

1955

Joseph V. Gittens v. Royce Lundberg : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH W. GITTENS,

Plaintiff and Appellant,

-VS-

ROYCE LUNDBERG,

Defendant and Respondent.

MAR 11 1955

Case No.

8295

BRIEF OF APPELLANT

Appeal from the District Court of the
First Judicial District of the State
of Utah, in and for the County of Cache,
Utah

Honorable Lewis Jones, District Judge.

Harvey A. Sjostrom,
Attorney for Plaintiff
and Appellant.

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IN THE SUPREME COURT OF THE STATE
OF UTAH

JOSEPH W. GITTENS,

Plaintiff and Appellant,

-vs-

ROYCE LUNDBERG,

Defendant and Respondent.

)
)
) Case
)
) No. 8295
)
)

PRELIMINARY STATEMENT

This is an appeal from a Judgment on the verdict in the defendant's favor, rendered in a suit for damages brought by Joseph W. Gittens against Royce Lundberg.

Plaintiff alleges that defendant was negligent in various ways in a collision at Smithfield, Utah, between a car driven by defendant and plaintiff as a pedestrian, at an intersection in said town and where plaintiff suffered

great bodily injury proximately caused by said negligence. Defendant denies any negligence on his part and alleges that if any damages were suffered by plaintiff such damages were caused by or contributed to by the negligence of plaintiff.

STATEMENT OF FACTS

The pertinent facts in this case are substantially as follows: Plaintiff, who lives about $2\frac{1}{2}$ blocks west of Main Street at First South and on the north side of First South in Smithfield, Utah, was on his way to obtain a water tap from the Anderson Lumber Co., whose place of business is on North Main in said city. This was about 6:30 or 6:45 P.M. on February 27, 1953 and it was growing dark. Leaving his home, which is $2\frac{1}{2}$ blocks west of the place

of accident and on the north side of said First South (Tr. 92), he walked 1 block east on the north side of First South to the first intersection, then crossed the street to the south side of street where there was a pavement walk. (Tr. 93) The reason he assigns for crossing First South Street at 2nd West though he would have to go north again on Main Street to reach Anderson Lumber Co., was because the north side "is pretty rough and a lot of ditches" (Tr. 94) which is not disputed. None of the foregoing statements are disputed by the defendant. Between First and Second West he met a Mr. Norman Scowthers going west on the south sidewalk of First South. Reaching the sidewalk at the corner of First South and Main Street plaintiff looked both

ways (that is north and south) (Tr.94) and stepped out into street (Tr. 94). He had seen what turned out to be the car that defendant was driving two times before the last time he looked, once when the car was approximately three quarters of a block away and the 2nd time when it was about one half block away. The third time he saw the car, the car was getting closer than he had figured (Tr. 94) and he stepped as fast as he could to the center line of Main Street where he was struck. (Tr.95) Detailing further in regard to walking east on the south side of First South the first time he looked and saw defendant's car was when he had reached the sidewalk at First South and he judged said car to be approximately three quarters of a block north of him

and that as he started into the street the car was approximately one half block away. (Tr. 110) The last time he saw the car it was coming through the north crosswalk and when he was about 6 or 8 feet from the center of the road (Tr. 114) he stepped up fast in order to avoid being struck but was struck as heretofore noted. Defendant's car appeared to be in the east lane at approximately the 3/4 block and 1/2 block points. (Tr. 115)

At this time it should be mentioned that Main Street, running north and south at the place of accident, was 90 feet wide which consisted of 20 feet from curb to westernmost part of cement, 12 feet each for the two westernmost lanes going south. (Tr. 150) First South is 60 feet wide. (Tr. 166)

Witness Miller, testifying for the plaintiff, said he saw plaintiff walk on south side of said intersection in a easterly direction and get just past middle of south bound lane when he started to move faster, throwing an arm up and "acted as if he was blinded by lights". (Tr. 77, 78) After accident Miller observed plaintiff near double line. (Tr. 86) Officer Lowe arrived very late at scene. (Tr. 87)

Before going to trial, counsel for plaintiff informed defendant's counsel that on Sunday following the accident that defendant had called at plaintiff's home and by way of admission of liability, among other things had said that the car carried insurance. At the trial it was agreed by court and counsel that Mrs. Gittens, the wife

of the plaintiff, and whom had heard said remark of liability by defendant should out of the presence of the jury, give the substance of the remark by defendant so the Court might judge of its admissibility. This was done (Tr. 134) The Court ruled that such testimony was inadmissible to show an admission. (Tr. 139, 214)

Mrs. Gittens testified in open court that defendant came to her residence on Sunday following the accident and said that he was late in leaving work that day and was in a hurry to get home as his wife had an appointment to go to club and he was to tend the babies. (Tr. 139, 140)

Dr. Robert Budge, testifying for plaintiff, said that when he arrived at the scene of accident plaintiff was lying about 3 feet west of the center

line. (Tr. 66) And that he had multiple fractures of the ribs and had spinal shock. (Tr. 67) He could not say that Gittens was intoxicated (Tr. 69) as he was in shock.

