

1955

Ray Naisbitt v. Joseph Eggett : 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. Quinne

Recommended Citation

Brief of Appellant, *Naisbitt v. Eggett*, No. 8385 (Utah Supreme Court, 1955).
https://digitalcommons.law.byu.edu/uofu_sc1/2399

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.

FILED

SEP 21 1955

Case No. 8385 Clerk, Supreme Court, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

RECEIVED

DEC 8 1955

LAW LIBRARY
U. of U.

RAY NAISBITT, Guardian ad litem
for DARRYL R. NAISBITT, a minor,

Plaintiff and Appellant,

VS.

JOSEPH EGGETT,

Defendant and Respondent,

BRIEF OF APPELLANT

**Appeal from District Court of
Davis County, Utah**

HONORABLE PARLEY E. NORSETH, Judge

**E. L. SCHOENHALS and
GEORGE C. MORRIS**

*Attorneys for Plaintiff and
Appellant.*

INDEX

	<i>Page</i>
STATEMENT OF POINTS	3
STATEMENT OF FACTS.....	1
 ARGUMENT	
I. NEGLIGENCE IS A QUESTION FOR THE JURY, AND UNLESS ALL REASONABLE MEN MUST DRAW THE SAME CONCLUSION FROM THE FACTS AS THEY ARE SHOWN, THE COURT COMMITTS ERROR IN DIRECTING A VERDICT.....	4
II. A COURT EXERCISING APPELLATE JURIS- DICTION, IN REVIEWING A JUDGMENT OF A LOWER COURT, WHEREIN A VERDICT WAS DIRECTED, VIEWS ALL EVIDENCE AND DRAWS ALL INFERENCE IN LIGHT MOST FAVORABLE TO THE PARTY AGAINST WHOM THE VERDICT WAS DIRECTED.	8
III. IF THE FACTS ARE SUCH THAT REASON- ABLE MEN CAN REACH THE CONCLUSION THAT THE DEFENDANT WAS NEGLIGENT, OR THAT PLAINTIFF WAS OR WAS NOT CON- TRIBUTORILY NEGLIGENT, THE CASE MUST GO THE JURY.	9

TABLE OF CASES

Bates v. Burns, 281 P. 2d 209 U.	5
Blashfield Motor Vehicle Law, 21 Page 400.....	13
Butts v. Anthis, 73 P. 2d 843.....	15
Callahan v. Disorda, 16 A. 2d 179.....	12
Cleveland et al. v. Grays Harbor Dairy Products, Inc., et al., 74 P. 2d 909	16
Dungan v. Brandenburg, 230 P. 2d 518.....	10
Galarowicz v. Ward, 230 P. 2d 576, 119 U. 611.....	9
Gibbs, et al. v. Blue Cab, Inc., 249 P. 2d 213, U.	9
Glenn v. Gibbons & Reed Co., 265 P. 2d 1013, 1 U. 2d 308.....	9

INDEX—(Continued)

	<i>Page</i>
Jenkins v. Bentley, 268 N. W. 819.....	13
Kovacs et al. v. Ajar et al., 196 A. 876.....	17
Martin v. Stevens, 243 P. 2d 747, U.	7
McCarthy et al. v. City of St. Paul et al., 276 N.W. 2.....	14
Morby v. Rogers, 252 P. 2d 231, U.	5
Nielson v. Mauchley, 202 P. 2d 547, 115 U. 68.....	7
Oklahoma Natural Gas Co. et al. v. Courtney, 79 P. 2d 235.....	15
Scofield v. Sprouse-Reitz Co., 265 P. 2d 396, 1 U. 2d 218.....	5
Scoville v. Kellogg Sales Co., 261 P. 2d 933, 1 U. 2d 19.....	9
Smith v. Bennett, 265 P. 2d 401, 1 U. 2d 224.....	9
Smith et al. v. Pachter, 19 A. 2d 85.....	19
Springer v. Sodestrom, 129 P. 2d 409.....	13
Station et al. v. West Macaroni Mfg. Co., 174 P. 817, 52 U. 426	15
Stickle v. Union Pacific R. Co., 251 P. 2d 867, U.	6
Weenig Bros. v. Mawing, 262 P. 2d 491, 1 U. 2d 101.....	15
T — Transcript of testimony page, line.	
Italics and caps supplied.	

