

1953

James H. Beckstrom v. Paul Williams ; Brief of Defendant and Respondent

Utah Supreme Court

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IN THE SUPREME COURT

**of the
STATE OF UTAH**

FILED
OCT 24 1953

Clerk, Supreme Court, Utah

JAMES H. BECKSTROM,

Plaintiff and Appellant,

vs.

Case No.

8027

PAUL WILLIAMS,

Defendant and Respondent.

BRIEF OF DEFENDANT AND RESPONDENT

STEWART, CANNON & HANSON,

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Respondent.*

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of the
STATE OF UTAH

JAMES H. BECKSTROM,

Plaintiff and Appellant,

vs.

PAUL WILLIAMS,

Defendant and Respondent.

Case No.
8027

BRIEF OF DEFENDANT AND RESPONDENT

STATEMENT OF THE CASE

This action was commenced by plaintiff and appellant against defendant and respondent for personal injury and property damage as a result of a collision between a tractor operated by plaintiff and a Chevrolet 1½ ton truck driven by defendant. The collision occurred August 3, 1951, about 4:30 p.m. on Utah Highway 228, near Benjamin, Utah. The defendant Williams counter-claimed against plaintiff for property damage and personal injury. The jury returned a verdict in favor of the defendant, no cause of action, on the complaint, and in favor of the plaintiff, no cause on action, on the counter-

claim of defendant. Plaintiff appeals from the jury verdict, no cause of action, on the complaint. Plaintiff and appellant raises three points on his appeal; one point on the failure of the court to instruct the jury on the theory of last clear chance; one point on the failure of the court to give one of plaintiff's requested instructions concerning the duty of an operator of a vehicle entering a highway from a private driveway; and one point on the court's ruling on a question propounded to a witness by plaintiff's counsel regarding a statement allegedly made after the accident by plaintiff to the witness.

STATEMENT OF FACT

August 3, 1951, plaintiff and appellant was driving a John Deere Tractor with a side rake attached from the yard of his brother, Arch Beckstrom, and drove from a private driveway west of Highway Utah 115, out onto the highway and the tractor was struck by a Chevrolet 1½ ton truck being driven south along the highway by the defendant and respondent, Paul Williams. Utah Highway 228 runs in a north-south direction and joins Utah Highways 115 and 147 near Benjamin, Utah County, Utah (R. 119). The driveway from where appellant drove extends from the highway into the yard of the Arch Beckstrom home. Utah Highway 228 is a 2-lane oiled highway, the traveled portion of the highway being 20 to 21 feet in width (R. 28-63), and there being shoulders 2 to 3 feet wide on each side of the oiled portion of the road. The tractor driven by plaintiff and appellant was 11½ feet in length and the side rake,

including the tow bar, had a length of 17 feet, 8 inches (R. 100). There was no other traffic on the roadway at the time of the collision (R. 63). Plaintiff and appellant was leaving the yard at the Arch Beckstrom home, and was going to turn left to proceed north along the highway (R. 70). There was no posted speed limit on the highway, and Williams was traveling south at a speed of 45 to 50 miles per hour (R. 51-52).

The collision that occurred was in the center of the right half of the highway, the lane for southbound traffic (R. 120, 124, 126).

There was a heavy growth of weeds, trees and bushes along the fence line to the west side of the highway and on the west shoulder of the road north of the Beckstrom driveway (R. 28, 47).

Plaintiff and appellant drove the tractor with side rake behind, from the driveway and as he approached the highway, had difficulty in observing the traffic coming from the north and had to lean forward to observe for such traffic (R. 50). Plaintiff Beckstrom had stopped the tractor in the yard before crossing the culvert that crossed a ditch west of the highway, but he never again stopped the tractor until the tractor was out onto the highway (R. 71). As the front wheels of the tractor were almost to the west side of the traveled portion of the highway, plaintiff by leaning forward, looked to the north and saw the truck driven by defendant Williams approaching at an estimated speed of 45 to 50 miles per hour, and at an estimated distance of 300 to 325 feet north of the tractor. Plaintiff and appellant then endea-

