

1954

Ronald Jensen v. Martin S. Taylor : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Christensen; Homer Holmgren; Gayle Dean Hunt;

Recommended Citation

Brief of Appellant, *Jensen v. Taylor*, No. 8149 (Utah Supreme Court, 1954).
https://digitalcommons.law.byu.edu/uofu_sc1/2163

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

RECEIVED

DEC 8 1954

U. of U.

Case No. 8149

**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED

APR 10 1954

RONALD JENSEN, by his Guardian
Ad Litem, Sverre Jensen,

Plaintiff and Respondent,

vs.

MARTIN S. TAYLOR,

Defendant and Appellant.

Utah Supreme Court, Utah

APPELLANT'S BRIEF

E. R. CHRISTENSEN
City Attorney

HOMER HOLMGREN
Assistant City Attorney

GAYLE DEAN HUNT
Assistant City Attorney

INDEX

	<i>Page</i>
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS	15
ARGUMENT	17
POINT No. 1. The court erred in denying defendant's motion to dismiss at the close of plaintiff's evidence.	17
POINT No. 2. The court erred in failing to direct a verdict in favor of defendant as requested by defendant in his requested instructions.	22
POINT No. 3. The court erred in refusing to grant defendant a new trial.	25
POINT NOS. 4, 5, 6, 7, 8, 9 AND 10: All relating to error in Instruction No. 14 generally.....	25
POINTS NOS. 4 AND 10. Instruction No. 14 was erroneous as a whole.	47
POINT No. 5. Failure to keep the fire truck under proper control.	51
POINT No. 6. Failure to drive with due regard for the safety of all persons.	51
POINTS NOS. 7 AND 8. Failure to reduce speed as necessary for the safe operation of the truck.	52
POINT No. 9. Failure to keep proper lookout.	55
POINT No. 11. Error for the court not to instruct that defendant, having displayed red light and sounded the siren, had complied with the law.	57
POINT No. 12. Error for the court not to instruct the jury if collision was due solely to Oberg's negligence defendant would not be liable.	58
POINT No. 13. The court erred in admitting in evidence the opinion of S. S. Taylor as to the speed of the fire truck in answering hypothetical questions without proper foundation.	60
CONCLUSION	61

INDEX—(Continued)

CASES CITED	<i>Page</i>
Balthaser v. Pacific Electric Ry. Co., 167 Cal. 302, 202 P. 37, 18 A.L.R. 452	31
Baltimore Transit Co. v. Young, 189 Md. 428, 56 A. 2d 140....	41
Brown v. Lilli, 281 Mich. 170, 274 N.W. 751	22
Haarstritch v. O.S.L.R.R. Co., 70 Ut. 552, 262 P. 100.....	21
Lucas v. City of Los Angeles, 10 Cal. 2d 876, 75 P. 2d 599.....	32
Mungus v. Olson, Utah, 201 P. 2d 495.....	22
Raynor v. City of Arcata, 11 Cal. 2d 113, 77 P. 2d 1054.....	35
Reed v. Simpson, 32 Cal. 2d 444, 196 P. 2d 895.....	37
Rollow v. Ogden City, 66 Ut. 475, 243 P. 791.....	26
State of Washington v. United States, 194 F. 2d 38.....	39
Williams v. City of Pittsburg, 349 Pa. 430, 37 A. 2d 540.....	45

STATUTES CITED

Laws of 1941, Chapter 52, Page 116.....	27
Section 41-6-76, 1953, enacted by Chapter 65, 1949 Session Laws	18, 55
Section 41-6-14, Utah Code Annotated, 1953.....	53, 55
Section 57-7-82, Utah Code Annotated, 1943	28, 30
Section 57-7-118, Utah Code Annotated, 1943.....	28, 30
Section 57-7-140, Utah Code Annotated, 1943.....	28, 30

IN THE SUPREME COURT of the STATE OF UTAH

RONALD JENSEN, by his Guardian
Ad Litem, Sverre Jensen,

Plaintiff and Respondent,

vs.

MARTIN S. TAYLOR,

Defendant and Appellant.

Case No. 8149

APPELLANT'S BRIEF

STATEMENT OF FACT

At the intersection of 13th East and 5th South in Salt Lake City, right after midnight on the morning of October 21, 1952, a collision occurred between a Chevrolet convertible being driven by Seth M. Oberg, Jr., and a Salt Lake City fire truck being driven by defendant, Martin S. Taylor. The Oberg car was proceeding west on 5th South in the lane north of and next to the center and the fire truck was responding to a fire alarm and was proceeding south in the lane west of and next to the center of 13th South. Plaintiff was riding as a guest in

the Oberg car. Ken Foutz was also riding as a guest between plaintiff and Oberg, all three sitting on the front seat, Oberg to the left side. As a result of the collision plaintiff received serious injuries and brought suit against the driver of the fire truck.

The allegations of negligence as stated in the pre-trial order (p 9), are:

1. That defendant drove at a rate of speed greater than was safe, reasonable and prudent in view of the surrounding circumstances, to-wit, at a speed in excess of 35 miles per hour.
2. Defendant failed to keep a proper lookout for other vehicles in the intersection.
3. Defendant failed to keep the fire truck under safe, reasonable, and proper control while driving through the intersection.
4. That immediately prior to his entering the intersection, defendant did not have his flasher light flashing or his siren sounding.

At the conclusion of plaintiff's evidence the defendant made a motion to dismiss on the following grounds:

1. The evidence fails to show defendant was negligent in any of the particulars alleged in the complaint or referred to in the pre-trial order.
2. The accident happened solely because of the failure of the driver of the car in which plaintiff was riding to heed the warnings given by the siren and red light,

as provided by statute, and negligence of the driver was the sole proximate cause of the accident.

3. Plaintiff himself did not exercise reasonable care in the approach to the intersection in failing to hear the siren or see the red light or to take any precaution for his own safety.

This motion was denied. Since we have assigned as error the denial of this motion, we desire first to give the state of the record at that point in the trial.

Lorin R. Farnsworth testified that he was driving about 50 to 60 feet behind the Oberg car right up to the time Oberg entered the intersection. They were going 55 or 60 miles per hour. As they approached 13th East, the red semaphore light was on and Oberg applied his brakes momentarily, as did also Farnsworth. The light changed to green and Oberg proceeded on through at approximately 35 miles per hour (pp.42-44). When Farnsworth was at about the point on 5th South indicated by an "x" in a circle on Exhibit P-13, a map of the intersection, he saw the fire truck coming south at about the point marked "x" on 13th South, which is just at the north edge of the cross walk across 13th East. Farnsworth was then about 50 feet east of the cross walk. At that time he heard the siren and saw the red light. He applied his brakes and stopped at the intersection and then proceeded across the street (p.44). At the time he heard and saw the fire truck, Oberg's car was about 50 feet in front of him. At that time Oberg's car was close to the

east cross walk, even with the car that was stopped on that side of the street (p. 47). This car that stopped was not out into the intersection at all (p. 49). Farnsworth discovered that the tie rod on the right front wheel of the fire truck was broken off (p. 64). He went over to the Oberg car and turned the radio off, which was on about the average way you would usually have it on (p. 46).

Frank W. Nielson testified that he was stopped for the red light heading west on 5th South on the east side of 13th East. He had stopped immediately behind the cross walk (p. 66). As the light turned green he moved up 3 or 4 feet before he saw the fire engine and then stopped. Just as the light turned green, he saw the red light on the truck and heard the siren, the truck being then about one-half block north of the intersection. As the fire truck approached the intersection, the Oberg car came by his left and a collision occurred in the center of the intersection. Both vehicles proceeded straight ahead without the application of brakes. Asked whether the truck increased or decreased its speed he answered, "Not that I could notice or recall."

On cross examination he testified that while he was stopped waiting for the light to change his front wheels were just about at the east edge of the cross walk. His windows were up and he heard the siren quite loud and saw the red flashing light while he was waiting. He judged the speed of the truck to be from 20 to 30 miles per hour (p. 69). The fire truck was approximately at

the cross walk north of the intersection as the Oberg car passed his car. He also testified that while he was stopped at the west edge of the cross walk he could see north three-quarters of a block (pp. 71, 72).

Walter Jensen was driving east on 5th South in a Hudson and stopped at the intersection at 13th East for the red light. Just before the light turned green he saw the fire truck coming south on 13th East three-quarters of a block away (p. 52). When it was about one-half block away the light turned red against the fireman and green for Jensen. He saw the red light on the fire truck. He judged the fire truck was traveling 30 or 40 miles an hour. When asked if the fire truck decreased its speed as it approached he testified, "It was not apparent that it decreased its speed at all. It seemed like it came on at the same rate." (p. 54). It was at the north cross walk when he last saw it. He did not see the actual collision (p. 53). On cross-examination he testified that it was then a good three-quarters of a block away when he first heard the siren. His windows were closed and the siren kept getting louder as it approached. He also saw the red flasher light when he first heard the siren, when the truck was all of 500 feet away (p. 56).

