

1954

Leonard Bates v. Odell Walker Burns et al : Brief of Plaintiff and Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

LEONARD BATES,

Plaintiff and Appellant,

— vs. —

ODELL WALKER BURNS, and ODELL
WALKER BURNS, FARRELL BURNS
and FRANK D. BURNS, doing business
as a copartnership in the name and style
of BURNS FEED AND SUPPLY COM-
PANY,

Defendants and Respondents.

Case No.
8207

BRIEF OF PLAINTIFF AND APPELLANT

ROBERT MURRAY STEWART
Attorney for Plaintiff-Appellant

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BRIEF OF PLAINTIFF AND APPELLANT

STATEMENT OF CASE

The plaintiff brought this action to recover damages for personal injuries to himself and to property because of the negligence on the part of the defendants. On the 9th day of October, 1952, at around 2 o'clock P.M. at the intersection of Public Highway No. 91 and Highway No. 114, otherwise known as Geneva Road, and on the north side of Highway 91, known as Third West Street in Pleasant Grove, Utah County, Utah, the defendant, Odell Walker Burns, was traveling West on Highway 91 and negligently, carelessly and heedlessly drove defendants' G.M.C. tractor and trailer loaded with twelve tons of coal, a motor vehicle, into the right side of plaintiff's empty 1941 one ton International Pickup truck automo-

bile which the plaintiff was driving North on Highway 114, known also as Geneva Road and as 3rd West Street in Pleasant Grove, Utah. As a result the plaintiff was injured severely. The case was tried to a jury which returned a verdict for damages in favor of the plaintiff in the total amount of \$5,779.50. The verdict reads (omitting the Court and case and title), as follows:

We, the jury impaneled in the above entitled cause, find the issues in favor of the plaintiff and against the defendants jointly and severally and assess plaintiff's damages as follows:

Physical injury, pain and suffering.....	\$ _____
Medical Expenses	\$ 214.50
Loss of earnings during recuperation.....	\$1,000.00
Permanent disability	\$4,000.00
Pickup truck	\$ 565.00
	<hr/>
Total	\$5,779.50
	<hr/>

Dated March 16, 1954.

Signed: Waldo Lamoreaux
Foreman

The Court, notwithstanding the verdict, on motion of defendants, ordered, adjudged and decreed that the verdict and judgment entered therein in favor of the plaintiff be set aside and ordered, adjudged and decreed that judgment be entered in favor of defendants and against the plaintiff, NO CAUSE OF ACTION, and that defendants recover their costs, on the theory that plaintiff was contributorily negligent as a matter of law and that the verdict is against the law.

The plaintiff appeals from the judgment by the Court upon the ground that the Court failed to accept as true in arriving at its decision all the competent evidence in favor of the plaintiff, and further failed to give the plaintiff the benefit of every favorable inference which reasonably could be drawn from such evidence. The court also erred in its interpretation of the evidence, and in arriving at its conclusion included as evidence matters which it had specifically excluded from evidence during the trial of the case. The Court also erred in showing in its judgment a cipher opposite the first item appearing in the verdict of the jury, "Physical injury, pain and suffering" when no such cipher appeared in the original verdict handed in by the jury, thus showing a variance between the actual verdict of the jury and the Court's version of it, and then refusing to delete it although on motion duly requested so to do.

Plaintiff's Exhibit "A", a map or sketch to a scale of 1" equals 25 feet, showing the intersection and surrounding area where the accident occurred, also scale to the map, Exhibit "F" (Tr. 12), were both identified, introduced and received in evidence, excepting therefrom the markings upon the highway on the map Exhibit "A" with respect to distances (Tr. 3 and 8, 9 and 10 excluded the markings). Herbert M. Fehmel, engineer No. 3 for the State Road Commission, testified he drew the map to measurement on a scale 1" equals 25 feet. He also identified the scale to the map or sketch as Exhibit "F" (Tr. 13-14) as also being gauged 1" equals 25 feet. He also testified that where the sight line from the southeast

corner of Highway 114 at the stop sign intersects the center line of Highway 91 in an easterly direction was a distance of 368 feet from the center line of Highway 114 at the scene of the impact in the intersection of the two highways (Tr. 12). Mr. Fehmel further testified that the black markings or lines crossing the center line of Highway 91 were engineering stations 100 feet apart.

Mr. Holdaway testified that he had stopped at the stop sign on the Northwest corner of 3rd North Street in Pleasant Grove (Highway 114) and Highway 91. He marked an "X" on the map to show approximately where the front of his car would be while there (Tr. 15). He testified that he saw the coal truck approaching from the East on Highway 91 at from 40 to 50 miles per hour (Tr. 17). That it passed the front of his car within a few inches (Tr. 18), and that the coal truck was 50 to 75 feet from him when its brakes were first applied.