Theodore D. Birch, testifying for the plaintiff, said that he was driver of the ambulance from Logan to Smithfield and that he found Mr. Gittens lying "just on the west side of the double line". (Tr. 127)

An examination by Dr. Edwin C. Budge showed that Plaintiff's second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh ribs were fractured on left side; the second, third, fourth and fifth ribs on the right side and that a rib on the left side had punctured his left lung. There were also other injuries. (Tr. 152, 154)

Testimony on part of defendant and his witnesses was substantially as follows: First as to the defendant: That he left his place of employment which is on Main Street and somewhat north of the place of accident about 7 P.M. or a little prior thereto to go to his home located one block south and $\frac{1}{2}$ block east of the place of collision on the day in question. That he had been called upon to stay about an hour over the usual quitting time because of an emergency. He got in the car, turned on his lights and went south in westernmost lane of travel. When he got between Center Street and First South there was oncoming traffic and he dimmed his lights. (Tr. 147, 148) "As I got down to the intersection, pretty near thru, well, this man darted out

from the graveled portion of the road and onto the highway. And I imagine he was ten or fifteen feet, but it seemed like I could reach out and touch him, and in the first instance I thought of just turning sharply to the left to miss him, and as I done that I applied my brakes and as I kept coming around, well, he just kept running in front of me and he hit me right in the front fender. I went over to the center of highway and stopped as quick as I could. I went back to look to see what I had done." (Tr. 148) "As I seen him he looked so darn close the only thing I could think about was missing him." (Tr. 159) That he hit him with his right front fender and at same time was going between 20 and 25 miles per hour. (Tr. 160) At trial as well as at time

of his deposition he testified he did not see plaintiff until within 6 to 10 feet away and Gittens was within crosswalk and that Gittens was 2 or 3 feet west of pavement when he first saw him. When he first saw Gittens, he was just running. The right front headlight and top of windshield hit Gittens. (Tr. 162, 163, 164) That there was an arc light at the southwest corner of intersection where accident occurred. (Tr. 165) And oncoming cars from the south glared in his eyes hindering him from seeing plaintiff. (Tr. 166, 167) The oncoming lights first bothered him a couple of hundred feet north of intersection. That in fact he didn't know why he did not see Mr. Gittens until Gittens got within 2 or 3 feet away from pavement. (Tr. 169)

Mr. L.O. Lowe, the marshall of Smithfield, testifying for the defendant said he arrived at scene of accident about 7 P.M. (Tr. 174) That when he got there, there was a lot of people and Dr. Budge was there. That the ambulance arrived immediately after he arrived at the scene. (Tr. 176) The impact occurred on the south boundary of the cross walk. (Tr. 178) The body was lying near the center of the two west lanes. (Tr. 179, 180) That the skid marks started 21 feet north from where body was lying and continued for 22 feet after that point so the marshall testified and was able to assist on these points as well as others by defendant's attorney. (Tr. 180, 181) Officer Lowe was permitted to testify as to the speed of car without any proper qualifications

whatsoever. (Tr. 181, 182, 183, 184)

On cross examination Mr. Lowe testified that he sent an exact copy of the accident report he had in court to the State. (Tr. 185) That he put on the report he sent to the State office that it was 21 feet north of impact where defendant first observed danger. (Tr. 186) That he has known defendant all his life and is acquainted with his parents. (Tr. 189) That he was going north on Main Street, north of place of accident when he was informed of the accident. (Tr. 189, 190) He directed the traffic mostly west of the body. (Tr. 192) He would not say that he had not told a son of the plaintiff that plaintiff was lying in center of road. (Tr. 195) He did not talk to defendant in making out his

report. (Tr. 195) That he had never talked to the defendant about the accident nor defendant to him. (Tr. 199) Mr. Lowe in the afternoon hearing produced what he said was the original exact report sent to the State office. (P. ex. 3) (Tr. 215) The photostatic copy of what Mr. Lowe sent in was at substantial variance with the report he produced in court in several particulars and at variance with what he had testified to. (P. ex. 4) He testified and the report he retained showed he arrived at scene at 7 P. M. (P. ex. 3) The photostatic copy showed 7:30 P. M. Further, on photostatic copy Mr. Lowe has 6 ft. as the distance danger was first observed. His testimony at trial was 21 feet in that regard and the same was shown on his so-called "original"