Seth Oberg testified that when he was about 200 feet east of 13th East on 5th South the red light was against him and slowed down to between 20 and 25 miles per hour (p. 77). When about 150 feet east of the east cross walk, he noticed the light was about to change to yellow. He

let his foot off the brake and coasted down to the intersection. The light turned green when he was 50 to 75 feet east of the cross walk. He was then going 20 to 25 miles per hour. He looked to the right but there was a car on his right that blocked his vision up north. He looked to the left and when he looked right again he was out in the center of the intersection and all he had seen was some red light coming to the right side of his car (p. 78). He was right in the center of the intersection when he first saw the red light of the approaching vehicle, which was then just past the north cross walk across 13th East. At that time Oberg was traveling 25 miles per hour (p. 80). The radio was on soft (p. 83). His automobile was a cloth top convertible through which you could hear quite a bit better than through the ordinary metal top (p. 87). He was about 50 feet east of the parked car when he saw the light changed to green (p. 88). He looked to the north when he was 15 to 25 feet east of the parked car and continued looking north until he was alongside the car (p. 89). The front of the parked car was even with the west end of the island, which goes down to the east side of the cross walk (p. 90). He saw no cars coming south on 13th East as he looked north. The impact occurred about under the street semaphore and his car was hit right behind the door (p. 93). He saw no flasher signal and heard no siren (p. 94). At the time he looked north and before he was even with the parked car, he could see through the trees but saw nothing. He continued looking north until even with the car and then the car obstructed his vision (p. 97).

Ronald Jensen, the plaintiff, testified that as they approached within 100 yards of 13th East they were going 35 or more miles per hour. As they approached the intersection the light turned green (p. 107). He looked up north when they were about 30 feet east of the east side of the cross walk, just back of the Nielson car (p. 110). He was sitting on the right side of the car, but he saw nothing, no red light (p. 109), and heard no siren (p. 119). That is the last he remembers. While there were trees there to the north he could not say if they obstructed his view. He did not look that close (p. 120).

This constitutes all of plaintiff's evidence as to how the accident happened. Plaintiff also called George Peterson, a police officer, who made the measurements after the accident and placed the results on the map of the intersection, exhibit P-13. Peterson fixed the point of impact by a dot with a circle around it on exhibit P-13, which is west of the center line of 13th East and north of the center of 5th South and is near the traffic semaphore (p. 24). The truck was stopped 199 feet south of the point of impact, measured to the front bumper (p. 25). There were tire marks made by the fire truck extending in a straight line for a distance of 120 feet north from the center of the left front wheel. They may have been lighter or darker in spots (p. 28). He measured the marks on the left side and they went to the left front wheel (p. 28) but he did not know on the right side (p. 33). He saw evidence of front wheel tire marks on the left side, but not on the right side. He didn't examine the

right marks up to the wheel. He did not examine the tire marks closest to the gutter (p.32). He traced the left tire mark back to the beginning but did not observe where the left front took hold, nor could he tell how far the right front tire mark went (p.33).

Plaintiff also called S. S. Taylor, traffic engineer, Salt Lake City, who was asked a hypothetical question based on various elements assumed to be existing at the time of the accident and from such he gave his opinion that the truck was traveling at the point where the brake marks, testified to by Peterson, began between 30 or 50 miles per hour (p.180). He admitted on cross examination that it would make a difference in his opinion if (a) the evidence failed to show that the front wheels were locked from the time the brakes were put on; (b) if the tire marks testified to by Peterson were not actually friction marks on the pavement (p.183); (c) if all 4 marks, those from the front wheels and rear wheels on each side, did not run the entire distance (p.184); (d) if the rear tires, which are not visible on the photo (exhibit P-1) and from which he obtained his information as to the condition of the front tires, were not substantially in the same condition as the front tires; (e) if the brake marks on both sides were not continuous and uninterrupted (p.185).

He also testified if all the wheels both front and rear were locked and sliding, and all the other assumed factors were present, the truck was traveling 44 to 50 miles per

hour, and if all the wheels, except the right front, were locked and sliding at the time the brake mark first appeared, the truck would be going between 38 and 44 miles per hour.

Defendant's evidence was as follows:

There were four firemen riding the fire truck, defendant Martin S. Taylor driving, Lt. Arthur C. Halladay riding beside defendant, Kenneth E. Wells and Richard H. Taylor riding the rear tail board. All four testified that the siren was sounded and the red flasher lights were on all the way from the fire station at 258 South 13th East to the point of impact and that the siren gives a loud noise and can be heard for at least 3 blocks and red flasher lights can be seen for at least 2 blocks.

Defendant testified that when about 300 feet north of 5th South he was traveling about 40 miles per hour and the traffic light at the intersection was red (p. 130). He then applied his brakes and slowed down to a point about 125 feet north of the intersection, then going about 25 miles per hour. During this interim he looked to the east and west. He saw the Nielson car waiting on the east side and the Jensen car waiting on the west side. He then released his brakes and accelerated his speed (p. 131). He could have stopped if he had had to, but when he saw the cars holding up for him he released the brakes (p. 135). He did not see the Oberg car until Lt. Halladay yelled, "Lookout!" He was then right in the middle of the intersection, a few feet north of the semaphore. He was then

going 30 or maybe 35 miles per hour (p. 131). His speed acceleration had been steady. He did not recall that he looked east at any time in the last 100 or 125 feet before the impact. He could not recall that he did. Counsel on cross examination asked:

Q. "If you had looked in this period of time I am speaking of just about 100 or 125 feet before the impact some time during the course of your look you would have seen this convertible as it either approached the Nielson car or went by it because the Nielson car was stopped, of course?"

A. "Yes."

Q. "Isn't that correct?"

A. "I imagine I could have seen it unless it was right on the side at the time." (p. 143).

There was nothing but Nielson's car to block his vision (p. 143). As he so proceeded he was conscious of the two cars being stopped and if they had started up he would have noticed them. However, he could not have seen the convertible if it had not overtaken the Nielson car as he started to look ahead for traffic (p. 144).

Laverna Bishop (p. 145) and Mrs. J. M. Baker (p. 156) both lived on the third floor and on the south side of the Charleston Apartments, located on the west side of 13th East and some little distance north of 5th South. They both testified they heard the sound of the siren coming from the north (p. 147, 158) and that a definite interval of time elapsed between first hearing the siren and the thud of the impact. The siren kept get-

ting louder as it approached the intersection, becoming very loud according to Miss Bishop (p. 146-148). Mrs. Baker said she first heard the siren when it was way down the street (p. 163).

Mrs. Harold H. Holmes, who lives on the east side of 13th East, the second house north of the intersection, was in bed when she heard the fire engine siren (p. 151). It got louder as it approached the intersection. There was a definite lapse of time between first hearing the siren and the impact.

Sadie Pack, who lived at 501 South 13th East, the south east corner of 13th East and 5th South was in a room in a south-west corner of her home. The windows were shut but she heard the siren and it was loud (p. 205).

Carl A. Taylor who lives about 300 feet east of the intersection on the south side of 13th East, was in bed when he heard the siren. The siren sound came from the north and was as loud as usual, loud enough so he could hear it in his house. He got up and looked out of the window and while at the window the crash occurred (p. 206-208).

Lt. Arthur C. Halladay was riding the fire truck with the defendant driver. When about 250 feet north of the intersection he says they were going 40 to 45 miles per hour. The driver then slowed down until he got about to the corner, when, seeing the traffic had all come to a stop he proceeded on through the intersection. Just after they had left the north cross walk he saw the Oberg car

coming west at a high rate of speed, estimating 45 to 50 miles per hour. Halladay yelled "lookout" but the collision was inevitable. The crash occurred right underneath the semaphore. Because of a broken tie rod Halladay had to help steer the truck to a stop (p. 167). He saw the Nielson car and the Jensen car stopped as the truck came to the intersection. He saw the Oberg car pass the Nielson car. The truck had then just passed the north cross walk (p. 168). He also saw the Oberg car as it was just about to pass the Nielson car. The truck was then about even with the cross walk. The truck was going about 35 miles per hour at the time of the impact (p. 169). The speed of the truck was reduced to 30 to 35 miles per hour before the driver started to accelerate again.

Kenneth E. Wells was riding on the left side of the tail board standing holding to the handle provided for such use (p. 172). He felt the driver hit the brakes and slow down. He saw the Nielson car waiting when they were about 300 feet from the corner, being on the left side of the truck he was not able to see the Jensen car (p. 173). The defendant had the truck braked down to 25 to 35 miles an hour when about 125 feet north of the cross walk. They were not quite in front of the Charleston. Up to that point he saw no car other than Nielson's. The truck then gradually accelerated its speed. Wells kept looking east and first saw the Oberg car when the truck was about at the cross walk. This was just before the Oberg car passed the Nielson car. It was going about 40 or 45 miles per hour. Wells just had time to holler

to the other fireman on the tail board "hang on we can't miss him." (p.174-175). He saw the Oberg car before it passed the Nielson car and it showed no signs of slowing down at all. The impact occurred about directly underneath the semaphore (p.175).

Richard H. Taylor, the other fireman riding on the rear of the fire engine, testified the driver applied the brakes about 300 feet from the intersection and slowed down until about 125 feet from the cross walk and then continued on again. His speed was reduced from 40 to 45 to 25 to 30 miles an hour and then gradually increased (p.). When they were about 125 feet north of the intersection he first saw the Jensen car waiting. When Wells said "we are going to hit" the witness saw both the Nielson and the Oberg cars. The fire truck was then at the south end of the north cross walk across 13th East. There was just a flash and then they hit.