Plaintiff Bates testified he waited for some minutes at stop sign before entering the intersection of Highway 91 and Highway 114 (Tr. 53). He looked both ways and the road was clear (Tr. 53). He started across Highway 91 at 5 or 6 miles an hour in low gear (Tr. 54). His truck was hit by the defendant's coal truck when he was pretty near across the Highway 91. The defendant's truck was about 150 feet away coming very fast when he saw it. Plaintiff attempted to speed up a little on the last end (Tr. 54). Plaintiff's truck was damaged beyond repair (Tr. 57) and he was injured. Plaintiff Bates and Myrtle C. Bates, his wife, testified concerning plaintiff's injuries. His injuries consisted of a cut on the back of

his head 2½" long (Tr. 59, also Tr. 27). His face was scratched up and was a mass of abrasions (Tr. 54 and 27). A lump about the size of a walnut was raised on his right cheek bone (Tr. 27). He had a lump on his forehead almost as big as an egg (Tr. 27 and 54). His right eye was swollen shut (Tr. 27). His knees were banged up (Tr. 59). He had a sprained shoulder (Tr. 27). His hands were swollen and he could not shut them (Tr. 27). He had 7 fractured ribs (stipulated to by counsel for plaintiff and defendants) (Tr. 29 and 30). Plaintiff had an hemorrhage from the mouth. Plaintiff was unable to do anything and even at the time of the trial was still unable to do anything. Plaintiff's entire body seemed to be affected, his mind is not clear, and his memory is not good. It was excellent before the accident (Tr. 31). He remained in the American Fork Hospital for three days (Tr. 30). Ever since the accident (one year and one half ago) the plaintiff's back has bothered him and his side has bothered him. He has had pains in his side (Tr. 39). Since the accident he drives a truck or car very little. His wife does practically all of the driving (Tr. 38).

Defendant did not see plaintiff until he was right on him (Tr. 45). Defendant stated he saw the plaintiff as he pulled out to start across the highway (Tr. 130). Defendant said he saw the plaintiff when the defendant was 100 feet away (Tr. 130). Plaintiff was quite away from the yellow line when the defendant saw him (Tr. 136). Defendant took it for granted the plaintiff would yield the right of way to him as he figured he was entitled to

it (Tr. 137). Defendant says the plaintiff and defendant were both in the intersection at the same time (Tr. 137). Defendant says he was traveling at 35 miles per hour (Tr. 137).

Dr. Christopherson was going South on Highway 114 and watched the plaintiff proceed across Highway 91 through the rear view mirror of his Packard automobile and saw the plaintiff get nearly across, or approximately two-thirds of the way across, the highway when the coal truck came into his vision (Tr. 97). It was then 20 feet from the point of impact (Tr. 104). He said the impact took place from 6 to 10 feet north of the center line of Highway 91 (Tr. 98). Dr. Christopherson did not stop his car. He was traveling around 30 miles per hour and slowed down to 15 to 20 miles per hour, took his foot off the accelerator and put on the brake just a little (Tr. 99). He did not come to a complete stop but slowed down to 10 miles an hour. He went south 50 yards beyond the stop sign from whence the plaintiff started north before the accident occurred.

Mack Ostergaard, the peace officer for Linden, Utah (Tr. 106) said defendant told him "I did not have a chance. He pulled right in front of me." The defendant said his speed was 35 miles per hour. "His distance from the point—from the distance that he first noticed the danger was 10 to 20 feet—something like that" (Tr. 108-109). "There was another car parked by the other stop sign on the north side of the street, and to avoid hitting one of them he tried to go between the two * * *" (Tr. 108). Ostergaard said Burns knew of the dangerous

intersection (Tr. 109). Mr. Ostergaard placed an "X" in a circle on Exhibit "A" where he saw scuff marks and drew parallel curved lines for 22 feet to represent scuff marks of coal truck. Ostergaard testified that the defendant's truck traveled from the point of impact and passed between the stop sign and telephone pole on the northwest corner of the intersection of Highway 91 and Highway 114 (Third West in Pleasant Grove) into a lot and hitting a shed, a distance of 188 feet. A triangle with a "T" in it on Exhibit "A" illustrates the location of the shack (Tr. 110). (The shack also is shown on Exhibit "A" according to the actual measurements.) The reaction time at 35 miles per hour would be 55 feet. 55 feet plus 22 feet of brake marks would total 77 feet at 35 miles per hour where the defendant saw the plaintiff's truck (Tr. 116 and 117). The average reaction time for the average individual is three-quarters of a second and a truck traveling 35 miles per hour would travel one and one half times the speed per second (Tr. 118).

The foregoing substantially states the case, omitting only such details as do not bear directly on this appeal.

STATEMENT OF POINTS

The appellant will present his case under four points:

POINT ONE

THE COURT FAILED TO ACCEPT AS TRUE ALL OF THE COMPETENT EVIDENCE IN FAVOR OF PLAINTIFF AND TO GIVE TO THE PLAINTIFF THE BENEFIT OF EVERY FAVORABLE INFERENCE WHICH NATURALLY COULD BE DRAWN FROM SUCH EVIDENCE.

POINT TWO

THE COURT ERRED IN ITS INTERPRETATION OF PART OF THE EVIDENCE.

POINT THREE

THE COURT RELIED UPON MATTERS WHICH IT HAD SPECIFICALLY EXCLUDED AS EVIDENCE.

POINT FOUR

INACCURATELY COPYING JURY VERDICT INTO ITS JUDGMENT AND THEN REFUSING TO CORRECT THE ERROR.