(Tr. 216, 217) On the copy he sent in he had no traffic lanes but on the "original" he had 2 lanes on west side of street. On none of the reports does it show that he got defendant's version of accident, yet on each report it shows defendant had 16 years driving experience as also drivers license number.

(Tr. 218) On the copy he gave to Mrs. Gittens sometime after the accident only one traffic lane was shown on it the same as the one sent in to State.

(P. ex. 5) On both photostatic copy and the one given to Mrs. Gittens the car shows no left swing until it got to south cross-walk. (P. ex. 4 and 5)

On page 222 Mr. Lowe tries to explain the variance as probably being a mistake of the clerk in his office in the use of the typewriter but the figures

written in or all the said exhibits are his. (Tr. 222, 224) No skid marks are shown on any of the "reports". On so-called "original" nothing appears how the accident happened. On photostatic copy he says "car going south on highway no. 91. Pedestrian going east on First South, stepped in front of car". The photostatic copy also shows report as being dated 3/3/53. On original there is nothing as to this matter.

A Mr. Dee Moor testified for the defendant but there is nothing in his testimony to show where the body was lying in regards to the southbound lanes. (Tr. 225, 229)

Nathan Thornley testified for the defendant saying that he with one Cliff Simpson was sitting in Simpson's car

about 40 feet south of the said intersection and on the east side of street. The car was pointed north. That he observed two cars coming south in the west lane. (Tr. 229, 230) "The first thing I heard was that of brakes squeaking and he hit something, I looked out there and Mr. Gittens was in the road." The car went southeast about 40 feet. (Tr. 230, 231) That he has never talked the matter over with anyone. (Tr. 233) That he never talked with Mrs. Gittens and told her that Mr. Gittens was lying in the center of the road. (Tr. 234) Nothing is said by this witness as to observing any skid marks.

Mr. Ralph Chadwick, another witness for the defendant testified in substance: That he left work in a store in Smith-

field about ten minutes to 7. That he got in his car, stopped it at Center and Main and after allowing defendant to pass in a southerly direction and in west lane (Tr. 237) followed him in the said west lane. That he saw defendant swerve violently to the left. That he himself turned off the highway in order to miss Mr. Gittens. That he stopped his car and by the time he got to where Gittens was lying someone had gone to phone. (Tr. 235, 236) Chadwick did not see anyone at intersection before he saw Gittens lying in road. That defendant started to swerve about the middle of the intersection. (Tr. 239) There was a light on the corner. (Tr. 240) That he talked to the sheriff about the accident the next morning and offered himself as a witness. (Tr. 241)

On cross-examination Mr. Chadwick admitted that he gave a written statement for a certain Mr. Neal about five days after the accident in which he said among other things that "the body was lying in the middle of the road" (Tr.243) That he stopped his car about 15 or 20 feet south of the intersection and by the time he got to Mr. Gittens there were several people there. (Tr. 247) That he did not see the impact. (Tr.251)

Plaintiff in rebuttal called his son, Leuallyn, who testified in substance that the morning after the accident he called on Marshall Lowe who drew a map for him and pointed out to him that his father was lying in the middle of the road. (Tr. 259)

Mrs. Gittens was also called for plaintiff's rebuttal and she testified

in substance that she called Mr. Nathan Thornley about two weeks after the accident and he said Gittens was lying in the center of the road. (Tr. 232)

During the trial there was testimony as to whether Mr. Gittens was under the influence of beer, but there is no evidence that at time of accident he was under its influence.

STATEMENT OF POINTS

1. The Court erred in refusing to give plaintiff's requested instruction no. 1 in not directing a verdict in favor of the plaintiff and against the defendant as requested in said instruction.

2. The Court erred in refusing to give plaintiff's requested instruction no. 17 and which reads as follows:

You are instructed that, if the plaintiff was suddenly put in peril without having sufficient time to consider all the circumstances, he is excusable from omitting some precaution or making an unwise choice under the disturbing influence, although if his mind had been clear he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault. In such cases

even if in bewilderment he runs directly into the very danger which he fears, he is not at fault or negligent.