vored to stop the tractor by manipulation of the gears and foot brake, and was able to stop the tractor when the front wheels reached a position estimated as 5 feet west of the center of the highway (R. 75, 76). At the time the tractor came to a stop, the Chevrolet truck of defendant and respondent was estimated by plaintiff to be 125 feet north of the tractor. It took plaintiff several seconds to stop the tractor. After stopping, plaintiff did nothing to get out of the way or to leave the tractor (R. 52). Defendant and respondent testified that he first saw the tractor as it proceeded east and was 2 or 3 feet west of the west edge of the oiled portion of the highway, and that he was at that time 65 feet north of the tractor (R. 135, 150, 151, 158). Defendant's measurement as to the distance was made after the accident, measurement made from the point of impact to the place where he was on the highway when he observed the tractor approaching the highway. Defendant, seeing the tractor come from behind the bushes and weeds and approaching the highway attempted to apply his brakes, felt them take hold, but was unable to avoid a collision with the tractor, striking the tractor between the front and rear wheels (R. 151, 159). After the impact, the tractor was carried south along the highway, the car swerving slightly to the west as it came to a stop (R. 152, 131). The impact between the truck and tractor was in the center of the lane of traffic for southbound vehicles (R. 120, 126). It had just started to sprinkle slightly when the collision occurred and after the collision, it rained hard for about a half hour (R. 66, 153, 63).

Plaintiff and appellant fell from the tractor in the collision and was taken to the Payson City Hospital. While plaintiff was in the Payson City Hospital, he was questioned by the investigating highway patrolman, Trooper Owen Beardall of Springville, Utah. Officer Beardall questioned plaintiff at the hospital concerning the accident, and Beckstrom told the officer that he was looking back to see that the hay rake missed the bridge, and that he never saw the Williams truck. Beckstrom denied at the trial that he told Beardall that he was looking back and that he said he never saw the Williams truck (R. 122, 123).

Exhibits A, B & C are pictures of the scene of the accident. Exhibit A being a photograph taken from a point north of the driveway into the Arch Beckstrom yard, showing the trees, weeds and telephone pole along the west side of the highway to the north of the Beckstrom driveway. The driveway from where the tractor approached is indicated by the automobile shown in the picture, the automobile being upon the culvert, that is, west of the highway and over which the hay rake was passing at the time of the collision. On Exhibit A, indicated by an X is the point of impact between the truck and tractor. Exhibit B is a photograph taken from the north side of the driveway, looking north along Highway 228. Exhibit C is a photograph taken south of the driveway, looking north past the driveway along Highway 228. Exhibit D is a photograph taken from a point of the highway where plaintiff claims defendant's truck was at the time it was first observed by him; the exhibit

also shows a tractor which is claimed to be in the position of plaintiff's tractor when plaintiff was first able to see defendant's truck. Exhibit D does not represent the conditions existing at the time of the accident and does not show the obstructions to visibility that existed at the time.

STATEMENT OF POINTS

POINT ONE

THE TRIAL COURT DID NOT ERR IN FAILING TO SUBMIT THE CASE TO THE JURY UPON THE THEORY OF LAST CLEAR CHANCE.

(A) UNDER THE EVIDENCE THE COURT WAS CORRECT IN REFUSING TO SUBMIT THE CASE TO THE JURY UPON THE THEORY OF LAST CLEAR CHANCE AS SET FORTH IN SECTION 480 OF THE RESTATEMENT OF TORTS.

(B) UNDER THE EVIDENCE OF THE CASE THE TRIAL COURT CORRECTLY REFUSED TO SUBMIT THE CASE TO THE JURY UPON THE LAST CLEAR CHANCE DOCTRINE AS SET FORTH IN SECTION 479 OF THE RESTATEMENT OF TORTS.

POINT TWO

THE TRIAL COURT DID NOT ERR IN FAILING AND REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION 11, THE COURT HAVING GIVEN SUBSTANTIALLY THE REQUESTED INSTRUCTION IN ITS INSTRUCTIONS 3, 4 AND 12.

POINT THREE

THE TRIAL COURT CORRECTLY SUSTAINED DEFENDANT'S OBJECTION TO PLAINTIFF'S QUESTION TO THE WITNESS TANNER TO STATE WHAT PLAINTIFF TOLD TANNER IN THE PAYSON HOSPITAL AS TO HOW THE ACCIDENT OCCURRED, SUCH QUESTION CALLING

FOR A SELF SERVING STATEMENT MADE BY PLAINTIFF AND BEING HEARSAY EVIDENCE AS TO THE FACTS OF THE OCCURRENCE OF THE ACCIDENT.