ARGUMENT

POINT ONE

THE COURT FAILED TO ACCEPT AS TRUE ALL OF THE COMPETENT EVIDENCE IN FAVOR OF PLAINTIFF AND TO GIVE TO THE PLAINTIFF THE BENEFIT OF EVERY FAVORABLE INFERENCE WHICH NATURALLY COULD BE DRAWN FROM SUCH EVIDENCE.

For the purpose of arriving at a decision of negligence as a matter of law, the Court must take into consideration all the evidence most favorable to the plaintiff, and give to the plaintiff the benefit of every favorable inference which naturally could be drawn from such evidence. See 109 P. 2d 1064 (Wash.) *Fetterman v. Levitch*.

Here are some of the matters the Court must consider. It must take into account that plaintiff's Exhibits "A" and "F" are true and correct, that the plaintiff had traveled north from the stop sign into the intersection of Highway 91 a distance of 125 feet at a speed of approximately 5 miles per hour, and that the defendant was

traveling eastward on Highway 91 at the speed rate of 50 miles per hour in a 40 mile zone (Tr. 17). Giving to the plaintiff the benefit of every favorable inference which naturally could be drawn from such evidence, it means that the defendant was traveling ten times faster than the plaintiff and that the defendant was ten times 125 feet, or a total of 1250 feet, down Highway 91 from the point of impact when the plaintiff started from the stop sign into the intersection. It means that when the plaintiff had traveled 50 feet into the intersection, at the same ratio of ten to one, the defendant was still 750 feet away from the point of impact. Traveling another 50 feet would place the plaintiff north 100 feet from the stop sign on to Highway 91 and at the center of said highway. (Use Exhibits "A" and "F" for location on map.) The defendant would then be 250 feet away from the point of impact. While the plaintiff traveled the last 25 feet, the defendant traveled ten times as far, or 250 feet, to the point where the impact took place. On the basis of this evidence most favorable to the plaintiff, just where on Highway 91 would the impact have taken place? There are certain stationary monuments that lend a certainty to the answer. They are like rabbit tracks in the snow. Note the stop sign on the sketch Exhibit "A" at the northwest corner of the intersection and also the telephone pole slightly to the southwest of it. These two monuments are approximately 10 to 15 feet apart. (See Exhibits "A" and "F") The coal truck of the defendants passed between these two monuments and knocked down a shack in the vacant lot some distance

ahead (Tr. 110). If a sight line were to be drawn from Highway 91 northwestward so that it extended midway between the stop sign and the telephone pole and within inches of the front of the Holdaway car (Tr. 18), one would at once be able to fix the course of the coal truck with a fair degree of accuracy. The stop sign and the telephone pole are visible and stationary. The Holdaway car helps define the course of defendants' truck. They are much like the visible rabbit tracks in the snow. The impact, therefore, would have occurred on what would have been, but for the intersection of Highway 114, on the north shoulder of Highway 91. (Use Exhibits "A" and "F" for location on map.) That would place the front of plaintiff's truck 5 feet over on the north shoulder of Highway 91. Plaintiff's truck is 17 feet long. The upright on the left side of the front bumper on defendant's coal truck struck the right front fender of plaintiff's truck about four or more feet from the front of his truck. (See Exhibits "B", "C", "D" and "E", particularly Exhibit "E".) That simply means that the plaintiff's truck at the time of the impact occupied only the North 12 feet, or thereabouts, of Highway 91 leaving a clearance of 8 feet to the south of plaintiff's truck on the north one half of Highway 91 for defendant's coal truck to pass plaintiff's truck without hitting it and still be mostly in its proper lane. The defendant's truck at its widest point is 8 feet wide. There is no evidence that there was any traffic approaching from the west on Highway 91. In fact, there would be none because the plaintiff had just

crossed that lane and had there been the plaintiff would have seen it.

The defendant was negligent in three particulars: (1) in traveling in excess of the legal speed rate for said district; (2) in failing to keep a proper lookout, and (3) in failing to yield the right of way to the plaintiff who had acquired it by reason of having entered the intersection first and progressed almost through it before the defendant entered it.

1. Had the defendant traveled at a legal rate of 40 miles per hour (Tr. 17), the natural favorable inference drawn from that fact is that the plaintiff would have been clear of the intersection by an additional 25 feet or more. Instead of covering 1250 feet as defendant did, defendant would have traveled only four-fifths of that distance, or 1000 feet. While the defendant would have traveled that last 250 feet at 40 miles per hour, the plaintiff would have traveled further north 31.25 feet through the intersection than he did (5 miles per hour is one-eighth of 40 miles per hour, one eighth of 250 feet is 31.25 feet). (Exhibits "A" and "F" will help to pinpoint plaintiff's position with regard to the intersection.) He would have been completely through it. That would make defendant's excessive speed doubtless the proximate cause of the collision.