STATUTES

U.C.A. 1953

41-6-117	4
41-6-155	4

IN THE SUPREME COURT of the STATE OF UTAH

RAY NAISBITT, Guardian ad litem
for DARRYL R. NAISBITT, a minor,

Plaintiff and Appellant,

vs.

JOSEPH EGGETT,

Defendant and Respondent,

Case No. 8385

BRIEF OF APPELLANT

STATEMENT OF FACTS

The Defendant had an automobile which was out of repair and the motor was not in good working order. The car would not operate when moving forward and the Defendant proceeded to operate the car in a backward motion backing up a hill since the engine would die when an attempt was made to move forward. The engine would run only while backing T 161-2-27. The Defendant observed a sign on the road where Plaintiff was hurt which indicated "Stop, Coasting Lane" T 168-

8 & 167-23. The Defendant had seen sleigh riders on the hill the day before the collision and knew there had been a sleigh riding accident on said road the night before T. 167-19-25.

The Defendant saw a car going up this hill, but paid no attention to whether or not the vehicle contained a sleigh or sleigh riders T 166. The car actually contained the Plaintiff who, with other boys, went up to the top of the hill in the car. The Plaintiff, a child 11 years of age, lay prone on the other boys all on the sleigh, Plaintiff being the third one on the sled and a guest of the boy on the bottom. The boys came down the hill in about a minute after arriving at the top of the hill. The boy on the bottom of the sled was the operator and driver. Plaintiff had nothing to do with steering the sled. As the sleigh proceeded down the hill the defendant approached a curve in the road T 162-28. The Defendant was backing up and was on the north or the wrong side of the road for vehicles proceeding in an easterly direction or Defendant was on his left hand side of the road T 162-11, see also "Exhibits E and N". The sleigh was also at this time approaching the blind curve in the road. The Defendant knew of this curve in the road and that the cut and scrub oak obscured vision around the curve. See "Exhibit E". Defendant also knew that the lane was being used by children for sleigh riding and nevertheless continued to back his car up on the wrong side of the road and without sounding his horn as he approached the blind curve and without giving any

warning T. 169-19. The sleigh came around the curve on its right hand side of the road and the force of inertia and centrifugal force forced the sled to its right side or proper side and it ran into the back end of the Defendant's car. Defendant first saw the sled round the curve when it was 10 feet away at which time he applied the brakes and stopped directly in the path of the sled T 163-8. The resulting accident destroyed a part of Plaintiff's brain T 34-11, resulting in loss of memory, defective sight, and probable epilepsy.

STATEMENT OF POINTS

POINT ONE

NEGLIGENCE IS A QUESTION FOR THE JURY, AND UNLESS ALL REASONABLE MEN MUST DRAW THE SAME CONCLUSION FROM THE FACTS AS THEY ARE SHOWN, THE COURT COMMITS ERROR IN DIRECTING A VERDICT.

POINT TWO

A COURT EXERCISING APPELLATE JURISDICTION IN REVIEWING A JUDGMENT OF A LOWER COURT, WHEREIN A VERDICT WAS DIRECTED, VIEWS ALL EVIDENCE AND DRAWS ALL INFERENCES IN LIGHT MOST FAVORABLE TO THE PARTY AGAINST WHOM THE VERDICT WAS DIRECTED.

POINT THREE

IF THE FACTS ARE SUCH THAT REASONABLE MEN CAN REACH THE CONCLUSION THAT THE DEFENDANT WAS NEGLIGENT, OR THAT PLAINTIFF WAS OR WAS NOT CONTRIBUTORILY NEGLIGENT THE CASE MUST GO TO THE JURY.

ARGUMENT

POINT ONE

NEGLIGENCE IS A QUESTION FOR THE JURY, AND UNLESS ALL REASONABLE MEN MUST DRAW THE SAME CONCLUSION FROM THE FACTS AS THEY ARE SHOWN, THE COURT COMMITS ERROR IN DIRECTING A VERDICT.

The laws of the State of Utah make it a misdemeanor to operate a motor vehicle upon the highway of the state when the vehicle is in an unsafe condition, 41-6-117, U. C.A., 1953.