ARGUMENT

POINT ONE

THE TRIAL COURT DID NOT ERR IN FAILING TO SUBMIT THE CASE TO THE JURY UPON THE THEORY OF LAST CLEAR CHANCE.

Respondent recognizes that this court on many occasions has recognized the last clear chance doctrine as set forth in the Restatement of Torts, Section 479 and 480. The court has affirmed the doctrine as set forth in these sections in the cases of ANDERSON V. BINGHAM & GARFIELD RAILWAY CO., Utah 214 P 2d 607, COMPTON V. OGDEN UNION RY. & DEPOT CO., Utah 235 Pac. 2d 515, MORBY V. ROGERS, Utah 252 Pac. 2d 231, COX V. THOMPSON, Utah, 254 Pac. 2d 1047, MINGUS V. OLSEN, 114 Utah 505, 201 Pac. 2d 495, GRAHAM V. JOHNSON, 109 Utah 365, 172 Pac. 2d 665.

(A) UNDER THE EVIDENCE THE COURT WAS CORRECT IN REFUSING TO SUBMIT THE CASE TO THE JURY UPON THE THEORY OF LAST CLEAR CHANCE AS SET FORTH IN SECTION 480 OF THE RESTATEMENT OF TORTS.

Section 480 of the Restatement of Torts provides:

“A plaintiff, who, by the exercise of reasonable vigilance could have observed the danger created by the defendant’s negligence in time to have avoided harm therefrom *may if, but only if,* the defendant

- (a) Knew of the plaintiff’s situation, *and*
- (b) Realized or had reason to realize that

the plaintiff was inattentive and, therefore, unlikely to discover his peril in time to avoid the harm, and,

- (c) Thereafter is negligent in failing to utilize with reasonable care and competence his *then* existing ability to avoid harming the plaintiff."

Under the facts of the case now before this court, the defendant did not see tractor of plaintiff until defendant was within 65 feet of the place where the accident occurred. At that time, the defendant observed plaintiff's tractor approaching the hard surfaced portion of the highway, moving east, and the defendant being then 65 feet north of the tractor, and moving at a speed estimated from 40 to 60 miles per hour, immediately attempted to apply brakes, but was unable to stop before the impact. Can it be reasonably said, after observing the tractor but 65 feet in front of him, and at the speed at which plaintiff was traveling—40 to 60 miles per hour—that defendant was negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming plaintiff?

Plaintiff was only 65 feet away when defendant *knew* plaintiff intended to cross the highway, that is, that plaintiff was approaching the highway, and at a slow rate of speed, 1 to 1½ miles per hour. Can it be said reasonably that defendant at the time he was this short distance away when he observed the tractor moving slowly and approaching the highway should have reasonably known of the plaintiff's situation *and* realized or had reason to realize that plaintiff was inattentive and,

therefore, unlikely to discover his peril in time to avoid harm? Defendant, traveling along a highway and seeing a tractor moving very slowly toward the highway, 1 to 1½ miles per hour, cannot be said to have known of the plaintiff's inability to stop the tractor before entering the highway, cannot be charged with knowing that plaintiff was not going to stop before entering onto the highway and with knowing that plaintiff was inattentive and unlikely to discover his peril, i.e., the approach of a rapidly moving automobile along the highway. The court having instructed the jury that the prima facie speed limit was 60 miles per hour, and there being no claim that this instruction was erroneous, it must be assumed that the prima facie speed limit was 60 miles per hour.

Immediately upon seeing the plaintiff's tractor, defendant then attempted to stop by application of brakes. It is claimed that, if plaintiff had turned to the right, he could have avoided the accident, and that there was negligence in attempting to stop rather than turning to the right to the left side of the highway. Defendant testified that the tractor was moving toward the east half of the highway and in the very short time he had to act, he applied brakes. Defendant is not charged with negligence in failing to take the better of avenues of escape afforded him, he is only charged with taking reasonable care some avenue to avoid the harm.