2. Had the defendant kept a proper lookout, he could have driven to the rear of plaintiff's truck on Highway 91 and have avoided the accident, or he could have slowed down for plaintiff to clear the intersection. The defendant Burns' testimony as to the point where he first

saw the plaintiff's truck is confusing. He said he first saw the plaintiff's truck at the stop sign and saw it start up when the defendant was 100 feet away (Tr. 130). Later he said he saw it when it was in the intersection before it reached the yellow line (meaning the center line of Highway 91), when he was 100 feet from the point of impact. Of these two conflicting statements plaintiff is entitled to the benefit of the defendant's testimony which is more favorable to the plaintiff, and to every favorable inference which naturally could be drawn from such testimony. Defendant Burns on direct examination says he saw the plaintiff at the stop sign (Tr. 130) :

- A. *I saw this vehicle pulling out to start across the highway* and when I first saw him I thought he saw me and would stop and permit me to pass. As I got closer I could see he wasn't, so I turned to the right as much as I could, but still stay on the highway, and he kept coming. Of course, I ran into him
* * *

That the defendant Burns meant the stop sign at the southeast corner of Highway 114 and Highway 91 where he saw the plaintiff there can be no doubt, for he further says :

- Q. Describe the course that the Bates truck took from the time you first saw him, until the impact occurred, as to whether or not there were any variations in stopping or starting, or anything of that nature.
- A. As near as I could tell, there was no changing or stopping, *other than starting up from the stopped position which he was in.* I don't know whether he gained any speed from the

time he left until he got there or not. It seemed that he drove directly north and did not turn one way or the other.

Later on cross examination the defendant testified to just the opposite effect, namely, that he did not see the plaintiff until the plaintiff was approaching the center line of Highway 91. At transcript 136 plaintiff's counsel asked the defendant:

Q. Why did not you, when you first saw the Bates' truck attempt to stop or slow down?

A. When I first saw him?

Q. Yes.

A. Well, the fact that I didn't stop or slow down is that he was quite a long ways from the yellow or center line of the highway, I took for granted that he would yield the right of way to me which I figured I was entitled to, and I didn't know that he was going to pull on across the highway in front of me.

Defendant knew that this was a dangerous intersection from much prior experience (Tr. 44), and should have driven more cautiously on approaching this intersection. If the defendant had seen the plaintiff's truck starting from the stop sign into the intersection as he testified he did, and that he was then 100 feet from the point of impact, it would be the equivalent of defendant saying that the plaintiff was traveling at a much faster rate of speed than that of the defendant in order that they reach the point of impact at the same time. For defendant's testimony to be true he would have traveled 100 feet while the plaintiff traveled 125 feet which would

make plaintiff's approximate speed one-sixth faster than defendant's, or 58 miles per hour. This is not tenable in the light of all the evidence that the plaintiff was traveling at the rate of 5 or 6 miles per hour, or traveling slowly across the intersection. On the other hand, if the defendant had not seen the plaintiff until he was within 100 feet of the plaintiff when the plaintiff was nearing the center line of Highway 91 in the intersection, the defendant was not only ordinarily negligent, he was grossly negligent, in not seeing him. If the defendant had maintained a proper lookout ahead he could have driven to the rear of plaintiff's truck and thus have avoided the accident.

3. The defendant failed to yield the right of way to the plaintiff after the plaintiff had clearly acquired it by reason of his having entered the intersection first and having progressed nearly across it.

Utah Code Annotated 1943, 57-7-138. Vehicles entering a through highway. — The driver of a vehicle shall stop as required by this act at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to the vehicle so proceeding into or across the through highway. See also 58 A.L.R. 1197 and 81 A.L.R. 185.

The defendant testified (Tr. 137): “* * * I took for

granted that he [meaning the plaintiff] would yield the right of way to me which I figured I was entitled to, and I didn't know that he was going to pull on across the highway in front of me." Referring to the point 125 feet north on Highway 91 from the point where the plaintiff started into the intersection would place the front of plaintiff's truck 5 feet north beyond what would ordinarily be the north edge of the northwest bound traffic lane of Highway 91. The defendants' coal truck would have to have been driven clear across the northwest bound lane of Highway 91 which is 20 feet wide (See Exhibits "A" and "F") and on to what would ordinarily be the shoulder of the road but for the intersection itself. This is to say, that the defendant went completely out of his course of travel and followed the plaintiff on to the north shoulder in order for the impact to take place at the point of the north shoulder of Highway 91 where it actually took place. Defendant's course gave the plaintiff no opportunity to avoid the impact of defendant's truck. Plaintiff had one of four decisions to make. First, he had the alternative of stopping. Traveling at the rate of five miles per hour before plaintiff could even apply his foot to the brake he would have traveled several feet, which would have placed him directly in the course of the defendants' truck. Second, he could not turn to the right because he would be turning directly into the oncoming coal truck of the defendants. Third, he could not make a left angle turn; it must be turned on a curve. It will be recalled that the Holdaway car was stopped at the stop sign on the northwest corner of Highway 114 and High-

way 91 and by turning to his left the plaintiff would have crashed into the Holdaway car. The only other alternative that was left to plaintiff was to attempt to speed up to avoid the coal truck crashing into his truck. That is exactly what the plaintiff did (Tr. 54), and that is what any ordinary prudent man would have done under like and similar circumstances. That is exactly what a jury of eight intelligent men concluded after they had carefully listened to all of the testimony and weighed all of the evidence in the case. (See jury verdict.) They brought in a verdict for the plaintiff.

