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James S. Devine et al v. Helen Cook and W. S. Hatch Co., Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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JAMES S. DEVINE, MRS. JAMES
S. DEVINE and JANET GUSINDA,

Plaintiffs and Appellants,

vs.

HELEN COOK and
W. S. HATCH CO., INC.

Defendants and Respondents.

Case No.

8145

BRIEF OF RESPONDENT
W. S. HATCH CO., INC.

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Hatch Co., Inc.

FILE
OCT 7 1954

Clerk, Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

JAMES S. DEVINE, MRS. JAMES
S. DEVINE and JANET GUSINDA,

Plaintiffs and Appellants,

vs.

HELEN COOK and
W. S. HATCH CO., INC.

Defendants and Respondents.

Case No.

8145

BRIEF OF RESPONDENT
W. S. HATCH CO., INC.

STATEMENT OF FACTS

This appeal is taken by the plaintiffs and appellants, James S. Devine, Mrs. James S. Devine and Janet Gusinda, from a judgment and jury verdict entered against them and in favor of the defendants, Helen Cook and W. S. Hatch Co., Inc. in an action tried in the Second Judicial District Court in and for Davis County, State of Utah. The appellants' brief contains a Statement of Facts and we will set forth herein those facts with which this de-

fendant and respondent, W. S. Hatch Co., Inc. agrees, the facts with which this defendant takes issue, and other facts not referred to by plaintiffs in their brief.

It is agreed that the action arose out of an automobile accident in which the automobile owned and driven by the plaintiff, James S. Devine, collided with an automobile driven by the defendant, Helen Cook; that the collision occurred at the intersection of 1500 South State Street, Bountiful, Utah, and U. S. Highway 91 (Tr. 5, 6); that plaintiffs were all proceeding north in the Devine automobile on U. S. Highway 91 and that the defendant, Helen Cook, had been proceeding east on 1500 South Street and had come to a stop at the stop sign where 1500 South Street intersects with U. S. Highway 91, which is a through highway; that two tank outfits owned by this defendant, W. S. Hatch Co., Inc., a tank truck and four-wheeled tank trailer, and a tractor pulling a semi-trailer carrying a tank, had also been proceeding north on U. S. Highway 91 and had slowed down in preparation of turning left to go west on 1500 South Street, and that the truck and four-wheeled trailer operated by Herschel Metcalf had come to a stop in preparation of turning left (Tr. 7, 15, 16); that both truck drivers stated that they could not make the left turn until Mrs. Cook had cleared the intersection (Tr. 174, 175).

In their brief appellants agree that the driver of the first truck, Herschel Metcalf, stated that he did not remember motioning or signalling to Mrs. Cook to proceed across the intersection (Tr. 174); they contend, however, that Mrs. Cook and their witness, Elora Hutchings, both testified that Metcalf had motioned or signalled to Mrs. Cook to clear the intersection (Tr. 50, 60 Plaintiffs' Brief,

p. 2). It should be noted, however, that the court granted this defendant's motion to strike the testimony of Elora Hutchings to the effect that Metcalf signalled Mrs. Cook to pass in front of him as being a conclusion of the witness (Tr. 50, 51), and that the court pointed out that the testimony of Mrs. Cook that he motioned her to cross the highway was merely her assumption (Tr. 60, 61). Mrs. Cook testified that Metcalf moved his arm twice in the manner which she indicated and that there was just a second or two between the first time he moved his arm and the second time (Tr. 61, 62). It should also be pointed out that Mrs. Cook further testified that she knew the first tanker could not make the turn unless she was out of the way; that the second tanker pulled up in back of the first tanker and there were then two tankers that were stopped on the highway and had to turn and go west (Tr. 61); that the first tanker remained stopped for a couple of minutes and the second tanker pulled up and came to a complete stop behind it before she started to move at all (Tr. 64, 66); that she knew the driver of the tanker could not make the turn west while she remained stopped there and that she was aware of the fact that she was blocking the highway to that extent (Tr. 64, 65); that she observed the first driver of the tanker had the mechanical signal out indicating that he intended to make a left turn and that she proceeded in front of the first tanker over into the east lane of the highway where she was hit (Tr. 62).

It should also be noted that Elora Hutchings, a witness called by the plaintiffs, testified that the first tanker had been completely stopped in the intersection a minute or two (Tr. 53, 56), and that Mrs. Cook was stopped for

the stop sign two or three minutes before she started forward (Tr. 56); she further testified that after Herschel Metcalf gave the signal which she described, Mrs. Cook hesitated about 30 seconds or so before she proceeded forward (Tr. 54, 57).