In the case of *FRENCH V. UTAH OIL REFINING COMPANY*, Utah, 216 Pac. 2d 1002, the court held that where the shortness of time afforded defendant did not offer him an opportunity to make an exact esti-

mate of the proper direction to turn to avoid a collision, that the last clear chance doctrine was not applicable, and further that it was not negligence for the driver of the truck to have turned rather than proceed forward. MORRISON V. PERRY, 104 Utah 139, 151, 140 Pac. 2d 772, also held that it was not negligence for a driver to take one of two courses when an emergency confronted him, even though the course taken was wrong, and resulted in an accident. At 40 miles per hour, defendant was traveling at the rate of 58.4 feet per second, and at 45 miles per hour he was traveling 65.7 feet per second; therefore, even at the lower of the speed estimates, defendant had less than 1½ seconds to act to avoid the accident.

Defendant did not know plaintiff would drive across the highway or realize that plaintiff was inattentive until plaintiff did so. After realizing the situation, defendant then did utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.

The antecedent negligence of defendant, if any, was in failing to have observed the tractor operated by plaintiff before it reached a point two or three feet from the west edge of the highway. He then assumed or had the right to assume that plaintiff would stop before crossing the hard surfaced portion of the highway. Furthermore, antecedent negligence on part of defendant is not sufficient to charge him with liability under the Section 480 of Restatement of Torts. In the case of ANDERSON V. BINGHAM & GARFIELD RAILWAY CO., Utah, 214 Pac. 2d 607, this court in stating that antecedent

negligence is not sufficient to make the defendant liable to the negligent plaintiff, and in analyzing the Section 480 of the Restatement, says, in quoting the comment on cause (c) found under Sec. 479 of the Restatement of Torts, as follows:

“(f) Antecedent Lack of Preparation.

* * * If the defendant, after discovering plaintiff's peril, does all that can reasonably be expected of him, the fact that his efforts are defeated by antecedent lack of preparation or a previous course of negligent conduct is not sufficient to make him liable. All that is required of him is that he use carefully his then available ability. Thus if A, a railway engineer discovers a wayfarer helpless on a highway crossing which he has entered without taking precautions to see whether a train was approaching and A, thereafter does all which is then in his power to stop the train before it hits the traveler, the traveler may not recover against the railroad although his position was seen in ample time to stop the train had the brakes not been negligently permitted to be in bad condition. So too, if a railroad train is exceeding the statutory speed limit in approaching a level crossing, but the engineer does not see the plaintiff's helpless peril on the crossing in time to stop the train, the fact that the train could have stopped in the distance between the two points had it been going at the lawful speed, is not enough to make the defendant liable to the negligent plaintiff.”

In the case of *MINGUS V. OLSEN*, 114 Utah 505, 201 Pac. 2d 495, Justice Wolfe in his concurring opinion says:

“Under the above quoted section (480) sub-

division (a) the defendant must know of the decedent's situation, it is not enough that he could have discovered decedent's situation, had he exercised ordinary vigilance.

"So unless from the evidence it could be reasonably found that defendant saw decedent during that time, then under this rule plaintiff's cannot recover." (Emphasis added)

The court in this case having held that where the driver of the automobile failed to see an inattentive pedestrian who had walked out into the street in front of the automobile, and the driver having failed to see the pedestrian until within 10 feet of him, that the driver of the automobile did not have a last clear chance to avoid the accident.

Under the evidence of the case, Section 480 of the Restatement of Torts was not applicable for the reason that defendant did not know of plaintiff's situation until it was too late to avoid the collision and defendant, immediately upon becoming aware of the plaintiff's situation, utilized with reasonable care his then existing ability to avoid the collision. There being no claim by plaintiff that he, plaintiff was inattentive, and plaintiff in fact claiming that he had discovered his own peril.

(B) UNDER THE EVIDENCE OF THE CASE THE TRIAL COURT CORRECTLY REFUSED TO SUBMIT THE CASE TO THE JURY UPON THE LAST CLEAR CHANCE DOCTRINE AS SET FORTH IN SECTION 479 OF THE RESTATEMENT OF TORTS.

Section 479 of the Restatement of Torts is as follows:

"A plaintiff who has negligently subjected

himself to a risk of harm from the defendant's subsequent negligence may recover for the harm caused thereby if, immediately proceeding the harm,

- (a) The plaintiff is unable to avoid it by the exercise of reasonable vigilance and care *and*
- (b) The defendant,
 - (i) Knows of the plaintiff's situation and realizes the helpless peril involved therein; *or*
 - (ii) Knows of the plaintiff's situation and has reason to realize the peril involved therein, *or*
 - (iii) Would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise, and
- (c) Thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

The court in the case of COMPTON V. OGDEN UNION RY. & DEPOT CO., Utah, 235 Pac. 2d 515, says:

"That section deals with situations where the plaintiff is unable to avoid the consequences of his own negligence or what is often referred to as 'Inextricable peril' and by reason thereof the defendant alone has the last clear chance to avert an injury to the plaintiff."