Ken Foutz, 26 years of age, was riding between plaintiff and Oberg in the convertible. The radio was on (p. 195). When they got almost to the intersection of 13th East and 5th South he looked through the trees and saw the fire engine (p. 196). The witness made a pencil mark on Exhibit P-13 where the trees were. He also marked with an ink "x" on Exhibit P-4 where the fire truck was when he saw it. Exhibit P-4 is a photo of the intersection looking west taken from a point a considerable distance east of the intersection and shows the Charleston Apartments. At that time the convertible was about where

the picture was taken (p. 197), which would be a considerable distance east of the intersection, he saw the truck and recognized it as a fire truck. He is certain he saw the truck and lights but is uncertain that he heard the siren. But his best recollection is that he did hear it. He became panicky as soon as he saw the truck. He looked over at Oberg and looked back, and scared to death but did not cry out or speak (p. 199-200).

William Y. Tipton, an engineer employed by Salt Lake City, gave the following measurements: the parking area is 23 feet wide from the west sidewalk line to the curb, the sidewalk is 6 feet wide on 13th East. From the end of the island on 5th South to the east side of the circle on exhibit P-13 is 60 feet. It is 59 feet straight east from the circle to the west side of the cross walk. From the "x" mark on 13th East at the cross walk to the circle is 55 feet (p. 213).

Since the map exhibit P-13 is drawn to scale the court did not permit Mr. Tipton to make any further measurements of distance on that exhibit.

Exhibit B-14 is a photo of the intersection looking west and taken from a point 125 feet east of the pedestrian lane. The comparison of this photo with exhibit P-4 shows they were taken at approximately the same point. Exhibit D-15 is a photo looking north from the center of the pedestrian lane on the east side of 13th East at a point in the center of 5th South. From this point it appears that the west side of 13th East is visible for the entire block to 4th South.

STATEMENT OF POINTS

POINT NO. 1. The court erred in denying defendant's motion to dismiss at the close of plaintiff's evidence as (a) the evidence failed to establish any actionable negligence on the part of defendant; (b) the evidence showed that the sole proximate cause of the accident was the negligence of Seth M. Oberg, Jr., the driver of the car in which plaintiff was riding; (c) the evidence showed that plaintiff himself was guilty of contributory negligence.

POINT NO. 2. The court erred in failing to direct a verdict in favor of defendant as requested, by defendant in his requested instructions.

POINT NO. 3. The court erred in refusing to grant defendant a new trial.

POINT NO. 4. Instruction No. 14 was erroneous as a whole and was prejudicial to defendant's rights.

POINT NO. 5. That part of Instruction No. 14 which permitted the jury to predicate negligence of defendant on a failure to keep his fire truck under proper control was erroneous and prejudicial to the rights of the defendant.

POINT NO. 6. That part of Instruction No. 14 which permitted the jury to predicate negligence of de-

fendant on a failure to drive with due regard for the safety of all persons was erroneous and prejudicial to the rights of defendant.

POINT NO. 7. That part of Instruction No. 14 which permitted the jury to predicate negligence upon a failure to reduce his speed as much as necessary for safe operation of the truck was erroneous and prejudicial to the rights of defendant.

POINT NO. 8. The failure of the court to give the jury some basis as a guide in determining where the truck, as a matter of law, should have slowed down and what elements are to be considered in determining negligence based upon the failure to slow down as necessary for the safe operation of the truck constituted error and prejudicial to defendant.

POINT NO. 9. That part of Instruction No. 14 which permitted the jury to predicate negligence of defendant upon a failure to keep a proper lookout was erroneous and prejudicial to the rights of defendant.

POINT NO. 10. It was error for the court in not defining and limiting anywhere in its instructions the grounds of negligence relied upon by plaintiff for a recovery and restricting the right to recover to a finding that one or more of such grounds of negligence existed in fact.

POINT NO. 11. It was error for the court to fail to instruct the jury that defendant having sounded the

siren and his truck exhibiting red lights, as required by law, had in fact complied with the requirement that he drive with due regard for the safety of all persons using the streets, and that he could continue into and across the intersection against the red light unless it should appear from the evidence that defendant became aware, or, in the exercise of due care, should have become aware, of Oberg's failure to yield the right-of-way in time to have permitted defendant to avoid the collision.

POINT NO. 12. It was error for the court to fail to instruct the jury to the effect that if the collision resulted solely from the negligence of Oberg, then defendant would not be liable.

POINT NO. 13. The court erred in admitting in evidence the opinion of S. S. Taylor as to the speed of the fire truck in answering hypothetical questions submitted without proper foundation.

ARGUMENT

POINT NO. 1. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS AT THE CLOSE OF PLAINTIFF'S EVIDENCE.

(a) *The evidence failed to establish any actionable negligence on the part of defendant.*

In the beginning of our Statement of Facts we stated the four grounds of negligence relied upon by plaintiff in his complaint and in the pre-trial order. They are (1) ex-

cessive speed in excess of 35 miles per hour, (2) failure to keep a proper look out, (3) failure to keep the fire truck under proper control, and (4) failure to exhibit the red light and sound the siren.

On the first ground the only persons who testified as to the speed of the truck were Nielson and Jensen. The former had stopped his car on the east side of 13th East and Jensen had stopped his car on the west side of 13th East. Both were waiting for the truck to pass and observed it for a distance of at least one-half block. Nielson said it was going 20 to 30 miles per hour. Jensen said it was going 30 to 40 miles per hour. S. S. Taylor gave his opinion, based upon a number of assumptions which were wholly without support in the evidence, as to the speed of the truck as it reached the point where the tire marks described by Officer Peterson first began. His opinion varied from 31 to 50 miles per hour. We submit such evidence does not disclose excessive speed in excess of 35 miles per hour. Further there is no evidence that 35 miles per hour is the speed limit so that any speed in excess of that speed would be excessive. Assuming that the speed limit was 35 miles per hour, there is no proof that the speed was exceeded by a witness testifying the speed was from 30 to 40 miles per hour or 30 to 50 miles per hour.

Finally, when an emergency vehicle, such as was this fire truck, is responding to a fire alarm, the statute, Sec. 41-6-76 U.C.A., enacted by Chapter 65, 1949 Session Laws,

expressly authorizes a speed in excess of the prima facie speed limits. A discussion of the statutes relating to authorized emergency vehicles will be given later in this brief. It is also significant to here point out that when the case was submitted to the jury, nowhere in its instructions did the trial court submit speed in excess of 35 miles per hour as an element of negligence relied on by plaintiff or to be considered by the jury. We think the foregoing is sufficient to show that the plaintiff did not make out a case on the element of excessive speed.

As to failure to keep a proper look out there is likewise no supporting evidence. Both Farnsworth and Nielson place the fire truck at the north cross walk across 13th East, as the Oberg car passed the Nielson car, which was standing east of the east cross walk across 5th South. As shown by the map, Exhibit P-13, the truck was then 55 feet from the point of impact and Oberg's car was 59 feet from the same point. Since Oberg's car was struck behind the door its front end had actually traveled at least 6 or 8 feet beyond the point of impact, so the car really traveled about 65 or 67 feet while the truck was traveling 55 feet. The evidence shows that the east and west traffic had heard the siren and seen the fire truck and was stopped to yield the right of way. The accident happened because the Oberg car suddenly emerged from behind the Nielson car into the intersection. There is not the slightest evidence that the Oberg car was visible at

a time and place before the accident so as to convict the defendant of negligence in not discovering it in time to avoid a collision.

There is likewise no evidence whatever to sustain the allegation that defendant did not have the truck under proper control. The evidence is all to the contrary. He brought the truck to a stop in a straight line according to Officer Peterson's observations notwithstanding the tie rod on the right front wheel was broken. The mere fact that a collision occurred does not establish lack of control.

Three of plaintiff's witnesses, Farnsworth, Jensen and Nielson, all testified that the truck had red flasher lights going and the siren sounding. Jensen saw and heard this while the truck was three-quarters of a block north of the intersection, at least 500 feet away. Nielson saw and heard the truck while it was one-half block away. It was the siren and the red light that attracted their attention to the truck and caused them to wait for the truck to pass. Certainly the plaintiff's and Oberg's mere negative statement that they did not hear the siren or see the red light raises no issue for the jury in view of the positive testimony of plaintiff's own witnesses above referred to. Oberg admitted he saw the red light immediately before the impact so his testimony raises no issue as to the red light being on. Either they failed to look or hear, or they heard with unhearing ears and looked with unseeing eyes, or the radio was on and prevented

them from hearing. The plaintiff said he glanced north when they were back of Nielson's car but the glance was so casual he couldn't tell whether the trees in the parking created an obstruction to his view. Oberg says his view was obstructed by the Nielson car.

We submit the plaintiff failed to establish negligence on the part of defendant or any of the grounds relied upon.