It is agreed that the plaintiff, James S. Devine, testified that the two tankers had previously passed his automobile and that as they approached the intersection of 1500 South State Street they began to slow down and he assumed that they were either going to stop or most likely make a left turn and he likewise began to slow down (Tr. 15). He further testified that there was 100 or 150 feet between the tankers as he was travelling along side them down the road; that as he went to go past the front of the first truck he saw what he thought was a blur and stuck his foot on the brake and turned out to the side and came to almost a complete stop before the impact with the Cook car occurred (Tr. 16).

It is agreed that plaintiff, Mrs. James S. Devine, was riding in the front seat sitting sideways with her back toward the right-hand front door, and that she was talking to her sister who was riding in the back seat (Tr. 68); that she testified that she noticed the two big oil tankers passing them and that the tankers then began to slow down and their car was slowing down; that she was looking at the tankers and noticed a blur and then felt their car brakes being put on (Tr. 68). On cross-examination she stated that the brakes had been applied at the time she saw the blur and that she did not say anything to her husband (Tr. 78, 79).

The plaintiff, Janet Gusinda, testified that she was sitting in the middle of the back seat (Tr. 86); that she

saw the two tankers and that at first the tankers were passing them and then they started to gradually catch up to the tankers and she thought she saw a wheel or something on the other side of the road and thought the first tanker went on and that the Cook car came off the side road in front of the second truck (Tr. 85). She said that it was her impression that a car was coming across the highway but at the time the brakes were being applied and she did not say anything to Dr. Devine about it (Tr. 97, 98).

Herschel Metcalf, the driver of the first truck and trailer, testified that he was travelling in the left lane for northbound traffic; that he put the signal arm out to indicate a left turn and saw the Cook car stop for the stop sign waiting for traffic to clear and that he did not have any idea which way Mrs. Cook intended to go; that it was impossible for him to make a left turn and he stopped and waited there approximately a minute to a minute and a half for Mrs. Cook to go one way or the other so he could proceed (Tr. 146, 147, 148, Exhibits D, E, 4, 5 and 6).

The driver of the second truck and semi-trailer, Philip Tumor, testified that he pulled up behind the truck and trailer driven by Metcalf, came to a complete stop and observed that Metcalf could not make the left turn because of the Cook automobile. He testified that he waited possibly a minute before the accident occurred (Tr. 182).

After the parties had rested the case was submitted to the jury on written instructions and the jury returned a verdict of no cause of action against all the plaintiffs and in favor of both defendants.

STATEMENT OF POINTS

POINT I

THE INSTRUCTIONS DID NOT PREJUDICIALLY ACCENTUATE THE DUTY OF THE PLAINTIFFS OR MINIMIZE THE DUTY OF THE DEFENDANTS AND NO EXCEPTION WAS MADE TO THE INSTRUCTIONS ON THESE GROUNDS.

POINT II

IT WAS NOT ERROR FOR THE TRIAL COURT TO INSTRUCT THE JURY ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFFS, MISS GUSINDA AND MRS. DEVINE AND THE COURT'S INSTRUCTIONS IN THIS REGARD WERE NOT ERRONEOUS OR PREJUDICIAL.

POINT III

ANY ERROR IN INSTRUCTING THE JURY COULD NOT PREJUDICE PLAINTIFFS AS TO THE DEFENDANT, W. S. HATCH CO., INC., AS THE MOTION OF THE DEFENDANT, W. S. HATCH CO., INC., FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

ARGUMENT

POINT I

THE INSTRUCTIONS DID NOT PREJUDICIALLY ACCENTUATE THE DUTY OF THE PLAINTIFFS OR MINIMIZE THE DUTY OF THE DEFENDANTS AND NO EXCEPTION WAS MADE TO THE INSTRUCTIONS ON THESE GROUNDS.

Under Point I in their brief plaintiffs contend that the trial court's instructions prejudicially accentuated the duties of the plaintiffs and minimized the duty of the defendants. At the time of trial plaintiffs did not except to the court's instructions on these grounds and they are limited on this appeal to the exceptions taken at the time

of trial. The entire exceptions taken by plaintiffs to the court's instructions are as follows:

"Comes now the plaintiffs and except to the Instructions given by the Court and more particularly to Instruction No. 4 and the third paragraph thereof which injects into the lawsuit the issue of contributory negligence on the part of Miss Gusinda and Mrs. Devine, the passengers in the automobile, since said issues were not clearly raised by the pleadings and were not supported by any factual theory presented during the trial of the lawsuit.

"The plaintiffs except to the giving of Instruction No. 6 which likewise pertains to the duty of guests in an automobile on the very same grounds and reasons as stated in the exception immediately preceding.