"Where the plaintiff is thus in a position of inextricable peril the defendant is liable either:
(1) If the defendant knows of the plaintiff's

situation and realizes or has reason to realize the helpless peril, or,

- (2) In the case where a duty exists toward the plaintiff if in the exercise of reasonable vigilance the defendant should have discovered the plaintiff's helpless situation in time to avoid the injury. But this is so only if the plaintiff's negligence has come to a rest and plaintiff is, therefore, unable by the exercise of reasonable vigilance and care to avoid the injury."

In this case the court states that the doctrine of "inextricable peril" applies to cases where one has negligently caught his foot in a frog on a switch or some other such circumstance. The court also in this case refers to the other Utah cases where the doctrine of "inextricable peril" has been applied, such being; the case of a man helpless on the track under a moving train, *TEAKLE V. SAN PEDRO RAILWAY CO.*, 32 Utah 279, 90 Pac. 402; boy asleep on a railroad track *KNUTSON V. OREGON SHORT LINE RAILROAD*, 79 Utah 145, 2 Pac. 2d 102, and *PALMER V. OREGON SHORT LINE RAILROAD*, 34 Utah 466, 98 Pac. 689. See also *GRAHAM V. JOHNSON*, 109 Utah 346, 166 P 2d 330.

The doctrine of last clear chance under this section does not include cases in which a plaintiff has the physical and mental ability to avoid the risk up to the moment of harm. His continuing negligence continues to insulate the defendant's negligence and the ordinary rule of contributory negligence governs the case. *COMPTON V. OGDEN UNION RY. & DEPOT CO.*, *supra*.

Defendant contends that the plaintiff was not in a position of "inextricable peril". Plaintiff testified that when he came to a stop on the highway, he looked north and again observed plaintiff's truck and at that time the truck was 125 feet away. Plaintiff testified he remained on the tractor while watching the truck approaching, but still proceeded out onto the highway and did nothing to get out of the way. Certainly plaintiff had the physical and mental ability to get out of the way to avoid the harm to himself. His failing to utilize his physical and mental ability to avoid the risk of harm was continuing negligence.

Under the court's ruling in prior cases it is defendant's contention that plaintiff under any circumstance was not in a position of "inextricable peril" as is described in the COMPTON V. OGDEN UNION RY. & DEPOT CO., case quoted before.

In any event, to invoke the doctrine of last clear chance, the evidence must clearly show that the defendant had a last clear chance to avoid the accident. This court held in the case of MORBY V. ROGERS, Utah, 252 Pac. 2d 231, that one should not be liable for failing to avoid the effect of the others negligence in a situation where it is speculative as to whether he was afforded a clear opportunity to avoid it. The court in that case has further held that for the question to be properly submitted to a jury, the evidence must be such as would reasonably support the finding that there was a fair and clear opportunity to avoid the injury. The court further said:

"It would not be sufficient that it appear from hindsight that by some possible safety measure, or even by reasonable care the defendant, "by the skin of his teeth" could have avoided the collision."

This court further held in the case of *SANT V. MILLER*, 115 Utah 559, 206 Pacific 2d 719, that a pedestrian who walked across a main highway and stopped for 3 to 5 seconds with his back to approaching traffic was not in "helpless peril" and his negligence was continuing. The court further in this case held that as there was no showing that the driver of the car involved know or has a reasonable chance to discover appellant's position of danger in time to avoid running into him, that the doctrine of last clear chance did not apply.

This court has further set forth that in order for the doctrine of last clear chance to apply the defendant must have a fair and clear opportunity to avoid injury. *COX V. THOMPSON*, 254 P 2d, 1047; *HICKOCK V. SKINNER*, 113 Utah 1, 190 Pac. 2d 514. In *GRAHAM V. JOHNSON*, 109 Utah 365, 172 Pac. 2d 665, the court says,

"Her opportunity to avoid the accident must not be a mere possibility, but a clear opportunity."