(b) The evidence above referred to establishes that the sole proximate cause of the accident, regardless of any negligence on the part of defendant in the particulars alleged, was the negligence of Oberg in heedlessly and recklessly driving into the intersection at a time when the fire truck was plainly visible and had the right of way and was in such a position that a collision was inevitable. Had Oberg so much as glanced to the north as he passed Nielson's car, or if he had merely observed the intersection, assuming he could not have seen anything before, he could have seen the fire truck entering the intersection for it was at that point at that time according to Farnsworth and Nielson, and there is no dispute on that point. Oberg says he was going 20 miles per hour. He had to travel over 60 feet to get to the point of impact. Certainly he could have stopped or slowed down so as to permit the truck to pass. We think the situation here is similar to that in *Haastritch v. O.S.L.R.R. Co.*, 70 Utah 552, 262 P. 100, where it was held that the sole proximate cause of the collision between the car in which plain-

tiff was riding as a guest and the railroad car being pushed across the street, regardless of negligence on the part of the railroad, was the driver's negligence in failing to see and heed that which was plainly visible.

(c) Plaintiff admitted that he looked north and saw and heard nothing. At that time, according to Nielson and Farnsworth, the fire truck was at the north cross walk across 13th East. The fire siren was sounding and the red lights were flashing. A person cannot be heard to say that he didn't see that which was plainly visible before him or did not hear that which was clearly audible in his position. "The duty to look has inherent in it the duty to see what is there to be seen and pay heed to it." *Mungus v. Olsson*, Ut., 201 P. 2d 495. As stated in *Brown v. Lilli*, 281 Mich. 170, 274 N.W. 751, where plaintiff testified she looked and saw nothing. "If she looked and failed to see that which was plainly visible, she will be held in point of law to have seen it."

Being held in law as having seen the fire truck since it was there plainly visible before him, plaintiff had a duty to warn Oberg or do something to avoid the collision. He did nothing. We submit his negligence should prevent him from a recovery in this action.

POINT NO. 2. THE COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF DEFENDANT AS REQUESTED BY DEFENDANT IN HIS REQUESTED INSTRUCTIONS.

Defendant, in his first requested instruction asked the court to direct a verdict in his favor of no cause of

action, (p. 225) and took exception to the court's refusal to give it (p. 219). All that has been said under Point No. 1 is applicable here. In addition we have the evidence submitted by defendant and his witnesses. The speed of the truck as it approached the intersection is definitely fixed as being not in excess of 35 miles per hour by all four firemen. The evidence is likewise definite that the speed of the truck was reduced from 40 to 45 miles per hour down to 25 to 35 miles per hour, when about 125 feet north of the cross walk. While it is true Jensen and Nielson testified they did not notice a reduction or acceleration in speed, this would constitute no conflict with the definite evidence of the four firemen.

On the question of keeping a proper look out, defendant's testimony shows he saw the Nielson and Jensen cars stopped and waiting, and then proceeded on through the intersection watching the traffic ahead, since he had the right of way. The fact that he did not see the Oberg car as he came close to and into the intersection does not convict him of failing to keep a proper look out. When he was proceeding with the siren sounding and the red lights flashing and on an emergency call, he had a right to assume that all persons using the street would yield the right of way, until it should reasonably appear that the right of way was not being yielded. When the Oberg car first became visible to Halladay and Wells, who were looking easterly, it was then so close and coming at such speed that a collision was inevitable. There is no other

evidence as to when the Oberg car became visible, and no evidence that it was discoverable sooner by keeping a reasonable look out.

The defendant's evidence makes it clear and without dispute that he had the truck under proper control as he approached and entered the intersection and even after the impact. He had slowed down so he could have stopped at the intersection when it appeared to him that the traffic, east and west, was stopped and yielding him the right of way. He then accelerated his speed and entered the intersection. The impact broke the right tie rod but even this did not throw the truck out of control. He brought it to a stop in a straight line. There is no evidence to the contrary. The other three firemen confirmed the point. There is a total absence of any evidence showing a lack of proper control.

As to Plaintiff's allegation that the defendant did not sound a siren and did not exhibit a red light, the court on its own motion instructed the jury it must consider that the law had been complied with in that regard. So that element is eliminated from the case.

Since there was a failure of proof as to each of the grounds of negligence relied on for recovery, we submit the court should have directed the jury to bring in a verdict of no cause of action.

POINT NO. 3. THE COURT ERRED IN REFUSING TO GRANT DEFENDANT A NEW TRIAL.

Defendant seasonably filed a motion for a new trial or for judgment non obstante veredicto (p. 253). In this motion defendant specifically and separately assigned as error and presented to the trial court for consideration each and all the points heretofore stated and relied on for reversal in this appeal. Since all these points will be argued hereafter, we refer the court thereto to avoid repetition. We earnestly contend the court should have granted a new trial or have entered judgment for defendant notwithstanding the verdict.

POINTS NOS. 4, 5, 6, 7, 8, 9, AND 10, ALL RELATING TO ERROR IN INSTRUCTION NO. 14.

Instruction No. 14 as given by the court reads as follows:

“The traffic laws of Utah give to the driver of a fire truck, answering an alarm, certain privileges not enjoyed by drivers of ordinary vehicles. These privileges include the right to proceed past a red light without stopping, but the law specifically provides that the fireman can do so, only after slowing down as much as may be necessary for safe operation of the fire truck. It is also provided by law that, in using such a privilege, the fireman shall not be relieved of the duty to drive with due regard for the safety of all persons.

“It is admitted in this case that the defendant proceeded past the red light on 13th East Street. You must determine if he used this privilege prop-

erly, by reducing his speed as much as may have been necessary for safe operation of the fire truck, and by driving with due regard for the safety of all persons.

“If you find, by a preponderance of the evidence, that the defendant negligently failed to reduce his speed as much as was necessary for safe operation of the truck, or negligently failed to keep the truck under proper control, or negligently failed to keep a proper lookout for other vehicles in or approaching the intersection, and that such failures, or any of them, proximately caused the accident and injuries to the plaintiff, your verdict must be for the plaintiff and against the defendant.”

The defendant excepted to the instruction as a whole and to the various specific parts as are covered by points 5, 6, 7, & 9 (p. 219).

In Instruction No. 13 the jury were told that reasonable minds could not differ on the proposition that the fire truck was responding to an emergency call; that it was equipped with red lights visible for a distance of 500 feet in front of the truck; and that the siren was being sounded prior to and at the time of collision; and so the jury must find these elements as being established.

Originally, it was held by this court in *Rollow v. Ogden City*, 66 Utah 475, 243 P. 791, that the statutes and ordinances regulating speed of vehicles on the public streets and highways had no application to a fire department vehicle.

In Chapter 52 Page 116, Section 5, Laws of 1941, the legislature made all vehicles of the state and its subdivisions subject to the provisions of the act regulating traffic, subject to exceptions as are set out in the act with reference to emergency vehicles. Under this section an emergency vehicle was required to slow down upon approaching a red or stop signal "as necessary for safety but may proceed cautiously past such red or stop sign or signal."

Section 41 provides as follows :

"The prima facie speed limitations set forth in this act shall not apply to authorized emergency vehicles when responding to emergency calls and the drivers thereof sound audible signal by bell, siren, or exhaust whistle. This provision shall not relieve the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the street, nor shall it protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others."

Section 63 provided :

"(a) Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust whistle, or bell, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear

of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

(b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.”

These sections were carried into U.C.A. 1943 as sections 57-7-82, 57-7-118 and 57-7-140, respectively. In 1949, Chapter 65, the legislature amended sections 57-7-82 and 57-7-140 and repealed section 57-7-118. Section 57-7-82, as amended, incorporated the subject matter of exceeding the prima facie speed limits theretofore contained in section 57-7-118, U.C.A. 1943. Section 57-7-140, U.C.A. 1943, was amended to provide for displaying a red light visible 500 feet in front of the vehicle as an additional requirement to that of sounding the siren. Sections 57-7-82 and 57-7-140, as so amended in 1949, were carried in U.C.A. 1953 as sections 41-6-14 and 41-6-76. We quote these sections:

“57-7-82. (a) The provisions of this act applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this state or any county, city, town, district, or any other political subdivision of the state, except as provided in this section and subject to such specific exceptions as are set forth in this act with reference to authorized emergency vehicles.

(b) The driver of an authorized emergency vehicle, when responding to an emergency call

or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(c) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the provisions of this act;

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

3. Exceed the prima facie speed limits so long as he does not endanger life or property;

4. Disregard regulations governing direction of movement or turning in specific directions.

(d) The exemptions herein granted to an authorized emergency vehicle shall apply only when the driver of any said vehicle while in motion sounds audible signal by bell, siren or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp displaying a red light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle.

(e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

(f) The provisions of this act shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway, but shall apply to such persons and vehicles when traveling to or from such work."

"57-7-140. (a) Upon the immediate approach of an authorized emergency vehicle equipped with at least one lighted lamp exhibiting red light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle and when the driver is giving audible signal by siren, exhaust whistle or bell, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway, clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

(b) This section shall not operate to relieve the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway."

It will be noticed that in the 1949 laws that part of Section 5 of 1941 laws, permitting an emergency vehicle to proceed cautiously past a red light or stop sign was eliminated. On the matter of exceeding the prima facie speed limit the 1949 law, section 57-7-82 (c) (3) added the words "so long as he does not endanger life or property."

Since we challenge Instruction No. 14 as a whole, and also its several parts, an interpretation of the stat-

utes above quoted is imperative. We think the following authorities lay down the proper criteria by which the rights and duties of defendant in this case should be determined. The leading case, one which is frequently cited, is *Balthaser v. Pacific Electric Ry. Co.*, 167 Cal. 302, 202 P. 37, 18 A.L.R. 452.