Defendant was clearly in the wrong in assuming that he had the right of way regardless of the location of plaintiff's truck already in the right of way, for the plaintiff had preempted it for three reasons: First, by his having entered into the intersection long before the defendant was close to it, (1250 feet away), and second, by having traveled into the intersection so far that to all intents and purposes, he was pretty well across it before the defendant could reach the intersection, and third, that the plaintiff, until the defendant's coal truck had approached near enough to the intersection, could not ascertain what was in the defendant's mind, i.e., whether the defendant would continue forward and pass behind plaintiff's truck; whether defendant would slow down; or whether the defendant had seen the plaintiff in the middle of the intersection, or just what was in the defendant's mind.

The Utah case of *Conklin v. Walsh*, 193 P. 2nd 439, is an intersection case. The facts are somewhat analogous

to those of our case. Defendant A. H. Walsh Plumbing Co.'s truck was being driven east on South Temple Street in Salt Lake City, Utah, an arterial highway, at a rate of speed somewhat between 35 to 45 miles per hour. The plaintiff Conklin's car was being driven south on "O" Street and crossing East South Temple Street at a rate of 10 to 15 miles per hour. The defendant saw the plaintiff's car start just north of the stop sign to cross South Temple Street when defendant was one-quarter of a block away. Defendant then looked to the right or south and did not again look to the north until the plaintiff was almost in front of him. The collision occurred and plaintiff sued for damages.

The Court will take judicial notice that the blocks on the south side of South Temple Street in Salt Lake City are 10 acres and the distance from Ninth East to Tenth East is 40 rods or 660 feet. One-quarter of a block would be one-fourth of 660 feet, or 165 feet. In other words, defendant was 165 feet away from the intersection when the plaintiff was about to enter the intersection of "O" Street and South Temple Street. The Court held that the defendant was guilty of negligence as a matter of law for his failure to see the plaintiff's automobile in time to avoid the accident. The Court said:

"The duty to keep a proper lookout applies as well to the favored as to the disfavored driver. Neither driver can excuse his own failure to observe because the other driver failed in his duty. Neither driver is at any time to be excused for want of vigilance or failure to see what is plain to be seen. Drivers are permitted to cross over

arterial highways after having stopped. True, they must yield the right of way to cars which are close enough to constitute an immediate hazard. The rule, however, required the exercise of some judgment. There is still a duty on the part of the driver traveling the arterial highway to remain reasonably alert to the possibility of the disfavored driver starting across the intersection in the belief that he can cross in safety."

The facts in our case and the *Conklin v. Walsh* case are parallel in the following particulars:

Both accidents took place at an intersection where one highway was an arterial highway. The defendant in each case was driving on the arterial highway. Both defendants were favored and both plaintiffs were disfavored drivers. Both plaintiffs had entered the intersection first. Both plaintiffs' cars were struck by the cars of the defendants, and both plaintiffs suffered damages from the collisions which followed.

In our case the defendants' coal truck was 750 feet away, or thereabouts, from the intersection when plaintiff entered it. In the *Conklin v. Walsh* case, the defendant Walsh was only 165 feet, or thereabouts, away from the intersection when the plaintiff entered. In our case the plaintiff was more than one-half way through the intersection when he observed the defendants' truck approaching from his right 150 feet away and speeded up to get through the intersection in order to avoid being hit by the defendants' truck (Tr. 54). In the *Conklin v. Walsh* case the plaintiff did not see the defendant's truck at all. In our case the defendant saw the plaintiff's car

in intersection when he was 100 feet away from it and plaintiff was near the middle of intersection. In *Conklin v. Walsh*, the defendant did not see the plaintiff's car in the intersection at all until it was too late to avoid the collision. In our case defendant followed plaintiff's truck to his right and struck it at a point which would be 5 feet beyond the traveled part of Highway 91 and on to the shoulder of the road. There is another fact in our case which is not present in the *Conklin v. Walsh* case, viz: there were skid marks on Highway 91 of defendants' coal truck for a distance of 22 feet to the point of collision. Traveling at 50 miles per hour the reaction time of the defendant would be around 55 feet. That would make it a total of 77 feet from the point of the collision when defendant first saw the plaintiff in the intersection instead of 100 feet as testified to by the defendant. Considering the respective positions of the two trucks, plaintiff's and defendants', defendant under the circumstances could not have kept a proper lookout. There simply would not have been sufficient time to have done so under the circumstances. There are then the statements of the defendant (Tr. 34) to Mrs. Myrtle Bates: "I didn't see him until just before I hit him," and to Mrs. Hilda Pulley (Tr. 45) "* * * didn't see him, until he was right onto him, and he applied his brakes, but it was too late."

It is clearly evident that defendant Burns did not act reasonably alert so as to yield the right of way to the plaintiff who had established his prior right to it by reason of his having entered it first and having traveled practically through it. The rules announced in the *Conk-*

lin v. Walsh case applied to the facts in our case would require overruling the Court's decision and reinstating the verdict of the jury.