3. The Court erred in refusing one of plaintiff's witnesses, Sarah Jane Gittens, to testify that defendant voluntarily told her that the car he was driving at the time of the accident was covered by insurance, it coming with other language in the substance of admission of liability.

4. The Court erred in refusing to allow plaintiff to testify that he knew the law as respects to right-of-way at intersections and relied on the same.

5. The Court erred in allowing defendant's witness over the objections of plaintiff's counsel to testify as to

speed of defendant's car at place of accident without proper qualification of said witness L.O. Lowe.

6. The Court erred in refusing plaintiff's motion for a new trial.

POINT NO. 1

The Court erred in refusing to give plaintiff's requested Instruction Number 1 in not directing the jury to bring in a verdict against the defendant and in favor of the plaintiff.

ARGUMENT OF POINT NO. 1

It is the contention of plaintiff that whether the Court below believed the evidence put on by the plaintiff or defendant that he was entitled to have this instruction given. That the defendant was guilty of negligence proximately causing the injury to Mr. Gittens there can be no question. Defendant's own testimony conclusively shows this. For as he approached First South on Main Street the cars from the south glared in his eyes and impaired his

vision. (Tr. 166, 167) That he did not see plaintiff crossing the street at the intersection until he was within 6 to 10 feet away from him and when plaintiff was within 2 or 3 feet of the westernmost part of the pavement. (Tr. 169) Though his speed at this point was but 20 to 25 miles an hour (Tr. 160) and plaintiff had to traverse about 18 feet from west curb to that place. (Tr. 150) And though plaintiff was trying to avoid his car yet defendant followed him up and the collision took place. (Tr. 148, 150) All this was to have taken place in the westernmost lane as heretofore observed from defendant's own testimony. Defendant further states that plaintiff "darted" out from the graveled portion of the road and onto the highway. (Tr. 148) The word "suddenly" is used in the .

statue in regards to what a pedestrian shall not do and it is only fair to assume that somehow, or rather he thought that a similar word would be a complete defense to the action. But if he saw him "dart" he saw a beginning of a sudden and accelerated movement which he does not claim. Then too, he did not seek to throw any blame upon Mr. Gittens when he saw Mrs. Gittens the Sunday following the accident nor at the place of accident.

As to the testimony of Mr. L. O. Lowe, the Marshall of Smithfield, if subject to belief, does not aid the defendant's cause. But plaintiff maintains that the testimony of Mr. Lowe cannot be given credit and that Mr. Lowe is utterly unworthy of any belief as tending to aid defendant. For it is

utterly at variance with plaintiff's exhibits 4 and 5 just referred to in our statement of facts and which were reports made out shortly after the accident by Mr. Lowe (no. 4 being a photostatic copy of the so-called Marshall's "original"). We have pointed these differences out in our statement of facts giving transcript pages. But we will make this further comment upon the credibility of Mr. Lowe. Can any reasonable man believe that he did not consult with defendant in making out his report to the State though he denied the same (Tr. 125, 126) in order to obtain his version of how the accident happened? The exhibits no. 3, 4 and 5 show that he did for on each report he has 10 years driving experience of defendant. The Marshall also has on said report

exhibits the defendant's drivers license number. Are we to believe that he received these from defendant and nothing else when he gave defendant the report to fill out as he said he did (Tr. 186) or any other time? And why, it may be asked, did not Mr. Lowe fill out the drivers version of the accident on those reports? There is a most obvious place in the report for such version. The inescapable logic and conclusion is that he got this version, but because of his friendship for said defendant, whom he had known all his life (Tr. 189) and his family he did not want to do so.

While Mr. Thornley testified that he saw defendant's car and another following said car about 75 to 100 yards from the east side of highway where he

was sitting with a Mr. Simpson in his car facing north ready to make a U turn and that both cars were in the westernmost paved lane yet he testifies upon being asked by defendant's counsel if he noticed any cars going north from the south answered that they were waiting for those cars to pass. (Tr.230) The only reasonable logic is that he was somewhat turned in his seat watching for the north bound cars. This position is reinforced when he was asked what attracted his attention to the two southbound cars and he replied that the car back of Lundberg's pulled out on the gravel. And being further questioned as to what took place before that happened replied "Well, I just naturally was looking to see if there was somebody coming, turned around,

that's all." (Tr.233, 234) While he denied that he had ever talked to Mrs. Gittens prior to a day or two before the trial, Mrs. Gittens, as has been pointed out, swore that she called him on the phone a couple of weeks after the accident and that he said that plaintiff was lying in the middle of the road. (Tr. 232)