Whether or not the facts of the case are such that it comes within the provisions of Section 479 or 480 of the Restatement of Torts, there must be evidence that the defendant, as stated by the court :

"is negligent in failing to utilize with reasonable care and competence *his then existing ability* to avoid harming the plaintiff.

The first and only negligence which is the basis of recovery under the clear chance doctrine is this failure of the defendant to avoid the harm, having the knowledge and ability to do so."

The defendant Williams did not have any knowledge of the position of harm of plaintiff Beckstrom until such time as he was but 65 feet away from Beckstrom, or until plaintiff failed or was unable to stop the tractor and at that time defendant did not have a clear chance to avoid the harm, and he at that time utilized his then existing ability to attempt to avoid the accident by attempting to stop.

There is no showing that plaintiff was ever in helpless peril, no showing that defendant knew of plaintiff's situation in such a time that would afford defendant a clear chance to avoid the accident, and, therefore, the doctrine should not apply.

Taking each section of Section 479 of the Restatement of Torts, defendant contends:

- (a) That plaintiff was able to avoid the harm to himself by the exercise of reasonable vigilance and care, not being in an 'inextricable peril', and having the physical and mental ability to have removed himself from the path of the oncoming truck of defendant.
- (b) The defendant,
 - (i) Did not know the plaintiff's situation until it was too late to avoid the collision, and had not the opportunity to realize the helpless peril, if any, involved.
 - (ii) Did not know of plaintiff's situation and had no reason to realize the peril involved therein, or

(iii) The plaintiff was not in helpless peril.

Under the provisions of Section 479, the court was correct in refusing to submit the case to the jury upon the theory of last clear chance as set forth in the section.

POINT TWO

THE TRIAL COURT DID NOT ERR IN FAILING AND REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION 11, THE COURT HAVING GIVEN SUBSTANTIALLY THE REQUESTED INSTRUCTION IN ITS INSTRUCTIONS 3, 4 AND 12.

Plaintiff's requested instruction No. 11 was:

"The duty imposed upon the plaintiff in moving his tractor out of the yard and driveway and onto the highway was to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances. If he did exercise such care, then there would be no negligence on his part in connection therewith."

The court gave Instructions No. 3, 4 and 12, as follows:

INSTRUCTION NO. 3.

"You are instructed that negligence is the failure to use ordinary and reasonable care in the management of one's property or person. It is the failure to do what an ordinary and reasonable person would have done under the circumstances, or the doing what such person would not have done. The fault may lie in acting or in omitting to act."

INSTRUCTION NO. 4.

"Ordinary care is that care which persons of ordinary prudence would exercise in the management of their own affairs in order to avoid injury to themselves or to others."

INSTRUCTION NO. 12.

“You are instructed that a driver about to enter a highway from a private road or driveway shall yield the right of way to vehicles approaching on said highway, and such driver must use reasonable and ordinary care to avoid a collision with a vehicle proceeding on said highway.”

Instruction No. 12 is not claimed by plaintiff to be erroneous and the instruction, in addition to instructing regarding the duty of an operator of vehicle entering a highway from a private roadway, instructed that the driver was obligated to use reasonable and ordinary care to avoid a collision with a vehicle proceeding on a highway. In Instruction No. 3, the court instructed the jury as to what negligence was and in Instruction No. 4 the jury was instructed as to the definition of ordinary care. Instructions 3 and 4 substantially incorporate plaintiff's Instruction No. 11 and all the instructions taken together fairly instructed the jury with no overburden in favor of either plaintiff or defendant. The movement of a vehicle from a private road or driveway onto a highway is a matter which is regulated by statute, 57-7-139, Utah Code Annotated, 1943, as amended, the code provision applicable at the time of the collision, provided as follows:

“The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway.”

The court was obligated and did instruct the jury concerning plaintiff's duty in driving onto the highway

from a private road or driveway, and in the Instruction No. 12, which instruction covered the statutory duty, the court was careful to instruct that the driver had the obligation of taking reasonable and ordinary care to avoid a collision with a vehicle proceeding along the highway.

There was no error on the part of the court in failing to give plaintiff's requested Instruction No. 11, the substance of the instruction having been given by the court in the instructions as a whole.