Moreover, 41-6-155, U.C.A., 1953, provides that no person may move a motor vehicle upon a highway unless the same is in good working order. The Defendant has admitted that his vehicle was not in good working order, and that it would not operate in a forward motion, and it would only run backward. Motor vehicles are equipped to steer only the front wheels and one cannot use the back wheels to steer the car and it is most difficult to drive backward. The horn is equipped to throw the sound ahead of the car and not to the rear and the car is constructed to provide maximum visibility in the front with poor visibility to the rear. The jury were entitled to consider whether or not the Defendant was in violation of these statutes or otherwise negligent.

Negligence is a question for the jury, and unless all reasonable men must draw the same conclusion from

the facts as they are shown, a court commits an error when it directs a verdict. The following cases hold fast to this rule:

Bates vs. Burns, 281 P. 2d 209,U.....

“(2) It has been frequently announced by this court that negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they are shown. * * *

‘Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether, the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them.’ ”

Scofield vs. Sprouse-Reitz Co., 265 P. 2d 396, 397; 1 U. 2d 218.

“(1) Unless all reasonable minds must conclude that plaintiff was negligent in failing to observe the conditions before attempting to descend the stairs, the question of his due care must be submitted to the jury for determination. *Baker vs. Decker*, Utah, 212 P. 2d 679.”

Morby vs. Rogers, 252 P. 2d 231,U.....

“(1) (1) It is well settled that in order for a court to grant a request for a directed verdict or for a judgment notwithstanding the verdict grounded on non-negligence of defendant, the record must disclose no evidence against the party so requesting upon which reasonable minds could find him guilty of the negligence charged. The

issue here, then, was whether the record disclosed any evidence upon which the jury could have found the appellant guilty of negligence.

“(2) It is not a new or novel principle that acts of negligence may be proved by circumstances. Certainly, in many cases, particularly where the only eye witnesses are parties having an interest in the action, such circumstances are the only means by which certain facts may be discovered. In such cases it is proper that such circumstances should be evaluated by the jury in whose province lies the power to believe or disbelieve the testimony and evidence, to observe the demeanor of the witnesses, and to draw such reasonable conclusions from the whole record as may be warranted.

“(3) We are of the opinion that reasonable minds could find negligence on the part of the defendant from the evidence in the record. The trial court therefore did not err in letting the question of defendant’s negligence go to the jury under the evidence.”

Stickel vs. Union Pacific R. Co., 251 P. 2d
867, 870;U.....

“(5, 6) The authorities frequently state that the question of contributory negligence is usually for the jury. And that this is so wherever the evidence is such that reasonable minds may differ as to its existence has been stated innumerable times, which is undoubtedly correct. However, in view of the fact that before the issue may be taken from jury, the defendant has the burden of establishing plaintiff’s negligence by a preponderance of the evidence it may be a bit more precise to state that the question of contributory

negligence is for the jury whenever the evidence is such that jurors, acting fairly and reasonably, may say that they are not convinced by a preponderance of the evidence that the plaintiff was guilty of negligence which proximately contributed to cause his own injury."

Martin vs. Stevens, 243 P. 2d 747,U.....

"(3) The question of contributory negligence is usually for the jury and the court should be reluctant to take consideration of this question of fact from it. *Nielson vs. Mauchley*, Utah, 202 P. 2d 547; *Toomer's Estate vs. Union Pacific Railroad Co.*, Utah, 239 P. 2d 163. The expressions in those cases are in accord with this uniformly accepted doctrine. The right to trial by jury should be safeguarded. Before the issue of contributory negligence may be taken from the jury, the defendant's burden of proving both (a) that plaintiff was guilty of contributory negligence, and (b) that such negligence proximately contributed to cause his own injury, must be met, and established with such certainty *that reasonable minds could not find to the contrary*; conversely, if there is any reasonable basis, either because of lack of evidence, or from the evidence and the fair inferences arising therefrom, taken in the light most favorable to plaintiff, upon which reasonable minds may conclude that they are not convinced by a preponderance of the evidence either (a) that plaintiff was guilty of contributory negligence or (b) that such negligence proximately contributed to cause the injury, the plaintiff is entitled to have the question submitted to a jury."

Nielson vs. Mauchley, 202 P. 2d 547, 115 U. 68.