"The plaintiffs further except to Instruction No. 9 on the grounds and for the reasons that the last two sentences thereof single out one of the defendants, Helen Cook, and prescribes as to her a limiting factor with reference to her duty which definition, if given at all, should be given to all of the parties generally who might have been charged with negligence or contributory negligence, as was requested by counsel for the plaintiffs prior to giving of said instruction." (Tr. 206)

We can find nothing in the exceptions which would call the trial court's attention to plaintiffs claim that the instructions accentuated the duty of the plaintiffs or minimized the duty of the defendants.

In the recent case of *Employers' Mutual Liability Ins. Co. of Wisconsin v. Allen Oil Co.*, _____ *Utah* _____, 285 P. 2d 445, this court refused to consider an instruction on its merits where the objection raised at the trial failed

to point out with any degree of particularity wherein the proposed instruction was not supported by the law. In its opinion this court said and held:

“The appellants’ objection in the trial court to instruction No. 19 was couched in general terms, viz. ‘on the grounds and for the reasons that such instruction is not supported by, and is contrary to, the law and the evidence. That it is misleading, and can only serve to confuse the jury.’ The objection failed to comply with the requirements of Rule 51, Utah Rules of Civil Procedure, that ‘In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds of his objection.’ One of the purposes in requiring counsel to make objections to instructions in trial court is to bring to the attention of the court all claimed errors in the instructions and to give him an opportunity to correct them if he deems it proper. The objection should be specific enough to give the trial court notice of the very error in the instruction which is complained of on appeal. But an objection that an instruction is ‘not supported by, and is contrary to, the law’ lacks specificness and does not direct the court’s attention to anything in particular. A proper objection to instruction No. 19 which would have called the court’s attention to the error raised on this appeal would have been ‘That it does not correctly state the limits or extent of the respondents’ legal liability.’ No objection having been made which pointed out with any degree of particularity wherein the instruction was not supported by law, we will not here consider the instruction on its merits.”

If, in the face of the limited exceptions taken by

plaintiffs they are now entitled to have the entire instructions reviewed, it should be kept in mind that the trial involved three plaintiffs and two defendants, each occupying a particular legal status and having different rights and duties. That the trial judge was fully aware of his responsibilities in defining the numerous issues in the case was apparent throughout the court's instructions and was further illustrated by the court's comment to the jury following his instructions and the arguments of counsel:

"Gentlemen of the jury, I think maybe I will have something to say to you about these verdicts in addition to what has been said to you. As has been suggested there are virtually three lawsuits being tried in one. Now I have had the Clerk fix these verdicts in sets and they are in three sets here, comprising four verdicts in each case, and it will be necessary for you to return in each one of these cases a verdict. I am not suggesting which ones because you are the judges of that. But it will be necessary for you to have three verdict returns in these matters and I believe they are self-explanatory, not only by their wording but by what counsel has indicated to you, so you will not have any trouble in reference to that."

The four possible verdicts submitted in each of the three cases were as follows: (1) That the issues be found in favor of plaintiff and against both defendants and that damages be assessed, (2) that the issues be found in favor of the plaintiff and against the defendant, Helen Cook, and that damages be assessed, but that the issues be found against the plaintiff and in favor of the defendant, W. S. Hatch Co., Inc., no cause of action, (3) that the issues be found in favor of plaintiff and against the defendant, W. S.

Hatch Co., Inc., and that damages be assessed, but that the issues be found against the plaintiff and in favor of the defendant, Helen Cook, no cause of action, (4) that the issues be found against the plaintiff and in favor of both the defendants, no cause of action. This made twelve verdicts in all that were submitted to the jury. The fact that the case took on this somewhat complicated aspect resulted from the fact that plaintiffs chose to bring the three lawsuits in one action and to attempt to fix liability on two defendants. It may be that this was a situation which would have been simplified by submitting special interrogatories to the jury, but plaintiffs did not suggest such a procedure but instead requested general instructions and acquiesced in the cases being submitted on general instructions.

We submit that an examination of the entire instructions shows that the court very orderly and properly instructed the jury as follows: As to the issues of the case (Instruction No. 1), the burden of proof as it applied to both plaintiffs and defendants (Instruction No. 2), defined "negligence," "contributory negligence," and "proximate cause" (Instruction No. 3), explained the effect of contributory negligence on the part of Dr. Devine and on the part of the guest passengers, and the effect of such negligence if found to be the sole proximate cause and the fact that any negligence on the part of Dr. Devine could not be imputed to any of the passengers (Instruction No. 4), outlined in general terms the duty of drivers on the highway and the right of way rule at intersections (Instruction No. 5), outlined specifically the duty of the guest passengers Mrs. Devine and Janet Gusinda (Instruction No. 6), outlined specifically the duty on the part of

the driver of the W. S. Hatch Co., Inc. truck (Instruction No. 7), outlined specifically the duty of Dr. Divine (Instruction No. 8), outlined specifically the duty of the defendant, Helen Cook (Instruction No. 9), outlined the law on unavoidable accidents (Instruction No. 10), advised the jury that if they found liability they should assess damages (Instruction No. 11), explained the manner in which the damages should be assessed (Instruction No. 12), and finally gave the usual stock instructions containing definitions and rules regarding the conduct of the jury (Instruction No. 13). The Plaintiffs' case was fairly presented to the jury and the court in no way emphasized the duty of the plaintiffs or minimized the duty of the defendants.

