and whether she gave sufficient reappraisals of the traffic approaching from the west as she was proceeding across. That is what I contended for in *Hickok v. Skinner*, Utah, 190 P. (2d) 514."

Justice Latimer said at page 254:

"As I interpret the California decisions and analyze the reasoning of this court in the *Hickok v. Skinner* case, supra, I come to the conclusion that under the law in both jurisdictions the trial judge was right when he refused to direct a verdict against plaintiff based on the principle that she was guilty of negligence as a matter of law."

In *Martin v. Stevens*, (Utah) 243 Pac. (2d) page 746.

Justice Crockett at page 749 said:

"The question of contributory negligence is usually for the jury and the court should be reluctant to take consideration of this question of fact from it. *Nielson v. Mauchley*, Utah, 202 P. (2d) 547; *Toomer's Estate v. Union Pacific Railroad Co.*, Utah, 239 P. (2d) 163. The expressions

in those cases are in accord with this uniformly accepted doctrine. The right to trial by jury should be safeguarded. Before the issue of contributory negligence may be taken from the jury, the defendant's burden of proving both (a) that plaintiff was guilty of contributory negligence, and (b) that such negligence proximately contributed to cause his own injury, must be met, and established with such certainty that reasonable minds could not find to the contrary; conversely, if there is any reasonable basis, either because of lack of evidence, or from the evidence and the fair inferences arising therefrom, taken in the light most favorable to plaintiff, upon which reasonable minds may conclude that they are not convinced by a preponderance of the evidence either (a) that plaintiff was guilty of contributory negligence or (b) that such negligence proximately contributed to cause the injury, the plaintiff is entitled to have the question submitted to a jury."

In *Gibbs v. Blue Cab, Inc.*, (Utah) 249 Pac. (2d) 213.

Justice Henriod at page 215 of the opinion said:

"Assuming that in one aspect, by showing a violation of the city ordinance, defendant established some negligence on the part of deceased as a matter of law, the problem remains as to whether absence of the lamp under all the facts was or was not a contributing proximate cause of the collision,—particularly in view of the fact that immediately prior to the time of impact the bicycle, and therefore the lamp, was pointed away from the vision of the defendant—a proper jury question.

"We are committed to the principle that matters of negligence, contributory negligence and



proximate cause generally are jury questions, unless the evidentiary facts are of such conclusive character as to require all reasonable minds to conclude that the ultimate fact of negligence, contributory negligence or proximate cause does or does not exist. Recognizing the rule that the trial court's conclusions will remain undisturbed unless clearly arbitrary, we believe that application to this case of the principles mentioned, being the only practical yardstick applicable in intersection cases, compels us to disagree with the trial court's conclusions."

In *Stickle v. Union Pacific R. Co.*, (Utah) 251 Pac. (2d) 867.

Justice Crockett said at page 870:

"The authorities frequently state that the question of contributory negligence is usually for the jury. And that this is so wherever the evidence is such that reasonable minds may differ as to its existence has been stated innumerable times, which is undoubtedly correct. However, in view of the fact that before the issue may be taken from the jury, the defendant has the burden of establishing plaintiff's negligence by a preponderance of the evidence it may be a bit more precise to state that the question of contributory negligence is for the jury whenever the evidence is such that jurors, acting fairly and reasonably, may say that they are not convinced by a preponderance of the evidence that the plaintiff was guilty of negligence which proximately contributed to cause his own injury.

"It should be kept in mind that so far as the quantum of proof necessary to take the question of contributory negligence from the jury is concerned, the tests are the same as with respect to

primary negligence. For instance, in a given case, there may be some evidence upon which a finding of negligence by the defendant could be based, yet the jury may remain in such a state of mind that they may fairly say that they are not convinced by preponderance of the evidence that the defendant was negligent, and based upon such failure of proof may refuse to find a verdict against him. It would only be when the defendant's negligence had been established with such certainty that all reasonable care, that the court would rule as a matter of law that he was negligent and direct the jury to find a verdict against him; conversely, if evidence were such that reasonable men may fairly say that they are not convinced from a preponderance of the evidence, that he was guilty of negligence, the court could not rule that he was negligent as a matter of law and take the case from the jury.

“These principles apply in identical fashion to the question of plaintiff's contributory negligence except that the defendant has the burden of proof. That the evidence is such that the jury may find from a preponderance of the evidence that the plaintiff failed to use due care for his own safety is not sufficient. The proof must establish his failure to do so with such certainty that all reasonable minds must so conclude before the court may rule as a matter of law that he is precluded from recovery on that ground. The court should exercise caution and forbearance in considering taking questions of fact from the jury.”

In *Morby v. Rogers*, (Utah) 252 Pac. (2d) 231.

Justice McDonough at page 232-3 said:

“Reasonable minds, however, would be justified in inferring negligence on the part of de-



fendant from circumstantial physical facts also brought out in the record. For example the lack of skid or brake marks would justify an inference against defendant's purported "quick action" to avoid the accident. The final position of the automobile in the canal would justify a finding that defendant was traveling faster than his testimony indicated and that such speed indicated his lack of control over the automobile at the time of the accident. Furthermore, the testimony in regard to the boy's injuries would justify a finding that the deceased was struck with great force and was not "just tipped over" as defendant and his wife testified. The fact that extent of injury to the bicycle consisted of a damaged rear mud guard and that there was no injury to the front of the bicycle would justify a finding that the boy did not turn into defendant as was contended, but rather was struck from behind. In addition to this reasonable minds could find from the point of impact and the position of deceased's body that the boy had not made any sudden turn but had gradually veered over onto the west portion of the highway before he was struck.

"It is not a new or novel principle that acts of negligence may be proved by circumstances. Certainly, in many cases, particularly where the only eye witnesses are parties having an interest in the action, such circumstances are the only means by which certain facts may be valuated by the jury in whose province lies the power to believe or disbelieve the testimony of the witnesses, and to draw such reasonable conclusions from the whole record as may be warranted.

"We are of the opinion that reasonable minds could find negligence on the part of the defendant from the evidence in the record. The trial court therefore did not err in letting the question of

defendant's negligence go to the jury under the evidence."

## ARGUMENT

It is respectfully contended that it is a jury question as to whether or not the plaintiff exercised due care in keeping a lookout while she was crossing the street and whether she gave sufficient reappraisals of the traffic approaching from the west as she was proceeding across the street.

The Judge, even in his statement in which he directed the verdict, admitted that there was some conflicting evidence of the speed of the vehicle which of necessity would make this a jury question. Further, the circumstantial evidence is conflicting as to whether or not the plaintiff was merely bumped and tipped over or whether she was thrown through the air, a further conflict of warning by horn and a conflict of brake marks, all of which were to be determined by the triers of the fact and therefore was a jury question.

## CONCLUSION

It is respectfully submitted that the Court erred in this matter in directing a verdict against the plaintiff and invaded the province of the jury in so ruling.

Respectfully submitted,

W. D. BEATIE

*Attorney for Plaintiff  
and Appellant.*