In this case a fire truck responded to a call and cut the corner at an intersecting street and ran into defendant's train, killing one fireman and injuring another. The City of Pasadena paid compensation and brought suit to recover over again against the Railway Co. The statutes required that all vehicles in making a turn on intersecting streets to make the turn by the center of the intersection and also provided that no person should operate a motor vehicle in excess of 15 miles per hour in approaching or going around corners or in approaching or traversing intersecting highways. The statute also provided:

“Police patrol wagons, police ambulances, fire patrols, fire engines and fire apparatus in all cases while being operated as such, shall have the right of way with due regard to the safety of the public; but this provision shall not protect the driver or operator of any such vehicle or his employer or principal from the consequence of the arbitrary exercise of this right or for injuries wilfully inflicted.”

It was held that while the language of the statute was broad enough to apply to fire trucks in fixing speed limits, it must be construed as excluding such vehicles. The court says:

“It follows that the general rules of the road relating to speed and to the turning of corners contained in the Motor Vehicle Act do not apply to fire or police apparatus. We have only to consider the utter absurdity of requiring peace officers to observe the arbitrary speed limits fixed by the Motor Vehicle Act when pursuing criminals, who may be fleeing in high-power cars at twice the legal limit, to make manifest that the legislature did not have in view such a limitation on peace officers. And it is equally clear that they did not contemplate retarding the speed of fire apparatus in going to a fire.”

In construing the language “due regard to the safety of the public,” the court says:

“It is evident that the right of way of fire apparatus over other vehicles is dependent upon ‘due regard to the safety of the public’ only in so far as such ‘due regard’ affects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus.”

Lucas v. City of Los Angeles, 10 Cal. 2d 876, 75 P. 2d 599. Plaintiff was a guest passenger in an automobile being driven across the street intersection on the right side of the street, at a lawful rate of speed, in response to a mechanical “Go” signal. A police automobile operated upon authorized emergency business, traveling at a high rate of speed and disregarding the traffic “Stop”

signal, crashed into the automobile. The statute made the City liable for the negligent operation of its vehicles, even though in a governmental capacity. The court cites and relies upon the Balthaser Case. Since the decision of that case, the statute has been amended to provide that the provisions regulating the speed of vehicles shall not apply to authorized emergency vehicles, with the proviso that the section should not relieve the driver "from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of an arbitrary exercise of the privileges declared in this section."

The court says:

"The expression 'with due regard for the safety' of all persons using the highway was explained in the Balthasar Case, where the court said, 187 Cal. 302, at page 311, 202 p. 37, 41, 19 A.L.R. 452; 'It is evident that the right of way of fire apparatus over other vehicles is dependent upon 'due regard to the safety of the public only in so far as such 'due regard' affects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus.' This is the only reasonable interpretation that the statute will bear. *If the driver of an emergency vehicle is at all times required to drive with due regard for the safety of the public as all other drivers are required to do, then all the provisions of these statutes relating to emergency vehicles become mean-*

ingless and no privileges are granted to them. But if his 'due regard' for the safety of others means that he should, by suitable warning, give others a reasonable opportunity to yield the right of way, the statutes become workable for the purposes intended. (Italics added.)

“The expression ‘arbitrary exercise of the privileges’ has also caused some confusion. Since the vehicles are excluded from the restrictions of speed and right of way, negligence cannot be predicated on those elements if proper warning has been given. These are among the ‘privileges’ which are granted by the statutes. An arbitrary exercise of them may rest upon the question whether an emergency in fact existed. The statute has determined this question in part by the limitation in section 120 to cases where the emergency vehicle is engaged in the chase of violators of the law or in response to a fire alarm. Members of the fire and police departments are relieved from civil liability when ‘responding to an alarm of fire or an emergency police call.’ Thus, if such a vehicle is being operated in response to a fire alarm, excessive speed alone is not an arbitrary exercise of them.

“Some confusion has also arisen over the use of the expression in section 132 and similar statutes requiring the operators of these vehicles ‘to sound audible signal by siren.’ Section 554 of the Vehicle Code, St. 1935, p. 187, has clarified this somewhat by using the language: ‘Upon the immediate approach of an authorized emergency vehicle giving audible signal by siren.’ It will be noted that it is the sounding or the giving of audible signal that fixes the right of way and relieves the driver of negligence. Where there is dispute

as to whether the party injured heard the signal, it is a question of fact to be determined by the jury, but only in so far as that is material to the issue of his contributory negligence. The statutes are clear that when an audible signal is given the operator of the emergency vehicle has a clear right of way. The giving of the signal is the measure of care on his part, and if this is done his duty of care is performed, subject to the limitation as to 'arbitrary' conduct as hereinbefore noted.

"Our conclusions from the foregoing are that when the operator of an emergency vehicle responding to an emergency call gives the statutory notice of his approach the employer is not liable for injuries to another, unless the operator has made an arbitrary exercise of these privileges. In such cases speed, right of way, and all other 'rules of the road' are out of the picture; the only questions of fact, in so far as the public owner is concerned, are first, whether there was an emergency call within the terms of the statute; and third, whether there was an arbitrary exercise of these privileges. Here the emergency was conceded, the sounding of the siren was proved by the only substantial evidence offered, and an arbitrary exercise of the privileges has not been shown."

Raynor v. City of Arcata, 11 Cal. 2d 113, 77 P. 2d 1054. Plaintiff was injured when his automobile was struck by an automobile of the defendant City which was operated by the Fire Chief in response to an alarm. Plaintiff was driving on a through street with the traffic heavy on both sides of the highway. He entered the intersection in second gear at about 20 miles per hour. He charged

the Fire Chief drove at an excessive speed; that he failed to stop or slacken his speed at the stop sign; that he did not have a proper or efficient siren or did not sound a siren or signal with sufficient distinctness to be heard. Plaintiff himself and the driver of the car immediately following, testified they heard no siren. The court says the vital issue in this case was whether the Fire Chief sounded his warning siren as he proceeded at a high rate of speed in response to a fire alarm. The court refers to the Lucas case and says:

“A warning siren having been sounded, negligence of the driver could not be predicated on his rate of speed or failure to obey the ‘stop’ sign. An authorized emergency vehicle responding to an emergency call is exempt from limitations of speed and other rules of the road, such as those relating to the right of way. The exemption from speed limits and right of way is statutory. Sections 120 and 132, Motor Vehicle Act, St. 1923, pp. 556, 560, as amended by St. 1929, pp. 539, 542; now sections 517 and 554, Vehicle Code, St. 1935, pp. 178, 187. The exemption from other rules of the road has been established by judicial decisions, notably by *Balthasar v. Pacific Electric Ry.*, 187 Cal. 302, 202 P. 37, 19 A.L.R. 452.

“The provisions in sections 120 and 132, *supra*, to the effect that the exemptions there given shall not relieve the driver of an emergency vehicle of the duty to drive with due regard to the safety of the public, means that the driver must, ‘by suitable warning, give others a reasonable opportunity to yield the right of way.’ *Lucas v. City of Los Angeles*, Cal. Sup., 75 P. 2d 599, 603. The sections also provide that the exemption shall not protect

the driver from 'an arbitrary exercise' of the privileges there granted. But an arbitrary exercise of said privileges cannot be predicated upon the elements of speed and failure to observe other rules of the road where a warning has been given. 'In such cases speed, right of way, and all other 'rules of the road' are out of the picture.' 75 P. 2d 599, 605.

"In the instant case the evidence as to whether a warning signal was given was in conflict. The vice of the instructions given to the jury is that they authorize the jury to predicate a finding of negligence on the fire chief's speed and failure to observe the boulevard stop even though the jury conclude upon the conflicting evidence that a sufficient warning signal had in fact been given. The effect of the instructions was to authorize the jury to determine as a matter of fact whether in traveling at the rate of speed shown and in failing to observe the boulevard stop the Fire Chief had driven 'with due regard for the safety of all persons using the highway' or had been guilty of an 'arbitrary exercise' of the privileges accorded emergency vehicles."