Then we have Mr. Chadwick who had made a written statement to a Mr. Neal that Mr. Gittens was lying in the center of the road, (Tr.243) but which he "interpreted" at trial as being in the westernmost lane of south bound traffic. He, too, is unworthy of credibility as supporting defendant's case. He further said he offered himself as a witness to sheriff, meaning the marshall, the morning after the accident and talked to him (Tr. 241) yet after that

he stated in writing to Neal that Gittens was lying in the middle of road. (Tr. 243)

He, therefore say, that every material witness for the defendant, including the defendant himself, was in some way impeached: Mr. Love and Mr. Chadwick by previous written statements made by themselves. As far as Mr. Love is concerned not only had he made a report to the State at great variance with his testimony but he also told Mr. Gittens son that plaintiff was lying in the middle of the road. (Tr. 259)

On the other hand there is the testimony of Dr. Robert Budge who stated that when he arrived at the place of accident that Mr. Gittens was lying about 3 feet west of the

center line. (Tr. 66, 70) The testimony of Mr. Miller placed plaintiff in the center of the street. (Tr. 86) A Mr. Birch, the ambulance driver, who came from Logan, eight miles south of Smithfield, testified that Mr. Gittens was in the center of the road or a trifle west of double line. (Tr. 127)

But assuming, for the purpose of argument only, that the testimony of defendant and his pertinent witnesses is true. What have we? We have the defendant approximately 180 feet north of the place of impact when Mr. Gittens left the curb on the west side of the street at intersection. We assume this for the average man walks something like 3 miles an hour. The defendant says he was going between 20 and 25 miles an hour. In other words

he was traveling 7 to 8 times faster than plaintiff and plaintiff having arrived according to defendant within 2 to 3 feet of the westernmost part of the pavement before he saw him. From this it is obvious that plaintiff had the right-of-way and had a right to assume that the on-coming car would accord him that right. It must be noted that defendant testified that when he first saw plaintiff that he, the defendant, was "pretty near thru" the intersection. (Tr. 148) That he could almost reach out and touch him. (Tr. 149) The question then is where did plaintiff start running from if running he did? Not the curb, for Mr. Miller, a witness for the plaintiff, stated that plaintiff walked out from the curb. (Tr. 77) And so did the plaintiff. Mr. Miller stated that he

saw Mr. Gittens accelerated his pace when he was passed the line separating the two west lanes. (Tr. 77, 78) The conclusion, therefore, is inescapable that under section 41-6-78, Utah Code Annotated, 1953, plaintiff had the right-of-way regardless of whose theory of the case is accepted and he had a right to assume that defendant would accord him that right. Did plaintiff exercise due care under the circumstances? We believe he did. For as has been pointed out he looked 3 times. Once when he got to west side walk and car was something like $3/4$ block away; again when car was about $1/2$ block away and when he stepped from curb. Then he looked again when he had passed the line separating the two west lanes and seeing the car at the north cross-

walk accelerated his motion, but was struck as his foot reached the center of highway. (Tr. 110, 114) But taking defendant's evidence of the case, still plaintiff had reasonable grounds to think that as he stepped into highway from curb, defendant would accord him the right-of-way. The next question may be, assuming defendant's testimony was taken, was plaintiff guilty of contributory negligence when he observed defendant's car at the north cross-walk? We believe not. He acted in an emergency wholly created by defendant and he acted in a reasonable way regardless of what version is the correct one. But we urge that plaintiff's evidence shows by overwhelming weight that he was passed the line separating the 2 southbound lanes for

in addition to what we have already said on this not even Mr. Chadwick saw Mr. Gittens traverse the space between the curb and the westernmost part of pavement. (Tr. 240) Why did he not see Mr. Gittens? The obvious reason is that Mr. Gittens was directly in front of Mr. Lundberg's car as both cars were coming south in inside southbound lane and therefore he could not see him or he was paying no attention. And though Mr. Chadwick "interprets" middle of road as to where Mr. Gittens was lying after impact as being in the middle of the west southbound lane yet he uses "middle of the road" in describing where defendant's car stopped. (Tr. 239) On the whole evidence, it is evident that Mr. Lundberg was traveling between 40 and 50 miles an hour

instead of between 20 and 25 miles.