With all of the conflict in testimony in our case it was surely a case for the jury to decide.

Reference is made to the Utah case of *Martin v. Stevens*, 243 P. 2nd 747, decided in 1952, which is also an intersection case, and the cases cited therein. In the *Martin v. Stevens* case the plaintiff's automobile was struck in the middle by defendant's automobile at intersection of 18th East and Stratford Avenue, Salt Lake City, Utah. There was no stop sign at this intersection and neither street was an arterial highway. Defendant was traveling at 35 miles per hour in a 25 mile per hour zone. Plaintiff had entered intersection first. Other facts too detailed to include in this brief resulted in a decision by the District Court in favor of defendant on theory that plaintiff was contributorily negligent. On appeal the Supreme Court held that whether the plaintiff had been guilty of contributory negligence in not seeing and avoiding effects of defendant's negligence, and if so, whether such failure was proximate cause of the collision, were questions for the jury. In the course of the opinion (Sylibus 4) the Court among other things said, quoting from 2 Blashfield Cyclopedia of Automobile Law and Practice, Perm. Ed. Sec. 991 to 994 inclusive, pp. 206 et seq: "* * * The second rule is easier to apply and therefore more satisfactory, that is: * * * This rule has been called the basic law governing operation of vehicles at street intersections." The Court then said: "Necessity

dictates that this rule governs unless one vehicle is enough ahead of the other in entering the intersection to assure him a clear margin of safety." In our case the plaintiff had the right of way. He approached and entered the intersection so far ahead of the defendant that no doubt could arise as to which had the right of way on that basis. In *Sylibus 7* the Court said, among other things, that plaintiff: "* * * was not obliged to anticipate either that other drivers would drive negligently, nor fail to accord him his right of way, until in the exercise of due care, he observed, or should have observed, something to warn him that the other driver was driving negligently or would fail to accord him his right of way." (For the same rule of law see *Hess v. Robinson*, 109 Utah 60, 163 P. 2nd 510.) The question is truly for the jury to decide as plaintiff observed the defendants' truck when it was 150 feet down the highway. At this point, when he was over half way across the highway, defendant apparently had not seen plaintiff in the intersection, and was making no attempt to slow down in order to avoid a collision. Plaintiff then tried to speed up and to avoid the accident and defendant followed in the direction that the plaintiff was going instead of trying to pass to plaintiff's rear and thus avoid the collision.

In the case of *Lowder v. Holley, Utah*, 233 P. 2nd 350, plaintiff failed to observe defendant's vehicle approaching from the right and defendant was 250 feet away. (Our case defendant was 750 feet away when plaintiff entered the intersection.) The Court held that whether plaintiff's failure to see defendant's approach was negli-

gence was a question of fact for the jury. So also our case should be a question of fact for the jury. The Court also observed that had plaintiff seen the defendant it could be found to be within his duty of due care to assume that the defendant would yield the right of way.

The case of *Poulson v. Manness, Utah*, 241 P. 2nd 152, presented the question of whether plaintiff's failure to look again after he had looked to his right and left before starting into the intersection and no traffic was in sight for a distance of 400 feet (his visibility sight distance), and was struck constituted negligence and also whether such negligence proximately contributed to cause the collision, was held to have been properly submitted to the jury. See also *Hardman v. Thurman*, 239 P. 2d 215, and *Nielson v. Mauchley*, 202 P. 2nd 547, for application of the same rule.

POINT TWO

THE COURT ERRED IN ITS INTERPRETATION OF PART OF THE EVIDENCE.

Plaintiff's Exhibit "A" is a map or sketch drawn to a scale of 1" equals 25 feet, covering the intersection of Highways 91 and 114 and surrounding area. It was admitted in evidence "excepting as to markings upon the highway with respect to distances and locations, and the possible change in respect to one corner of the intersection, which are not received in evidence at this time, without their being supported by the record." (Tr.3).

The markings on the highway with respect to dis-

tances and locations have reference to the red sight distance line extending easterly from stop sign at southeast corner of Highway 114, the distance line in green shown on Highway 91, and the figures shown upon it. It will be noted on Exhibit "A" that the line shown on Highway 91 is broken up into three parts and the figures showing the distances in feet from left to right are the following: 45', 52' and 268'. Adding these figures together they total 365 feet, which would represent the total linear feet from the sight distance point on Highway 91 to the point of impact. Since these figures were not admitted in evidence they can have no bearing on the outcome of the case, excepting only that they might later be supported by the evidence (Tr. 3). The figures were not later supported by the evidence but the sight distance line was later supported by the evidence (Tr. 9 and 10). The distance from the intersection of the sight distance line on Highway 91 to the approximate center of Geneva Road (Highway 114) is 368 feet (Tr. 12). A scale, Exhibit "F", corresponding to the map, 25 feet to the inch, was introduced and received in evidence (Tr. 12 and 13).