To illustrate the emphasis given in the instructions the plaintiffs complain that Instruction No. 7 is prejudicial for the reason that it begins in the negative regarding the duty of the truck driver, Herschel Metcalf, while other instructions impose an affirmative duty on the plaintiffs. The fact is that this instruction was requested by the defendant, Helen Cook, as Requested Instruction No. 12 in an effort to cast liability on this defendant and it was objected to by this defendant at the time of trial as imposing a greater duty upon Herschel Metcalf than the law requires. In requesting the instruction, counsel for the co-defendant, Helen Cook, recognized the danger of imposing too great a duty upon the truck driver, Herschel Metcalf, and sought to shield the error of the instruction by asserting "that a driver of a vehicle upon a highway has no duty to ascertain or advise other drivers whether they may safely enter upon or pass over said highway." If the instruction was repugnant to plaintiffs, it was par-

ticularly so to this defendant as an over-statement of the duty imposed upon Herschel Metcalf.

POINT II

IT WAS NOT ERROR FOR THE TRIAL COURT TO INSTRUCT THE JURY ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFFS, MISS GUSINDA AND MRS. DEVINE, AND THE COURT'S INSTRUCTIONS IN THIS REGARD WERE NOT ERRONEOUS OR PREJUDICIAL.

In their brief plaintiffs state that defendants did not plead contributory negligence on the part of the guest passengers until after the case had been tried and the court had indicated its intention to instruct the jury on contributory negligence. It is a fact that this defendant, W. S. Hatch Co., Inc., did not plead contributory negligence on the part of the guest passengers until after the evidence was in and the court had indicated its intention to instruct the jury regarding contributory negligence on the part of the guest passengers, at which time this defendant moved to amend its complaint to conform to the evidence and alleged contributory negligence on the part of the guest passengers and the motion was granted (Tr. 188, 189).

The defendant, Helen Cook, however, pleaded contributory negligence on the part of the guest passengers and tried the case on that theory and at the conclusion of the evidence it was apparent to the trial court and to defendants' counsel that there was sufficient evidence to take the case to the jury on the question of contributory negligence on the part of the guest passengers.

In their brief the plaintiffs overlook certain facts which create a decided conflict with plaintiffs' theory as to how the accident occurred. The witness, Elora Hutchings, called and vouched for by the plaintiffs, testified that Mrs. Cook was stopped at the stop sign two or three minutes before she started forward (Tr. 57). Herschel Metcalf testified that he was stopped for a minute to a minute and a half (Tr. 148), and Mrs. Cook stated this time to be a couple of minutes (Tr. 64). Philip Tumor, the driver of the second truck, stated that he was stopped possibly a minute before the Devine car passed him (Tr. 182). The plaintiff, Dr. Devine, testified that he was travelling about thirty to thirty-five miles per hour (Tr. 40), that he had observed that the trucks had slowed down most likely to make a left turn (Tr. 50), that as he slowed down and went to go past the first truck he saw what he thought was a blur and stuck his foot on the brake and turned to the side, and that he came to almost a complete stop when the impact occurred (Tr. 16). The police officer called by the plaintiff testified that the Devine car laid down 49 feet of skid marks before the point of impact and that the Cook car left no skid marks before the impact.

Both of the guest passengers, Mrs. Devine and Janet Gusinda, testified that they saw the two tankers and Mrs. Devine testified that she noticed a blur and then felt the car brakes being put on, but she did not say anything to her husband (Tr. 68, 78, 79), while Janet Gusinda thought she saw a wheel or something and thought the first tanker went on and that the Cook car came off the side road in front of the second truck (Tr. 85). It was her impression that a car was coming across the highway but at the time

the brakes were being applied and she did not say anything to Dr. Devine about it (Tr. 97, 98).

It thus appears that the jury might well have found that the accident did not happen as claimed by plaintiffs but that a situation existed for a period of time ranging from one to two or three minutes during which time the plaintiffs, as they approached the intersection, might well have observed the condition and the guest passengers would have had ample time to apprise their driver of the situation after it appeared that he was not aware of the danger and did not intend to yield the right of way to Mrs. Cook. The fact that Mrs. Cook had the right of way cannot be disputed under the evidence, and according to Dr. Devine's own testimony he was nearly stopped at the time of impact. The jury would have certainly been justified in finding that the slightest warning on the part of the guest passengers would have apprised Dr. Devine of the danger and enabled him to avoid the collision.