In a Wisconsin case, Clifton v. Smith, 206 N.W. 923, 188 Wisc. 560, the plaintiff got out of a stalled car and was walking near it when another car approached at a high speed along a curving highway. Plaintiff went into a ditch at the edge of the highway and turned her back to escape the glare of the lights of the approaching automobile and she was struck by it. It was held that the findings of the jury that plaintiff was guilty of contributory negligence was without foundation to support it and in the case of Clark v. Dungen, 85 A (2) 168, 369 P. 220, in an action for injuries plaintiff received when he was struck by defendant's car while plaintiff was crossing street in the town of Borough evidence

would justify finding that defendant was negligent in not seeing plaintiff until defendant was 20 feet from plaintiff, and that defendant's testimony that plaintiff started back in front of defendant's car from a place of safety on curb was incredible. Not only do defendant and his witnesses show contradiction in themselves but their testimony contradicts each other. An example of this is where Marshall states that there were skid marks 21 feet before place of impact and defendant's testimony that he did not see plaintiff until within 6 or 10 feet of him. Of course skid marks would not be made before defendant saw plaintiff.

In *Brulle v. Cassidy* 289 N.W. 405, the Court approved the doctrine that a court should direct a verdict in favor of a party in whose evidence overwhelm-

ingly preponderates, though there is some eviience in favor of the adverse party.

In the case of Hamblin v. Steckley et al 27 N.W. (2nd) 178, it was held error for the court to have submitted an interrogatory to the jury wherein they were asked to find whether or not the plaintiff was guilty in not warning her husband, whom she was riding with, of any approaching car with which they collided. The plaintiff testified that she had observed the cars approach and had warned her husband. Under these circumstances it was held it could not be reasonably found that she failed to observe and perform any duty imposed upon her by law.

Witness, whose testimony is inconsistent with common principles by

which conduct of mankind is naturally governed is not entitled to credit.

194 A. 131 (Weyer v. Blasler)

Testimony is incredible when it is so extraordinarily in conflict with probability or so utterly hostile and nearly impossible that it should not be believed by trier of fact. Caperna v. Williams - Bauer Corp. 53 N.Y. S. 2nd 295, 184 Misc. 132.

Where discrepancies exist between witnesses testimony on stand and other statements, jury may believe testimony and disbelieve statement, unless it clearly appears that witness cannot be believed at all. Weiser v. San Diego Elec. Ry. Co. 60 P. (2nd) 136.

When a witness makes two statements which are inconsistent with each other, both are for consideration and the trier

of facts is to determine which is to be believed, but only when it is reasonable to have it so and when offering inference can reasonably be drawn therefrom.

Baulene Sons Const. Co. v. Reynolds, 199 A. 259.

It is further held in Re Bregeff, 17 N.Y.S. (2) 816, 258 App. Div. 551 that witnesses who are perjurers corroboration is required by credible witnesses.

But there is another phase to be considered closely associated with what we have said on this point and that is that the physical facts are utterly against the testimony of the defendant as to how the accident happened. As has been pointed out before, he testified that he could almost reach out and touch Mr. Gittens when he first saw

him and that he, the defendant, was then pretty near thru the intersection and traveling in the outside lane. (Tr. 148) That he was going between 20 and 25 miles an hour (Tr. 160) and that at first sight of Gittens the said Gittens was running and was 2 or 3 ft. west of the westernmost portion of the pavement and that he hit him with the right front headlight and top of windshield (Tr. 162) and that Mr. Gittens "After I swerved the car, he stayed right in the headlight" (Tr. 160) and as I kept coming around, well he just kept running right in front of me. (Tr. 148) And that after accident Mr. Gittens was lying two or three feet "from this line here" obviously meaning the line that separates the two south-bound lanes. If all this be true, Mr. Gittens moved 12 feet or so before being

struck and defendant moved about 18 feet going between 20 and 25 miles an hour. Obviously this cannot be true for Gittens would be running about as fast as defendant was going. So we say that plaintiff's version that he was a step or two east of the line separating the two south bound lanes when he looked the third time and saw defendant coming into the intersection and that upon so seeing him he stepped up his pace and reached the middle of the road when he was struck is the only tenable version. That defendant's version flies in the face of a physical impossibility goes without saying and this Court has held that such incredible testimony is no evidence at all in the case of Haarstrich v. Oregon Short Line R. Co. 79 Utah 552, 262 P. 100. This was a case of collis-

ion between the rear end of a train
backing up and a car where the testi-
mony on part of plaintiff and witnesses
was in conflict with physical impos-
sibility and this Court said such testi-
mony was no evidence at all. We shall
not try to give the testimony and phys-
ical facts here because we feel certain
that this Court will want to read the
full case and not merely a part of it.