Reed v. Simpson, 32 Cal. 2d 444, 196 P. 2d 895. This is an action brought by the surviving widow and children of John Reed, a highway patrol officer, for death which occurred when the motorcycle he was riding collided with defendant's automobile. The trial resulted in a verdict for defendant and the appeal is on the instructions of the court. The officer noticing a car in front of him weaving in an erratic manner over the center line decided to apprehend the driver. The traffic was heavy, moving

about 35 miles an hour. The defendant who was driving in an opposite direction from the officer decided to turn to the left in the middle of the block. He stopped to let some cars pass him, giving the left turn signal and drove in front of the officer's motorcycle resulting in a collision. The Trial Court instructed the jury that the evidence showed that the officer did not sound his siren at all and therefore he was not entitled to the exemption accorded emergency vehicles. The statute provided that "said exemption shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary as a warning to others." The court held that absence of the warning siren did not as a matter of law take the officer out of the exemption as the words "as may be reasonably necessary" indicates that there is some discretion on the part of the officer whether conditions required the sounding of the siren. The court reaffirms the Lucas and Raynor cases and says:

"Defendants argue evidentiary considerations that would establish contributory negligence on the part of the decedent in bar of plaintiffs' recovery of damages — that if he was traveling at 60 miles an hour on the boulevard, as some witnesses testified, his excessive speed coupled with his neglect to sound his siren contributed proximately to cause the accident; and, on the other hand, if he was proceeding at 35 miles an hour, as other testimony indicates, his failure to keep on the lookout and avoid the dangers of traffic, which was concededly heavy at the time, contributed proximately to the fatal condition. But since in the performance of his official duty, the decedent

was exempted from the restrictions of 'speed right of way,' and all other 'rules of the road', his lack of due care cannot be predicated on those elements if the 'reasonably necessary' warning contemplated by the statute was given. *Lucas v. City of Los Angeles*, supra, 10 Cal. 2d 476, 486, 75 P. 2d 599; see, also, *Isaacs v. City and County of San Francisco*, supra, 73 Cal. App. 2d 621, 626, 167 P. 2d 221. Of course, if the decedent's conduct were found to be an 'arbitrary exercise of (his traffic) privileges' as where 'such driver' has given a 'reasonably necessary' warning but sees that it has not been observed or heeded, and having opportunity to stop, he nevertheless continues on into an inevitable collision — he would not be relieved from his negligence because the issue would then be akin to that 'involved under the last clear chance doctrine.' ”

State of Washington v. United States, 194 F. 2d 38. The United States maintained a fire department at its barracks near Vancouver, Washington and had an arrangement with the City for mutual assistance in case of a fire alarm. While the federal fire truck was enroute to the city fire station it collided with the vehicle which a state patrolman was driving. The patrolman was not on any emergency mission. The State of Washington brought an action for damages to the vehicle and for the injuries sustained by the patrolman under the Workmen's Compensation Law. The collision occurred at the intersection, the patrolman being on an arterial street and the fire truck entered the same without stopping. The collision occurred near the center of the intersection when

the fire truck struck the left rear portion of the car driven by the patrolman. The patrolman did not hear the government fire truck in time to avoid it and did not yield the right of way. The driver of the fire truck reduced its speed to approximately 25 miles an hour with the siren sounding and red lights flashing. The state statute provided that the laws applicable to the operation of vehicles upon the public highways should not apply to "any emergency vehicle properly equipped as required by law and actually responding to an emergency call; provided, that the provisions of this section shall not relieve the operator of an authorized emergency vehicle of the duty to operate with due regard for the safety of all persons using the public highway nor shall it protect the operator of any such emergency vehicle from the consequence of a reckless disregard for the safety of others.

It was contended that notwithstanding the exemption of the fire truck from the statutory duty to stop before entering the arterial street, the driver of the truck should have looked out for and avoided striking the patrol car. The court says:

"In the case of *Balthasar v. Pacific Electric Ry. Co.*, 187 Cal. 302, 202 P. 37, 41, 19 A.L.R. 452, the Supreme Court of California had under consideration a statute which gave the right of way to fire department apparatus and other emergency vehicles while being operated as such 'with due regard to the safety of the public.' The California Court construed the 'due regard to the safety of the public' limitation upon the exercise of the right of way granted to emergency vehicles

to mean only that the driver of the favored vehicle should give other users of the highway proper and adequate notice of its approach and thus afford those required to yield the right of way a reasonable opportunity to do so. The rule of the *Balthasar* case has been followed later in many California cases."

"It is in the public interest that an emergency vehicle reach its destination and accomplish its mission as expeditiously as possible and, for that reason, it is given statutory exemption from traffic regulations. The driver of the vehicle has the right to assume that, if he gives adequate warning of the approach, others will yield him the right of way and will take into account the fact that his speed is not subject to the usual limitations. The exercise, in the public interest, of his special privileges as to speed and right of way is not consistent with due regard for the safety of others in the ordinary sense. If, as the California Courts have pointed out, he is to be required to drive with due regard for the safety of other users of the highway, the same as unexempt drivers are required to do, then the exemption granted to him by the statutes would be meaningless.

"In the present case, the driver of the Government fire truck continuously sounded a siren and flashed red warning lights. He thus gave adequate and proper notice of the approach of an emergency vehicle and, we think, operated his vehicle with due regard for the safety of other users on the city streets."

Baltimore Transit Co. v. Young, 189 Md. 428, 56 A. 2d 140. Miss Young was riding in her automobile which

was being driven by Pitts. They had been to the hotel for supper and were driving home when they reached Howard Street. The traffic light was green and they proceed across the intersection oblivious of the north-bound trouble truck of the Transit Company. Under the state law the trouble truck was an emergency vehicle and granted the right-of-way as such under the statute which provided that:

“Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust whistle, or bell, the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or some curb of the highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.”

Another statute provided that the exemption from the speed and other traffic regulations shall not relieve the driver from the duty “to drive with due regard for the safety of all persons using the street,” and shall not protect him from the consequence of a “reckless disregard for the safety of others.”

Another act provided that “an emergency vehicle approaching a red or stop signal shall slow down as necessary for safety and may proceed cautiously past such red or stop signal or stop sign.”

Another section provided that the prima facie speed limitations and provisions relative to right of way, stopping at through highways, rules of the road, traffic control devices and signals set forth in this article shall not apply to authorized emergency vehicles when responding to emergency calls and the drivers thereof sound audible signal by bell, siren, and exhaust whistle.

“Thus, although, the driver of an emergency vehicle is ordinarily not limited in speed, and is authorized to drive with caution past a red light, he may nevertheless, be held liable for damages if in the exercise of his special privileges, he fails to give audible warning of his approach and pays no attention whatever to traffic on an intersecting street. Evidence that the driver of such a vehicle drove at high speed past a red light at a busy intersection, without giving due warning to traffic on the intersecting street, warrants a finding that the vehicle was being operated with ‘a reckless disregard for the safety of others.’ On the other hand, the driver of such a vehicle cannot be expected to use the same care that the law requires of the ordinary motorist who has no emergency duty to perform. To stop at every slight indication of danger might often be a failure of duty in the past of the emergency driver. On many occasions his prompt and fearless action is imperatively necessary to prevent loss of property or loss of life, or both, or even widespread disaster.”

The driver of the trouble truck testified that he was going about 20 miles an hour and slowed down when he approached the intersection; that he looked to the right

for west bound traffic, but believing the way was clear he increased his speed to over 20 miles an hour. Suddenly plaintiff's car appeared before him about 10 feet away. His companion testified that the red light on the truck kept flashing from the time he turned it on and that he blew the siren from the next street below. The driver of the car immediately behind the plaintiff's car testified he saw the truck coming with the siren going full blast and the red light flashing. Two other witnesses testified they heard the siren. Goldberg, a taxicab driver, testified that he heard the siren only for a short distance before the truck reached the intersection. Pitts did not hear the siren. He testified that when they reached Howard Street, and had the green light, the car in front of him turned north and he started to cross and was knocked completely out. "In other words, when the slowly moving car ahead of him turned into Howard Street, he kept straight ahead and drove directly in front of the emergency truck with its siren screaming and its warning light flashing."

"Plaintiff also called attention to Goldberg's testimony that the siren was not sounded the entire distance from Fayette to Lexington Street, but only about a half block starting at the alley south of the May Company's store. Goldberg's testimony shows no negligence on the part of the Baltimore Transit Company or its servants. Of course to impose upon a traveler on a highway the duty of giving the right of way to an authorized emergency vehicle, notice to him must be given of its approach so that he has a reasonable

opportunity to stop or otherwise yield the right of way. *Balthasar v. Pacific Electric Ry. Co.*, 187 Cal. 302, 202 P. 37, 19 A.L.R. 452, 458. In the instant case, however, it was shown that the siren was heard plainly by other automobile drivers in the vicinity. Undoubtedly, Pitts, by the exercise of ordinary care and caution, could easily have heard the siren in sufficient time to yield the right of way to the emergency vehicle, and thus could have avoided the collision. Moreover, as there was no rain or fog to obscure his vision, he could easily have seen the flashing light.

“Pitts and plaintiff testified that they did not hear the siren and did not see the flashing light. But we accept the rule that when a witness testifies that he did not see or hear a certain object which, if he had actually looked and listened, he must necessarily have seen and heard, his testimony is not worthy of consideration.”

“In the case before us there is no substantial conflict in the evidence as to material facts. Plaintiff did not meet the burden of establishing some negligent act, or omission of defendant assuming the truth of all the evidence on behalf of plaintiff, yet no ground was shown for recovery. Therefore the judgment for plaintiff must be reversed.”
Reversed without a new trial.

Williams v. City of Pittsburgh, 349 Pa. 430, 37 A. 2d 540. Plaintiff was injured when his motorcycle and a fire truck collided at an intersection. The signal light was green for plaintiff and red for the fire truck. The fire truck was traveling from 40 to 45 miles an hour. The plaintiff alleged that no bell or siren was sounded. A verdict was found for the plaintiff, but the court gave de-

fendant judgment notwithstanding the verdict. The negligence claimed was (1) the speed of the fire truck, (2) its running through a red light, and (3) the failure to give warning of its approach. The statute provided that speed limitation applicable to other vehicles should not apply to those of the fire department traveling in response to a fire alarm if "operated with due regard for safety" and not with "a reckless disregard of safety of others." It was also provided that the ordinary rules with respect to signal light at intersections were not applicable to fire department vehicles. Plaintiff testified no bell or siren was sounded, but if there had been he would have been able to hear it.