POINT THREE

THE TRIAL COURT CORRECTLY SUSTAINED DEFENDANT'S OBJECTION TO PLAINTIFF'S QUESTION TO THE WITNESS TANNER TO STATE WHAT PLAINTIFF TOLD TANNER IN THE PAYSON HOSPITAL AS TO HOW THE ACCIDENT OCCURRED, SUCH QUESTION CALLING FOR A SELF SERVING STATEMENT MADE BY PLAINTIFF AND BEING HEARSAY EVIDENCE AS TO THE FACTS OF THE OCCURRENCE OF THE ACCIDENT.

Officer Beardall, the investigating highway patrolman, in the course of his investigation questioned the plaintiff at the Payson Hospital and at the hospital the plaintiff told Officer Beardall that he never did see plaintiff's truck prior to the collision and was looking back to the west at the time of the collision (R. 122, 123). This admission, by plaintiff, was part of defendant's case in chief, introduced as primary evidence of the facts stated to Officer Beardall and as substantive evidence in the defendant's case. The admission to Officer Beardall was not introduced by defendant to impeach plaintiff or to attack his credibility, but rather was part

of defendant's primary evidence of the fact that plaintiff Beckstrom never did see the truck of defendant and Beckstrom was looking to the back as he drove the tractor out onto the highway.

The Court correctly sustained the defendant's objection to the question put to the witness Tanner to state what the plaintiff Beckstrom told him at the Payson Hospital concerning the manner in which the collision occurred. As to what Beckstrom told Tanner at the hospital was self-serving and if the question as to what was said were asked to get out the facts of the accident, clearly hearsay (R. 181).

Plaintiff has cited to the court several Utah cases which are contended to be in support of the plaintiff's position, the cases, however, are contra to plaintiff's position, and as a fact, the holding of such cases is that in support of the Court's ruling in sustaining the objection to the witness Tanner concerning what plaintiff told Tanner at the hospital regarding the accident.

In the case of *PETERSON V. RICHARDS*, 73 Utah 59, 272 Pac. 229, the Court discusses the difference in the rule as to prior consonant statements as between a mere witness and a party to the action. The Court in the quoted case also discusses the other Utah cases which have been quoted by plaintiff in support of his position, and which case actually are against the position of plaintiff. In the quoted case the Court says:

“ . . . all admissions of a litigant as to a material fact are adduced and received, for the purpose of establishing the truth of the state-

ments made or the existence of a fact to which they relate, and on the theory that what a party, as to a matter of fact, has voluntarily admitted to be true, may be reasonably be taken as true, especially as to matter adverse to him, for presumptively a party ordinarily does not admit as true that which is against him unless it is true. And of such probative effect are admissions of matters of fact of a party generally regarded when adverse or disserving and voluntarily made as to make a prima facie case to the extent of the subject matter of the admission, and to dispense with other proof of the fact so admitted and is sufficient to support a finding of fact resting along upon such extrajudicial admission of a party. 3 Jones, Comms. on Evidence, Par. 1072. Thus, evidence of admissions of a party adduced by his adversary in his case in chief, and as a part of it, is received as substantive evidence, as primary evidence of the fact admitted, and not merely to impeach or discredit the testimony denies the admission, such but raises a conflict in the evidence as to whether the admission was or was not made. But in such case it may not be said that the party against whom evidence of his admission was received was impeached or discredited because he by his testimony denied making the admission. To say the contrary is to say that mere conflicts of evidence or testimony constitute impeachments of the respective witnesses. In such respect admissions of a party stand on a somewhat different basis than mere inconsistent extrajudicial and prior statements, for admissions of a party are received as substantive or primary evidence of the fact declared, while inconsistent statement are received only as affecting the credibility of a witness and the weight of his testi-

mony, and not as evidence of the fact declared by the inconsistent statement."

Plaintiff made no offer to prove what was said to the witness Tanner and the record is void as to what it is claimed Tanner would have said; therefore, the question as to error in sustaining the objection to the statement and question is moot, there being no way to know what Tanner would have said.

After Officer Beardall testified concerning plaintiff's statement to him, plaintiff was again called to the stand and was able to testify concerning the conversation with Beardall and to deny that he made the statement attributed to him by Officer Beardall.

Respondent submits that the court committed no prejudicial error in sustaining the objection to the question put to the witness Tanner.

CONCLUSION

Respondent respectfully submits that there was no prejudicial error in the trial of the action, that the jury verdict was just and fair and should be sustained by court.

Respectfully submitted,

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Respondent.*