POINT NO. 2

The Court erred in its refusal to give plaintiff's requested Instruction no. 17. Said instruction read as follows: "You are instructed that, if the plaintiff was suddenly put in peril without having sufficient time to consider all the circumstances, he is excusable from omitting some precaution or making an unwise choice under the disturbing influence although if his mind had been clear he ought to have done otherwise. This is especially true if the peril is caused by defendant's fault. In such cases, even if in bewilderment he runs directly into the very danger which he fears, he is not at fault or negligent."

ARGUMENT OF POINT 2

We believe the evidence regardless

of what view a jury might reasonably take justified the giving of such an instruction. As we have stated in our argument on point no. 1 and which argument is for the most part if not all applicable to this point, the defendant's own evidence shows negligence on his part and his version of plaintiff's conduct does not show contributory negligence on his part.

The Court assigns as its reason for refusal to give plaintiff's requested instruction no. 17, in that plaintiff knew of the approach of defendant's car when he stepped from the curb and cites the case of *People v. Tucker* 198 P. (2) 941. We believe that case is no authority for such holding. The Court refused in the case cited to give a similar instruction where evidence

established beyond a doubt that headon collision occurred on defendant's left hand side of roadway and failed to show that defendant had any right to be traveling on that portion of highway and refusal to instruct jury that jury might find defendant guilty of lesser offense if it entertained reasonable doubt as to whether defendant did an act forbidden by law which proximately caused injury to another was not error. In case cited by the lower court there was no question that defendant was in a lane of traffic where he had no right to be under the circumstance. In the instant case it was a question for the jury if our first point is not well taken. There is nothing here which points to the fact that plaintiff was guilty of negligence as a matter of

law or otherwise in regard to the sudden emergency doctrine. It is held in *Warner v. Shov*, 57 P. (2) pp. 123, that where pedestrian paused and looked before crossing highway and driver alleged that he was misled into thinking she was going to wait for him to pass before she crossed failure to instruct on doctrine of sudden emergency held error, where evidence justified inference that driver was not negligent up to the time that pedestrian dashed across the road. In this case, as has been pointed out in the statement of facts, Mr. Gittens looked first when he got to sidewalk, again when he stepped off curb and again when defendant's car was entering the intersection. (Tr. 94, 95, 110, 114) See also *People v. Boulware* 106 P. (2) 436 and *Randolph v.*

Hunt, 183, P. 359, where said instruction was approved. For the Court to refuse to so instruct was tantamount to saying that plaintiff was guilty of negligence as a matter of law and the jury was duty bound to believe defendant's contention in the case as to where plaintiff was when defendant first observed his speed and that plaintiff left the curb with the speed of a "10 second man" or a "super man" and also that he was guilty as a matter of law if jury could reasonably believe plaintiff's testimony as to how he proceeded across the intersection and his observations at that time and that he had no right to assume in either aspect of the case that he would be accorded the right-of-way.

If the plaintiff's contention that defendant was approximately 1/2 block

north of intersection when he started to cross intersection in easterly direction is subject to credibility and reasonable belief then defendant was driving his car between 40 and 50 miles an hour for he arrived at the place of impact while Mr. Gittens was traversing about 30 feet and certainly under these conditions plaintiff need not keep a constant lookout for he had the right-of-way and as has been said before, had a right to assume that defendant would accord it to him and was driving within the speed limits until he was put upon notice to suspect otherwise and which he did not have reasonable grounds to suspect until he looked the third time after crossing the line separating the two south bound lanes and when he stepped up his pace. That

plaintiff's testimony is credible goes without saying.

The Court holds, in effect, that the doctrine of "sudden emergency" is "out" if once a pedestrian sees or should have seen an oncoming car, when pedestrian is about to cross an intersection regardless of how reasonable his grounds are for believing that he is taking no chances at all. Obviously this is not the law and the cases cited support our statement.

POINT NO. 3

The Court erred in refusing one of plaintiff's witnesses, Sarah June Gittens, to testify that defendant voluntarily said in her presence that the car he was driving at the time of accident was covered by insurance, it coming with other language in the substance of an admission of liability and also showing that he did not blame plaintiff.