The Court apparently became confused as to the actual testimony on this point. In its memorandum decision at page 3 the Court says: "As shown on plaintiff's Exhibit "A" a line drawn from the stop sign eastwardly past the first obstruction to visibility, gave him an unobstructed view up the highway for 268 feet." Also further on on page 3 of its memorandum decision the Court refers to the sight distance as being 268 feet. The testimony and the fact are that the distance is 368 feet, a hundred feet

further down the highway. Not only does the testimony establish this fact (Tr. 12), but by using the scale, Exhibit "F" and applying it to the map, the distance may readily be established. The map Exhibit "A" and the scale Exhibit "F" are both in evidence. In this instance the Court in interpreting the testimony did not give plaintiff the benefit of all of the competent evidence most favorable to plaintiff, but actually accepted as evidence a distance figure of 268 feet that was contrary to the evidence and certainly less favorable to plaintiff than the actual figure of 368 feet. It was less favorable to plaintiff for the reason that plaintiff could see further down Highway 91 before leaving the stop sign at the southeast corner of Highway 114. If no traffic were in view he would naturally have more time in which to cross the intersection. He would not have to "race" in order to cross over. Had the sight distance been 100 feet less crossing would have been considerably more hazardous and would have put plaintiff on notice that he must proceed even more cautiously.

It should also be borne in mind that the figure 268 shown on the map Exhibit "A" was excluded from evidence and never thereafter supplied during the trial. From the actual testimony of 368 feet and the excluded testimony of 268 feet, the inference to be drawn from the 368 feet would certainly be more favorable to plaintiff than the 268 feet.

POINT THREE

THE COURT RELIED UPON MATTERS WHICH IT HAD SPECIFICALLY EXCLUDED AS EVIDENCE.

In its memorandum decision the Court referred to and relied upon matters that were actually excluded as evidence and not part of the testimony.

At the bottom of page one of its memorandum decision and the top of page two the Court says:

“He was well acquainted with this intersection, knew it was a very busy way and had to wait at times for as much as fifteen minutes for traffic to clear.”

On page three of the memorandum decision the Court emphasized further that it relied on excluded testimony for it again said:

“* * * traveling through an intersection which he knew to be so busy that he had to wait as much as fifteen minutes on previous occasions for traffic to clear * * *”

Attention is now directed to the actual testimony on this point and the Court's ruling thereon. On page 52 of the transcript of the testimony, Leonard Bates, the plaintiff, was asked on direct examination by Mr. Stewart:

Q. Now can you tell me the experience you had in crossing the highway?

MR. HANSEN: We object to that, your Honor, as being incompetent, irrelevant, and immaterial, what happened before that time. I don't think it is material or relevant, your Honor.

THE COURT: Well, I am wondering about this, Mr. Stewart. I hardly get the point on it. Will you tell me what you claim for it?

MR. STEWART: Yes, your Honor. I expect to show that 91 is a busy highway, and that he

had occasion to cross it daily, at least twice, and that he knew of that situation, and I expect to show that on many occasions he had waited as long as fifteen minutes to get an opening to cross that highway. And I expect to show that on this occasion of the accident, he was five minutes waiting there, or approximately that, before he started to cross the highway.

THE COURT: Now let me have the question again, will you please, Mr. Reporter?

(Question read.)

THE COURT: Don't you think your question is pretty general to arrive at that, Mr. Stewart?

MR. STEWART: It may be.

On transcript 53, continuing:

THE COURT: I think it is, that he can describe tipping his hat to a lady, and be just as much in answer. It would be immaterial.

The plaintiff actually testified that highway 91 was not always so busy with traffic. Continuing the testimony (Tr. 53).

MR. STEWART: Q. State if you had any difficulty in crossing the highway?

A. No, I never had.

Q. Was there much traffic there?

MR. HANSEN: On which day?

MR. STEWART: Any day.

A. Well, sometimes, there was quite a lot of traffic, and on other times you can go and you wouldn't hardly strike any. Now you can take it coming from the north, and it is lots easier to get across, coming back with a load, be-

cause you see back down the highway further.”

It is plainly evident that the Court was confused, if not wholly mislead, by giving consideration to matters not actually in evidence. Plaintiff’s answer to the question above clearly shows that only on special occasions did he have to wait long. The fifteen minute wait not in evidence evidently unduly exaggerated the amount of traffic at this intersection in the mind of the Court and doubtless played an important part in its conclusion, otherwise why the repetition of the excluded tender of testimony in its memorandum decision?

Most certainly the inference to be drawn from the consideration of the excluded testimony was less favorable to plaintiff than if it had never been relied upon by the Court.

POINT FOUR

INACCURATELY COPYING JURY VERDICT INTO ITS JUDGMENT AND THEN REFUSING TO CORRECT THE ERROR.

The essential part of the jury verdict, omitting the Court and cause for economy of space, reads:

We, the jury impanelled in the above entitled cause, find the issues in favor of the plaintiff and against the defendants jointly and severally and assess plaintiff’s damages as follows:

Physical injury, pain and suffering.....	\$	
Medical Expenses	\$	214.50
Loss of earnings during recuperation.....	\$1,000.00	
Permanent disability	\$4,000.00	
Pickup truck	\$	565.00
<hr/>		
Total	\$5,779.50	
Dated March 16, 1954		

(s) Waldo Lamoreaux
Foreman.