A witness for plaintiff who was driving a truck four or five truck lengths to the rear of plaintiff said he did not hear any siren or bell until the fire truck got into the intersection. He heard it then. Opposing this testimony the acting captain on the fire truck testified he rang the bell and with his foot operated the electrical siren. The driver said the bell and siren were both being sounded. Three other witnesses testified to the same effect — two of them being school boys who had heard the siren and turned around to watch. The third was a newspaper route man who heard the siren. The court says:

"Negative testimony of a plaintiff and his witnesses that they did not hear any whistle or bell of an approaching vehicle is sufficient to go to the jury if the defendant produces no evidence to the contrary, but if there is positive testimony of witnesses that they did hear such a warning

given, the negative testimony is insufficient to make out a charge of negligence.

“An analysis of the evidence in the present case indicates that it does not measure up to the required standard. The testimony of plaintiff’s witness was wholly negative in character, and plaintiff’s own testimony, although expressed in more affirmative terms, was not buttressed by any statement to the effect that as he drove his motorcycle along Bayard Street he was consciously listening for warnings from traffic approaching from the intersecting street; for all that appears, his failure to hear what so many others heard may have been due to mental pre-occupation or inattention. In view of this fact, in view of the positive testimony of five witnesses on behalf of defendant that the bell was rung and the siren sounded, and in view of the testimony of plaintiff’s own witness that he heard the siren at least as the fire truck came into the intersection, no verdict for plaintiff could be sustained on his mere assertion that no audible warning was given. The action of the court below in granting judgment for defendant n. o. v. was therefore proper.”

We shall now proceed to a consideration of the specific points relied on.

(a) Points numbers 4 and 10. Instruction No. 14 was erroneous as a whole. First, under the authorities cited above, this instruction should not have been given at all in view of the court’s Instruction No. 13, in which the jury were told that the truck proceeded with red lights displayed and a siren sounding, according to law. Under the authorities above cited such an instruction

is inconsistent with giving of Instruction No. 14. Having so found, under the facts of this case, that should have been the end of the matter, for clearly there was no evidence of a reckless disregard for the safety of others.

Second, the instruction as a whole is ambiguous and confusing. In the first paragraph the court states the law to be that a fireman may go through a red light only after slowing down as may be necessary for the safe operation of the fire truck and is not relieved of the duty to drive with due regard for the safety of all persons. Then the jury were told that they must determine whether this privilege was used properly by defendant reducing his speed as much as may have been necessary for the safe operation of the fire truck and by driving with due regard for the safety of all persons.

In the last paragraph they are told to find for plaintiff, if they find defendant negligently failed to reduce his speed as much as was necessary for the safe operation of the truck, or negligently failed to keep the truck under proper control, or negligently failed to keep a proper lookout for other vehicles in or approaching the intersection. In this last part nothing is said about driving with due regard for the safety of all persons, even though the jury was previously told they must determine that point. Undoubtedly, under such an instruction the jury would feel free to find for plaintiff on the ground that defendant had not driven with due regard for the safety

of others without regard to any findings they may have made as to the three grounds that were submitted to them in the last paragraph of the instruction.

Furthermore, the duty to drive with due regard for the safety of other persons is fully and completely discharged, under the authorities cited, by the sounding of the siren and the displaying of a red light, which factors are admitted in Instruction No. 13.

Third, under the language of the last paragraph of Instruction No. 14, the jury were at liberty to consider defendant's driving in the same light and with no more protection to him than if he had not been driving an emergency vehicle. By this language it is assumed that the defendant was in the same position as the driver of an ordinary vehicle. Nowhere in the statute is any thing said about proper control or proper lookout. If those factors are here involved they must be deemed a part of the general limitation of driving with due regard for the safety of others, and the instruction should have clarified that point.

Fourth, Instruction No. 14 is the only instruction purporting to state the grounds relied upon by plaintiff for a recovery. But the jury were nowhere instructed as to what items of negligence they were limited to in determining whether defendant was liable, unless it be assumed that because the instruction directed a recovery if the jury found defendant guilty of all or either of the

three stated items of negligence, that constituted a limitation. No such assumption is warranted as the jury was also told to find whether defendant drove without regard for the safety of all persons, and further, under the general language of Instruction No. 10, the jury were told that if defendant was negligent, without defining or limiting the items of negligence, plaintiff would be entitled to recover unless he was guilty of contributory negligence. Instruction No. 10 does not limit the jury to the items stated in Instruction No. 14, nor does the latter say that the items there stated are the only items of negligence before the jury. Instruction No. 10, as a mere statement of law, is no doubt correct, but without a restriction anywhere, and especially in No. 14, as to the specific items of negligence involved, the jury were left to find defendant guilty of negligence upon any ground of negligence the jury might find existed.

It is well here to point out again that nowhere did the court submit to the jury the question as to whether defendant drove at an excessive rate of speed, and yet the jury might have concluded that defendant was driving at an excessive rate of speed since the items of negligence were not defined or limited in the instructions. The court must have concluded that the element was not involved notwithstanding the pleadings and the pre-trial order. So that under the statutes above quoted we have as the only limitation upon defendant's driving into the intersection against the red light that he slow down as necessary for the safe operation of the truck and that he

drive with due regard for the safety of all others and not in reckless disregard thereof and as to both of which the evidence shows he fully complied.

(b) POINT NO. 5. FAILURE TO KEEP THE FIRE TRUCK UNDER PROPER CONTROL.

In Instruction No. 14 the court submitted to the jury whether defendant negligently failed to keep his truck under proper control. There is not the slightest evidence anywhere in the record of lack of proper control, as we have heretofore pointed out under Points Nos. 1 and 2. The mere happening of a collision is no evidence of lack of control. The fact that defendant did not see the Oberg car until just before the impact is no evidence of lack of control. The fact that he brought the truck to a stop in a straight line notwithstanding the right tie rod was broken and the steering mechanism was thereby damaged is conclusive proof that he had the truck under proper control. Furthermore, he testified he could have stopped at the north cross walk if the traffic had not stopped for him. The effect of submitting this issue to the jury was to let them speculate, without any evidence, that defendant failed to have the truck under control, or to infer that element from the mere happening of the accident. This was clearly erroneous and prejudicial.

(c) POINT 6. FAILURE TO DRIVE WITH DUE REGARD FOR THE SAFETY OF ALL PERSONS.

The authorities heretofore cited clearly demonstrate that there was no evidence upon which the court could be justified in submitting this issue to the jury. Having dis-

played the red lights and having sounded the siren the defendant had fully complied with the requirement to drive with due regard for the safety of others. Instructing the jury to make a finding on this issue was erroneous and prejudicial.

(d) POINTS NO. 7 and 8. FAILURE TO REDUCE SPEED AS NECESSARY FOR THE SAFE OPERATION OF THE TRUCK.

In the first place the evidence of the four fireman was that the speed of the truck was reduced from 40 to 45 miles per hour to about 25 miles per hour as defendant approached the intersection. It then appeared that the traffic had heard and heeded his approaching warnings, for a car was stopped on the west side and another on the east side of the intersection waiting for him to pass. Neither the testimony of Jensen that it was not apparent that the truck slowed down and that it seemed like it came on at the same rate, nor that of Farnsworth that he did not notice or recall that the speed was reduced, is sufficient to raise a conflict against the fireman's testimony.

But aside from the lack of evidence to warrant submission of this factor, where is the evidence that a slowing down was rendered necessary under the conditions then obtaining? The requirement to slow down is not absolute under the statute. It is only when necessary for the safe operation of the truck. This involves a discretion on the part of the driver. There must be some condition shown that would make it necessary to slow the truck down to provide safe operation. The mere happen-

ing of the accident does not prove that a slowing down was necessary to safely operate the truck. The evidence shows that Oberg's car suddenly and unexpectedly appeared from the opposite side of Nielsen's car into the intersection. The speed of the truck, as testified to, was not so fast as to furnish proof that the truck could not be safely operated. It is common knowledge that the speed testified to was not unusual. The speed given in several of the cases heretofore cited was in most instances as great as is here involved.

Certainly this provision of the statute must apply to the safe operation of the truck as such, and that is the construction the court made of it in its instruction. The requirement that the truck be operated with due regard for the safety of others and not with reckless disregard thereof is covered by the express provisions of sections 41-6-14 and 41-6-76, U.C.A., 1953. The two provisions, therefore, must not be synonymous. This provision that there be a slowing down as necessary certainly must have inherent in its application that conditions exist that would require a slowing down such as someone being already in the intersection with whom a collision is likely or that the fire truck may be so driven that it will not collide with persons or vehicles waiting in obedience to the law.

The wording of this part of this instruction is such that it assumes that in any instance, regardless of the speed shown by the evidence, a reduction of speed must be made or the jury may find negligence. The jury were

not told to find whether under all the conditions shown by the evidence that a slowing down was in fact necessary in this instance to safely operate the truck. Under the instruction as given the jury might very well assume the mere happening of the collision is sufficient proof that the speed was not reduced as was necessary for its safe operation.