This court has on numerous occasions discussed the degree of care which a guest in an automobile or other vehicle must exercise for his own safety. In *Atwood v. Utah Light & Ry. Co.*, 44 Utah 366, 140 P. 137, this court said:

"... It no doubt is the law, as contended by appellant's counsel, that every occupant of a vehicle in which he is riding, must always exercise ordinary care for his own safety, and if, by the exercise of such care, he could avoid injury to himself, but fails to do so, he cannot recover, regardless of the fact that he had no control or direction of the vehicle in which he was riding at the time of the ac-

cident and injury. * * * Of course every one who may be riding in a vehicle, whether as passenger, invitee, or otherwise, must always exercise ordinary care and prudence to avoid injury to himself, and to that end, in case of imminent danger, must leave the vehicle in case such a course is practical and necessary to avoid injury. Again, he may not sit silently by and permit the driver of the vehicle to encounter or enter into open danger without protest or remonstrance and take the chances, and, if injured, seek to recover damages from the driver of the vehicle or from the one whose negligence concurred with that of the driver's, or from both."

The rule as to when contributory negligence shall be submitted to the jury and when it should be ruled on by the court as a matter of law is set forth in *Shortino v. Salt Lake & U. R. Co.*, 50 Utah 476, 174 P. 860, as follows:

"That the question of contributory negligence on the part of the plaintiff, like that of the negligence of the defendant, is for the jury, where the evidence and the inferences to be deduced therefrom are such that reasonable men may arrive at different conclusions, has so often been decided by this court that the proposition has, in effect, become elementary.

"In other words, if there is any substantial doubt whether a plaintiff was or was not guilty of contributory negligence, or whether, if negligent, such negligence was the proximate cause of the injury, the court cannot determine the right to recover as a matter of law, but must submit the question of contributory negligence or of proximate cause, or both, to the jury as questions of fact.

"Where, however, the facts are conceded, or

there is no conflict in the evidence, and upon a consideration of all of the evidence, and the legitimate inferences that may be deduced therefrom, but one conclusion is permissible, then both questions are questions of law, and must be determined as such by the court.”

In *Montague v. Salt Lake & U. R. Co.*, 52 Utah 386, 174 P. 871, the court considered the duty of a guest riding in the same automobile involved in the accident in the Shortino case. In holding that the question of contributory negligence on the part of the guest was properly submitted to the jury, the court said:

“The rule applicable here, which is adopted by the Supreme Court of Minnesota in the case of *Cotton v. Willmar & S. F. Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935, which case is cited and followed in the *Atwood Case*, *supra*, is stated thus:

“The rule which has met with general approval in the more recent cases makes the passenger responsible only for his personal negligence, and leaves it to the jury to determine whether, under the circumstances he was justified in trusting his safety to the care of the driver and not looking or listening for himself. The negligence of the driver is thus not imputed to the guest or passenger, but the circumstances may be such as to make it the duty of the passenger to look and listen and attempt to control the driver for his own protection. The passenger is thus held responsible for his own negligence, but not for the negligence of the driver. He must exercise due care and caution, and, if his negligence contributes approximately to the accident, he cannot recover damages.’ ”

In *Cowan v. Salt Lake & U. R. Co.*, 56 Utah 94, 189 P. 599, suit was brought by another passenger in the Shortino car. The court gives an exhaustive review of cases from all states and concludes by approving the rules laid down in the Atwood case and Montague case. In its opinion the court said:

“ * * * we can conceive of no reason why the question of whether a passenger or an invitee riding in a vehicle was guilty of contributory negligence, in view of all the circumstances which would bar a recovery, should not be left to the jury, unless that question is free from substantial doubt.”

In *Lawrence v. Denver and Rio Grande*, 52 Utah 414, 174 P. 817, it was held that a guest, failing to see the train where a view was apparently unobstructed and a warning signal was given, was guilty of contributory negligence as a matter of law. In its decision this court said:

“Assuming for the sake of argument, but not conceding, that plaintiff was merely the guest of Bird, and was in no sense responsible for the manner in which Bird operated and managed the automobile while making the trip in question, it nevertheless was incumbent upon him to exercise ordinary care and prudence by making diligent use of his senses of sight and hearing, by looking and listening for trains as the automobile approached the crossing, and to heed the warnings and signals of the approach of the train, and to suggest to Bird that they stop until the danger was over, and to protest if that was not done * * * .”
(Citing cases)

In objecting now to the trial court instructing on

contributory negligence on the part of the guest passengers, and particularly as to the form of the instructions, the plaintiffs are again confronted with their exceptions to the court's instructions taken at the time of trial. The most that can be made out of plaintiffs' exceptions is that they (1) excepted to the third paragraph of Instruction No. 4 which injects into the lawsuit the issue of contributory negligence on the part of Miss Gusinda and Mrs. Devine since the issues were not clearly raised by the pleadings and were not supported by any factual theory presented during the trial; (2) excepted to Instruction No. 6 on the very same grounds and reasons; and (3) excepted to Instruction No. 9 on the grounds that the last two sentences single out one of the defendants and limit her duty.