The judgment entered by the Court supplied a cipher in the verdict opposite the first item "Physical injury, pain and suffering" thus \$ 0, so that the judgment of the Court reads:

Physical injury, pain and suffering.....	\$	0
Medical Expenses	\$	214.50
Loss of earnings during recuperation.....	\$1,000.00	
Permanent disability	\$4,000.00	
Damage to Pickup truck.....	\$	565.00
<hr/>		
Total	\$5,779.50	

On April 23, 1954, the plaintiff filed Notice of Motion to be heard on April 30, 1954, and it was duly argued on said date, among other things, that the judgment is contrary to the verdict rendered by the jury in said matter. In its argument the counsel for plaintiff pointed out to the Court that the judgment showed a cipher opposite the item "Physical injury, pain and suffering" which the verdict did not show and that this variance between the judgment and the verdict was in error and did not truly represent the verdict. To this matter the Court concluded that the verdict without the cipher and the judg-

ment showing a cipher were one and the same thing, that they both meant the same thing. The court erred in not correcting this discrepancy for the reason that without the cipher in the verdict it could be inferred that the jury had inadvertently overlooked this item, whereas with the cipher added it leaves no room for doubt that the jury actually concluded that the plaintiff had suffered no physical injury, pain and suffering. If the plaintiff had suffered no injury, pain and suffering he would hardly be entitled to recover damages for permanent disability, which is to say that if there were no injury there could be no disability, permanent or otherwise. There was actual injury, pain and suffering, amply testified to and stipulated to as shown by the transcript, hereinafter more specifically referred to, so the insertion of the cipher was truly a vital misrepresentation.

Concerning the plaintiff having suffered physical injury, pain and suffering, Mrs. Myrtle Bates, plaintiff's wife, testified (Tr. 27 et. seq.) that plaintiff had a cut 2½" long across the back of his head requiring four or five stitches; a lump about the size of a walnut on his right cheek bone; a lump about the size of an egg on his forehead at the hair line; his right eye swollen shut, his face swollen; his face a mass of abrasions; a sprained shoulder; his knee swollen and cut, as were his legs in different places and bruised and scraped; his hands were swollen and he could not shut them; he had seven fractured ribs and a punctured liver.

It was stipulated by counsel for plaintiff and defendant that plaintiff had seven ribs fractured (Tr. 29 and

30) and the Court stated the stipulation to the jury in the following words: "The Court: And the jury may accept that stipulation as facts established in the case." (Tr. 30).

Mrs. Bates testified that plaintiff's memory has not been nearly so good since the accident as it was prior thereto (Tr. 31), and Mrs. Hilda Pulley testified about plaintiff's memory to the same effect (Tr. 45). Also Leonard Bates, the plaintiff (Tr. 63).

From the foregoing the jury, if it found for the plaintiff at all, must find that the plaintiff had suffered physical injury, pain and suffering. It is inescapable that the omission of any figure opposite that item in its verdict was due to oversight and not with deliberate intention to ignore the item. The cipher added by the Court in its judgment is clearly in error and the Court's refusal to delete the cipher when it was timely called to its attention was likewise error.

On the other hand, the defendant has not been injured by the oversight of the jury in failing to make an award of damages to plaintiff specifically for physical injury, pain and suffering. Defendant has suffered no financial or pecuniary loss on account of the omission. The only one to be hurt by this omission is the plaintiff. Plaintiff is satisfied with the amount set out in the verdict and does not raise the question as to the adequacy of the verdict. For the sake of accuracy and fairness plaintiff desires the judgment to reflect the true fact in the judgment on file so that no advantage may be forfeited or disadvantage suffered as a result of his failure

to point out the discrepancy at this time and to have it corrected.

The substance of the verdict is an award of \$5,-779.50 in favor of the plaintiff. The failure by the jury to supply figures opposite each item set out in the verdict by the jury goes only to form and not to substance.

In 53 Am. Juris., Sec. 1054 p. 730 we read:

“Where the jury by their verdict for plaintiff implicitly finds facts from which the law presumes that general damages follow, so that a cause of action for actual or compensatory damages is conclusively established, the fact that the verdict is for exemplary damages only is an error in form and not of substance and is not grounds for reversal. Under such circumstances it will be regarded as a general verdict covering all damages, both actual and punitive.”

CONCLUSION

It is the sole prerogative of the jury to determine questions of fact where reasonable minds might differ as to the conclusions reached. Different factors to be taken into consideration and determined were speed of defendants' truck, speed of plaintiff's truck, exact point of impact, obstructions to vision of plaintiff to the east from Highway 114, whether plaintiff or defendant, or either of them, kept a proper lookout, and whether the failure of either so to do, and which one, was the proximate cause of the accident.

It is earnestly contended by the plaintiff that the trial court was wrong in its determination that the plaintiff was contributorily negligent as a matter of law, and

that his negligence, if any, was the proximate cause of the injury and damage suffered by the plaintiff. The judgment of the trial court should be set aside and the jury verdict in favor of the plaintiff be permitted to stand.

Respectfully submitted,

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Received copies of the foregoing brief this
 day of July, 1954.

Stewart, Cannon & Hanson

By.....
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