ARGUMENT OF POINT 3

As we have said in our Statement of Facts, plaintiff's counsel informed defendant's counsel out of court that we expected to show an admission by defendant by showing that he said that the car carried insurance. That thereafter, Mrs. Sarah June Gittens, testi-

ried out of the presence of the jury so the Judge could pass upon its admissibility as an admission. She testified in substance that the defendant came to her home Sunday following the accident and said that he had been kept late at work and was in a hurry to get home to tend babies as his wife was going to a party. That car carried insurance.

(Ps. 131, 135) As mentioned before, the Court ruled, that reference to insurance must not be made. We believe this was error not only as showing an admission that he was at fault but also as showing that he did not put any blame on Mr. Gittens, for it will be remembered that both in the pleadings and by attempted proof that defendant tried to show contributory negligence on plaintiff's part. In such a case it

has been held that such evidence as offered in this case is admissible.

Schell v. Grayson, 127 S.W. 415, Dulberger v. Gimbel Bros. 134 N.Y.S. 374, 76 Misc. 225.

We believe that not only was it admissible for this purpose but also for the purpose of showing an admission that he, the defendant was to blame. See Reid v. Owens, 98 Ct. 50, 93 L.(2) 680.

POINT NO. 4

The Court erred in refusing to allow plaintiff to testify that he knew the law as respects to right-of-way at intersections and relied on same.

ARGUMENT OF POINT 4

We believe that plaintiff should have been allowed to testify that he knew and relied on that which the law gave him at an intersection when crossing, but the Court refused it. (Tr.121, 122) That a party charged with contributory negligence should be allowed to testify as to what is in his mind at the time of the incident to see if it is a reasonable and logical thought goes without saying and should need no authoritative citation.

POINT NO. 5

The Court erred in allowing defendant's witness, over the objection of plaintiff's counsel, to testify as to speed of defendant's car at place of accident without proper qualification of said witness, L.O. Lowe.

ARGUMENT OF POINT 5

Mr. L.O. Lowe, the marshall of Smithfield, was permitted to testify over the objection of plaintiff's counsel as to the speed of defendant's car from the supposed skid marks made by defendant's car. No proper foundation was made qualifying him as an expert, nor was there any hypothetical question put requiring him to consider conditions at scene of accident. (Tr. 181, 184)

This Court held in the case of Morrison v. Perry, 140 P. (2) 772, that this is error and numerous other cases have held severally on this point that such a party is not permitted to base his opinion as to the speed of a car from the skid marks.

Where witness relied upon to establish excessive speed in automobile case by time, and distance travelled computation made only an approximation of factors and consequently, his results were speculative and conjectural, his testimony was not substantial evidence which is required to support a verdict. Burns v. Harfst, 259 P. (2) 379.

Evidence of skid marks furnish proper grounds for an expert only to give his opinion as to speed of a motor vehicle when its brakes are applied. Citing Sta

v. Lingman, 91 P. (2) 457, 97 Ut. 180.
Expert testimony seemingly in Utah case.
Experts testimony should, however, be
preceded by evidence of the kind of car
causing accident, the condition of road
bed, the place where brakes were applied
the place where the injured person was
struck and the distance the car slid
before stopping. Citing Heelner v.
Gernischied 171 N.W. 208, 41 S.D. 430.

Permitting state policeman to
testify that automobile was traveling
45 to 55 miles an hour, in response to
a hypothetical question requiring police
man to consider conditions at scene of
accident and condition of automobile,
was reversible error as not containing
sufficient facts on which to base an
opinion. Stephanifsky v. Hill, 71 A.
(2) 560. Conn. case.

POINT NO. 6

The Court erred in refusing plaintiff's motion for a new trial.

ARGUMENT OF POINT 6 and CONCLUSION

In discussing the five points heretofore set out and argued we believe the Court committed error in not granting a new trial on any one or all of the points raised.

Such a verdict as was rendered in this case can only lend encouragement to negligent and reckless drivers and consequently grievous injuries and deaths not only to pedestrians, but to drivers as well.

We, therefore, most respectfully urge this Court to send this cause back for a new trial and further urge that if it be sent back on the ground that

the Court below should have directed a verdict in favor of the plaintiff that it further instruct the Court below that if the evidence appears substantially as it did on the first that it direct a verdict in favor of the plaintiff and against the defendant.

Respectfully submitted,

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Attorney for Plaintiff
and Appellant.