On this appeal for the first time the plaintiffs complain as to the form of Instruction No. 4 regarding the duty of Dr. Devine and to the form of Instruction No. 6 regarding the duty of the guest passengers. We agree with counsel for defendant, Helen Cook, who requested the instructions, that the words complained of by plaintiffs "in any degree" and "to any extent, however slight" do not render the instructions so faulty as to be reversible error under the recent case of *Johnson v. Lewis, et al*, _____ Utah_____, 240 P. 2d 498. We strongly urge, however, that plaintiffs cannot be heard to complain as to the form of the instruction at this time. The only grounds for plaintiffs excepting to Instruction No. 4 and Instruction No. 6 were that the issue of contributory negligence on the part of Miss Gusinda and Mrs. Devine, the passengers in the automobile, "were not clearly raised by the pleadings and were not supported by any factual theory

presented during the trial of the lawsuit.” (Tr. 206) As has already been pointed out the defendant, Cook, pleaded contributory negligence as an affirmative defense and tried the case on that theory and at the conclusion of the evidence the record shows that the court permitted the defendant, W. S. Hatch, Co., Inc. to amend its answer to conform to the proof. It has also been demonstrated that there was ample evidence to support the defendants’ theory of contributory negligence on the part of the guest passengers. If plaintiffs had been concerned about the form of the instructions on contributory negligence the objections should have been taken at the time of trial. We again call attention to the rule laid down by this court in *Employer’s Mutual Liability Ins. Co. of Wisconsin v. Allen Oil Co.* (supra) that “No objection having been made which pointed out with any degree of particularity wherein the instruction was not supported by law, we will not here consider the instruction on its merits.”

In *Walkenhorst v. Kesler*, 92 Utah, 312, 67 P 2d 654, the court held that exceptions to instructions as a whole cannot be sustained if part of the instruction is good. In its opinion the court said:

“The exceptions to the instructions were as a whole. The exception did not even specify any particular instruction. The six instructions were grouped together. The ‘rule (is) too well established to be the subject of controversy that such an exception cannot be sustained if any part of the instruction is good.’ *Hansen v. Oregon S. L. R. Co.*, 55 Utah, 577, 188 P. 852, 854; *McLaughlin v. Chief Consol. Min. Co.*, 62 Utah, 532, 220 P. 726. In addition, the rule is that all parts of the charge to the jury must be construed together.

When taken as a whole, if the charge is substantially correct and could not have misled the jury, the verdict and judgment will not be disturbed. This rule bears such unquestioned indorsement and the cases supporting it are so numerous as to make the citation of authorities unnecessary.”

Again in *Mebr v. Child*, 90 Utah 348, 61 P 2d 624, the court said and held:

“Appellants having confined their objections to the whole instruction which is divisible into integral parts, they are not entitled to prevail on their assignment with respect to that instruction. When an instruction is divisible into integral parts and any one or more of the integral parts is not open to objection, then, and in such case, an objection to the whole must fail. Among the numerous cases in this jurisdiction which so hold are the following: *Farnsworth v. Union Pac. Coal Co.*, 32 Utah, 112, 89 P. 74; *Grow v. Utah Light & Ry. Co.*, 37 Utah, 41, 106 P. 514; *Rampton v. Cole*, 52 Utah, 36, 172 P. 477; *Hansen v. Oregon Short Line R. Co.*, 55 Utah, 577, 188 P. 852; *McLaughlin v. Chief Consol. M. Co.* 62 Utah, 532 220 P. 726.”