As pointed out in Point No. 8, the court furnished the jury with no guide in determining what elements are involved in the failure to slow down. Where must the slowing down take place? Must it continue on into the intersection and to the point of impact? The evidence showed a reduction took place to a point about 125 feet north of the cross walk and then the speed was increased. The jury might very well have believed the defendant slowed down and then accelerated his speed, and yet under the instruction, conclude this was not a compliance with the law. They were left, therefore, to their speculations with a wholly inadequate instruction. Finally, the matter of failing to slow down was not in issue either under the grounds of negligence charged in the complaint or the grounds stated in the pre-trial order. We submit that an allegation of driving at an excessive rate of speed in excess of 35 miles per hour does not raise the issue of whether a slowing down was necessary in order to proceed against the red light. The statute expressly permits a speed in excess of the prima facie speed limits

and in any case it might appear that the existing conditions would make it necessary to slow down even below the statutory speed limit.

POINT NO. 9. FAILURE TO KEEP PROPER LOOKOUT.

The court instructed the jury that if the defendant negligently failed to keep a proper lookout for other vehicles their verdict should be for plaintiff. This submits to the jury the question of proper lookout upon the same basis as if defendant were not driving an emergency vehicle. Nowhere in the statute is anything said about a proper lookout. The standard of care to be exercised by a driver of an emergency vehicle is contained in subdivision 4 (e) of Section 41-6-14 and 41-6-76. Subdivision 4 (e) says that the driver of an emergency vehicle shall drive with due regard for the safety of all persons, the meaning of which we have already established by the authorities heretofore cited. It also says that the statute shall not protect him from the consequences of his reckless disregard for the safety of others. It is apparent that this involves more than the mere negligent failure to observe some traffic rule or rule of care. It involves a reckless disregard. Under the law defendant had the right to assume that persons on the street would heed his warnings and yield the right of way. Because of this he was not required to keep the same attentive lookout as others would be required to give. The statute says he may not recklessly disregard the safety of others. This in itself infers that he will not be liable for what would be mere negligence on the part of the

driver of an ordinary vehicle. An analagous situation is that of a driver and his guest when the former is not liable to the latter for mere negligence but is for a reckless disregard for the guest's safety. We do not say that failure to keep a look out is never involved where the driver of an emergency vehicle is involved; what we say is that the failure to keep a lookout must, under the circumstances involved, amount to a reckless disregard for the safety of others, such as would be involved if the evidence showed that the other car was already in the intersection, plainly visible, or readily discoverable in time for the fireman to stop or otherwise avoid a collision. The evidence would have to be of a character to sustain a finding that he had the last clear chance to avoid the collision.

We submit there is no evidence in this case showing such a lack of proper control as to permit that issue being submitted to the jury. Defendant saw the traffic stopped and waiting for him. There is no evidence whatever that Oberg's car was in such position to be observed and at such a time as would indicate to defendant that Oberg was not heeding his warnings and enable the defendant to avoid the collision. The evidence is all to the contrary. Oberg's car came speeding from behind and past Nielsen's car into the intersection in a flash. The truck being then where it was, the collision was inevitable.

POINT NO. 11. ERROR FOR THE COURT NOT TO INSTRUCT THAT DEFENDANT, HAVING DISPLAYED RED LIGHTS AND SOUNDED THE SIREN, HAD COMPLIED WITH THE LAW.

Defendant by his requested instruction No. 3 asked the court to instruct the jury as follows :

“The fact, if it is a fact, that Mr. Oberg, driver of the car in which plaintiff was riding, did not hear the siren or see the red light in time to stop and yield the right of way, or for any other reason failed to yield the right of way, would not alter the right of the defendant to proceed through the intersection and he would not be liable in this action, unless it should appear from the evidence that the defendant became aware, or in the exercise of due diligence, should have become aware of Oberg’s failure to yield the right of way in time to have permitted defendant to avoid the collision.”

The defendant excepted to the failure of the court to so instruct. All of the foregoing argument leads to the point that the court should have instructed as defendant requested. The evidence was undisputed, as found by the court in Instruction No. 13, that defendant sounded the siren and displayed red lights visible more than 500 feet in front of the fire truck. This was tantamount to a finding that he was driving with due regard to the safety of all others as held by the authorities heretofore cited. There is no showing of a reckless disregard for others. There is no showing that he failed to slow down as was necessary for the safe operation of the truck. He had

fully complied with the statutory conditions upon which his exemption from traffic laws was based. He then had a right to proceed through the red light, unless it should appear from the evidence that defendant became aware, or in the exercise of due care, should have become aware of Oberg's failure to yield the right of way in time to have permitted defendant to avoid the collision, assuming, of course, there was sufficient evidence to submit the last clear chance to the jury.

POINT NO. 12. ERROR FOR THE COURT NOT TO INSTRUCT THE JURY IF COLLISION WAS DUE SOLELY TO OBERG'S NEGLIGENCE DEFENDANT WOULD NOT BE LIABLE.

In requested instruction No. 6, defendant requested as follows:

“If you believe from the evidence that the driver of the car in which plaintiff was riding was negligent under all the conditions shown by the evidence in entering upon the intersection and not stopping or otherwise yielding the right of way to said fire truck, and you further find that the driver of said fire truck was not at fault under the conditions revealed by the evidence, then your verdict must be for the defendant, no cause of action.”

Defendant excepted to the court's failure to so instruct.

We have heretofore argued the proposition that the court should have granted our motion to dismiss and also should have directed a verdict for defendant, one of the

grounds in each case being that the evidence showed that Oberg's negligence was the sole proximate cause of the accident. We are now presenting the point that at the least defendant was entitled to have that issue squarely presented to the jury for its consideration. In Instruction No. 9, the jury were told that the act of one or more persons may work concurrently as the efficient causes of the injury, and each would be regarded as the proximate cause. By Instruction No. 10, the jury were instructed that if defendant's negligence was a proximate cause of the injury he would be liable even though they should also find Oberg was also negligent and such negligence was a proximate cause of plaintiff's injuries. Nowhere were the jury instructed as to the result if Oberg's negligence was the sole proximate cause of plaintiff's injuries. By the court instructing as it did, the jury were permitted to consider only the possible concurrence of defendant's and Oberg's negligence. They were not permitted to consider the eventuality of Oberg's negligence alone being the sole proximate cause, or the effect that such sole proximate cause, would have in relieving defendant of liability. Clearly under the evidence of this case, and in the interest of presenting the case fully and fairly to the jury the defendant was entitled to have his requested instruction, or something similar, given to the jury and the court's refusal constitutes prejudicial error.

POINT NO. 13. THE COURT ERRED IN ADMITTING IN EVIDENCE THE OPINION OF S. S. TAYLOR AS TO THE SPEED OF THE FIRE TRUCK IN ANSWERING HYPOTHETICAL QUESTIONS WITHOUT PROPER FOUNDATION.

The hypothetical questions asked Taylor as to the speed of the fire truck were based entirely upon the observations and testimony of Officer Peterson. It assumed that Officer Peterson had testified as to all the elements necessary so that the hypothetical question would be based in all its parts upon the evidence in the record, for Taylor had no first hand knowledge of these necessary factors.

The hypothetical questions assumed that there were two sets of tire marks, one made by the wheels on one side and the other by the wheels on the other side, running the same direction, having the same characteristics; that the tire marks indicated that the front wheels were locked and sliding from the beginning to the end; that both tire marks were continuous and uninterrupted. Peterson did not so testify. He did not examine the right tire marks, only the left (p. 28, 33). He saw evidence of front wheel tire marks on the left side, but not on the right side (p. 32). He traced the left tire back to the beginning but did not observe where the left front tire took hold, nor could he tell how far the right front tire went. We submit that under this state of the record there was no foundation for the question. It is well to point out too that Taylor in answering the question assumed to

know what the four rear tires looked like as to wear conditions by looking at the 2 front tires in a photo introduced as Exhibit P-1 (p. 184) and as to the nature of the street surface by looking at this same photo.

CONCLUSION

From the foregoing we think it is apparent that the judgment appealed from should be reversed. To hold defendant liable under the evidence in this case would be to place a fireman driving in response to a fire in the same category as the driver of an ordinary vehicle. The statutory exemptions granted him would be a snare rather than a protection in the faithful performance of his duties. Having sounded his siren and having displayed red lights all as required by the statute, and having observed that the traffic at the intersection was standing and waiting for him to pass, he was fully qualified to take advantage of the statutory exemptions granted him to proceed through the intersection. The burden was then upon the plaintiff to show that he proceeded in reckless disregard for the safety of others. Certainly no such recklessness is shown here, where Oberg's car suddenly flashed from behind a waiting car into the intersection in a matter of a split second and when defendant was then already in the intersection rendering the collision inevitable. We submit that the trial court should have granted our motion to dismiss or directed verdict as requested by defendant. A reversal without a new trial should be entered by this court.

Should the court differ with us on the first conclusion, we respectfully submit that a reversal should be entered and a new trial granted upon the errors in the instructions referred to in this brief. These errors were basic and were prejudicial to the defendant.

Respectfully submitted,

E. R. CHRISTENSEN

City Attorney

HOMER HOLMGREN

Assistant City Attorney

GAYLE DEAN HUNT

Assistant City Attorney