The plaintiffs' exception to Instruction No. 9 is not well taken. In that instruction the court outlined the duty of the defendant, Helen Cook, as he had outlined the duty of the defendant, W. S. Hatch Co., Inc. in Instruction No. 7, the duty of the plaintiff, Dr. Devine, in Instruction No. 8 and the duty of Mrs. Devine and Janet Gusinda in Instruction No. 6. In *Earle v. Salt Lake & Utah R. Corporation*, _____ Utah _____, 165 P. 2d, 877, the court held that the defendant could not complain of an instruction dealing with the duty imposed by law on the

railroad at intersections as unduly emphasizing the railroad's duty because the plaintiff's duty was not also set forth in such instruction where other instructions defined the plaintiff's duties. In its opinion the court said:

" * * * In Instruction No. 11, the court defined the duty imposed by law on defendant at intersections. Complaint is made that this unduly emphasizes defendant's duty because plaintiff's duty is not also set forth in that instruction. In Instructions Nos. 17, 18 and 19 the court defined the duty imposed on plaintiffs. It might have been more concise to get the instructions dealing with the duty of the respective parties closer together in the charge."

POINT III

ANY ERROR IN INSTRUCTING THE JURY COULD NOT PREJUDICE THE PLAINTIFFS AS TO THE DEFENDANT, W. S. HATCH CO., INC., AS THE MOTION OF THE DEFENDANT, W. S. HATCH CO., INC. FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

The only error claimed by the plaintiffs on this appeal is directed to the trial court's instructions. We submit that if the trial court erred in its instructions to the jury, such error was not prejudicial to plaintiffs so far as the defendant, W. S. Hatch Co., Inc. was concerned, as the court should have granted such defendant's motion for directed verdict at the close of the case. After all parties had rested the defendant, W. S. Hatch Co., Inc. moved the court as follows:

"If the court please, comes now the defendant, W. S. Hatch Company, and moves for an instruction directing the jury to return a verdict in favor of the defendant, W. S. Hatch Company, and against the plaintiffs, and each of them, no cause of action, on the ground and for the reason that the plaintiffs first have failed to show by a preponderance of the evidence or by any evidence that the defendant, W. S. Hatch Company, was guilty of any actionable negligence which caused or contributed to the cause of the accident and the resulting injuries.

"Second, that it affirmatively appears that James S. Devine, the driver of the car in which plaintiffs were riding, was guilty of negligence and that such negligence was the sole, proximate cause of the accident and the resulting injuries sustained by plaintiffs.

"Third, that it affirmatively appears from the evidence that plaintiffs were each guilty of negligence which contributed to the cause of the accident in failing to keep a proper look out and in failing to exercise ordinary care for their own safety and that such acts of negligence constituted contributory negligence which would bar their recovery." (Tr. 189-190)

The motion was taken under advisement and in view of the jury's verdict, was not ruled upon. This defendant earnestly contends that its motion for directed verdict should have been granted, particularly on the ground that the plaintiffs failed to show by a preponderance of the evidence or by any of the evidence that the defendant, W. S. Hatch Co., Inc., was guilty of any actionable negligence which caused or contributed to the cause of the accident and the injuries. The only act or omission on

the part of W. S. Hatch Co., Inc. complained of by plaintiffs was that Herschel Metcalf, the driver of the first truck, signalled Mrs. Cook in the manner described by Mrs. Cook and Mrs. Hutchings. The plaintiffs contend that this signal was a direction to Mrs. Cook to proceed across the highway and that the way was clear for her to do so. There is no rule of law that would permit such a construction being placed on the evidence. Mr. Metcalf testified that he had no idea which direction Mrs. Cook intended to proceed. The evidence further showed that he was not in a position to advise Mrs. Cook of the traffic conditions nor did he attempt to do so. The very most that could be said of a signal such as the one described by Mrs. Cook and Mrs. Hutchings was that Metcalf was advising her that he was yielding the right of way to her and that so far as he was concerned she might proceed and he would not hit her. That such a signal would be limited to an assurance that Metcalf would yield the right of way to Mrs. Cook was recognized in the case of *Harris v. Kansas City Public Service Commission* (Supreme Court of Kansas, 1931) 297 Pac. 718. In that case two of defendant's street cars were standing at the crossing which plaintiff, a pedestrian, intended to use, the rear of the front car and the front end of the following car both encroaching on the pedestrian crosswalk. The plaintiff, upon receiving a signal from the motorman of the rear car, went between the two cars and was struck by another of defendant's cars proceeding in the opposite direction. The Supreme Court held as erroneous an instruction given by the trial court judge which charged the jury that plaintiff would not be guilty of contributory negligence if defendant's motorman signalled her to proceed

over the crossing and she relied upon such signal under the belief that there was no danger from an approaching car, unless such a danger was obvious to a prudent person. The court pointed out that the motorman's signal could mean no more than an assurance that he would not start his car and catch her between it and the car in front of it. In its opinion the court said:

"This instruction was based on the assumption that the motorman who signaled plaintiff had some duty to look out for pedestrians like plaintiff at that street intersection. His duty was to operate his own street car in a proper way so as not to injure pedestrians or other traffic having the same right to use the street as the defendant corporation. He had no duty to protect her against injury from other street cars on parallel tracks. The defendant company could not confer such authority and responsibility upon its motormen. * * * There was no allegation that the motorman had authority to direct street car traffic or authority to signal this plaintiff that she could cross the street in safety. It would have been a usurpation of the police powers of the city government itself for defendant to have authorized its motorman to undertake that duty."

In further support of their motion for a directed verdict the defendant, W. S. Hatch Co., Inc., contends that the signal of Herschel Metcalf described by Mrs. Cook and Mrs. Hutchings could in no way have been the proximate cause of the collision between the Cook automobile and the car driven by the plaintiff, Dr. Devine. In *Sumsion v. Streator-Smith, Inc.*, _____ Utah _____, 132 P. 2d 68, the trial court granted defendants' motion for non-suit and this court affirmed the ruling on the ground

that plaintiff failed to show causal connection between the negligent conduct complained of, namely the failure to give an arm signal, and the injury to plaintiff. In its opinion the court said:

"The only alleged negligence was the failure to signal and there was sufficient evidence to go to the jury on the question of whether the defendant signalled and whether the failure to signal was negligent conduct. But even so, the plaintiff still did not make out a prima facie case for recovery in negligence for there is no proof or evidence to show that the failure to give the arm signal was the proximate cause of the injury. It is a fundamental principle of the law of negligence that the person complaining has the burden of showing causal connection between the negligent conduct complained of and the injury to the plaintiff. *Bergman v. Denver & R.G.R. Co.*, 53 Utah 213, 178 P 68; *Newton v. Oregon Short Line R. Co.*, 43 Utah 219, 134 P. 567. In the instant case, there was no evidence to indicate that the tow truck driver failed to look before pulling away from the curb. The only negligent act complained of is the failure to signal. The plaintiff must supply the links in the chain of proximate cause which show that his failure to signal caused the collision. * * * While deductions may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities the other way equally or more potent the deductions are mere guesses and the jury should not be permitted to speculate. The rule is well established in this jurisdiction that where 'the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law.' Tremelling

v. Southern Pac. Co., 51 Utah 189, 170 P. 80, 84; Tremelling v. Southern Pac. Co., 70 Utah 72, 257 P. 1066. Many cases are cited in support of this proposition and the court quoted with approval from 29 Cyc. 625 where it is stated: 'The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of injury, and no recovery can be had if the evidence leaves it to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them.'

"The trial court correctly held that the plaintiff failed to make out a prima facie case for recovery in negligence."

Certainly it cannot be successfully claimed that the arm signal given under the circumstances described in the evidence of this case was an effective cause of the collision. The act of Mrs. Cook in hesitating thirty seconds and then proceeding into the east lane of Highway 91 and the conduct of Dr. Devine in failing to yield the right of way to her would either one be sufficient to break any line of causation as a matter of law.

CONCLUSION

With regards to plaintiffs' case, the trial court fairly, fully and very orderly instructed the jury on the issues of the case, and in so doing the duty imposed on the plaintiffs was not emphasized or accentuated, nor was the duty imposed on defendants at all minimized. If it was proper to instruct the jury on contributory negligence, it was necessary to keep that issue in mind throughout the instructions. To do otherwise would most cer-

tainly have been error. Furthermore, the plaintiffs having taken no exceptions to the instructions on these grounds at the time of trial, cannot raise the objections for the first time on appeal.

The evidence in the case required that the jury be instructed regarding the question of contributory negligence of Mrs. Devine and Janet Gusinda. To have failed to do so would have been error. The court's instructions on contributory negligence were not prejudicial to plaintiffs' case, but if they were, the error now complained of was not mentioned in the plaintiffs' exceptions to the instructions and it cannot be considered on this appeal.

If this court were to find error in the instructions the judgment should stand as to the defendant, W. S. Hatch Co., Inc., as its motion for directed verdict should have been granted. The evidence in the case would have required the trial court to direct a verdict for this defendant even if the jury had returned a verdict for plaintiffs. The motion was good on the following grounds: That there was no actionable negligence on the part of the defendant, W. S. Hatch Co., Inc., as the signal given by Herschel Metcalf could only have indicated to Mrs. Cook that as between the two he was yielding the right of way to her; that such a signal could not have been a proximate cause of the collision; and that Mrs. Cook by waiting thirty seconds after the signal and then electing to proceed and Dr. Devine in failing to yield the right of way to her, completely broke any conceivable line of causation.

It is respectfully submitted that the plaintiffs received a fair trial at the hands of a conscientious and cap-

able trial judge and jury, and that the judgment as to this defendant, W. S. Hatch Co., Inc., should be affirmed.

Respectfully submitted,

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Hatch Co., Inc.