“(3) In holding that the court erred in finding as a matter of law that plaintiff was guilty of contributory negligence, we do not wish to understand that the jury could not have so found. Whether or not plaintiff acted as a reasonably prudent man under the circumstances is a question of fact for the jury to determine. The mere fact that plaintiff had the right of way did not give him a right to proceed without regard to existing conditions. He must exercise due care and act as a reasonably prudent man would act under all the existing circumstances. See *Bullock vs. Luke*, 98 Utah 501, 98 P. 2d 350; *Hickok vs. Skinner*, Utah, 190 P. 2d 514; *Conklin vs. Walsh*, Utah, 193 P. 2d 437; and *McDougall vs. Morrison*, 55 Cal. App. 2d 92, 130 F. 2d 149, on page 151. * * *

“In our discussion we have only considered facts most favorable to plaintiff, and have not discussed the evidence of the defendant. A jury might find from all the circumstances that the facts and circumstances we have assumed did not exist and that the accident happened in accordance with defendant’s version. If a jury so found the facts, plaintiff could not recover.

“Since the court erred in directing a verdict of “no cause for action” the case is reversed with instructions to grant a new trial. Costs to appellant.”

POINT TWO

A COURT EXERCISING APPELLATE JURISDICTION IN REVIEWING A JUDGMENT OF A LOWER COURT, WHEREIN A VERDICT WAS DIRECTED, VIEWS ALL EVIDENCE AND DRAWS ALL INFERENCES IN LIGHT MOST FAVORABLE TO THE PARTY AGAINST WHOM THE VERDICT WAS DIRECTED.

Glenn vs. Gibbons & Reed Co., 265 P. 2d 1013,
1 U. 2d 308.

“Defendant’s contention that there was no actionable negligence on the part of the defendant presents a more difficult question, Inasmuch as the defendant was granted a directed verdict, we must view the evidence in the light most favorable to the plaintiff to determine whether or not there was sufficient evidence to go to the jury. *Finlayson vs. Brady*, Utah, 240 P. 2d 491.”

Smith vs. Bennett, 1 U. 2d 224, 265 P. 2d 401.

“The evidence and all reasonable inferences therefrom will be viewed in a light most favorable to plaintiff. *Cox vs. Thompson*, Utah 254 P. 2d 1047.”

Scoville vs. Kellogg Sales Co., 1 U. 2d 19, 261
P. 2d 933.

“We must view the evidence in a light most favorable to plaintiff, the victim of the directed verdict.”

Gibbs et al vs. Blue Cab, Inc., 249 P. 2d 213,
-----U.-----

“We have held that where a verdict is directed, the evidence on appeal will be canvassed in a light most favorable to him against whom it was directed.”

Galarowicz vs. Ward, 119 U. 611, 230 P. 2d
576.

“(1) A nonsuit having been granted in their favor, we take all the evidence against the Siegels as true, and give the plaintiff the benefit of every favorable inference and intendment which fairly arises from such evidence. *Kitchen vs. Kitchen*, 83 Utah 370, 28 P. 2d 180; *Groesbeck vs. Lakeside*

Printing Company, 55 Utah 335, 186 P. 013; Maberto vs. Wolfe, 106 Cal. App.; 202, 289 P. 218.”

Dungan vs. Brandenburg, 230 P. 2d 518.

“ ‘Ordinarily an appellate court in determining an appeal views the evidence, where it is conflicting, in the light most favorable to a sustaining of the lower court’s judgment. (Citing cases). A reverse rule however applies where, as here the trial court directs the jury to return a verdict for the defendants. The conflicting evidence then must be viewed in a light most favorable to plaintiff.’ ”

The supreme court of Arizona in the above caption case held that where a truck driver was backing a truck that he owes the child to duty to protect him from being injured by the truck and that any evidence at all upon which reasonable men might disagree would require that the case go to a jury.

POINT THREE

IF THE FACTS ARE SUCH THAT REASONABLE MEN CAN REACH THE CONCLUSION THAT THE DEFENDANT WAS NEGLIGENT, OR THAT PLAINTIFF WAS OR WAS NOT CONTRIBUTORILY NEGLIGENT THE CASE MUST GO TO THE JURY.

The Plaintiff was a guest and had no control over the operation of the sled, and there was no evidence of any contributory negligence chargeable to a guest.

STANDARD OF CARE

Whenever an individual undertakes to do something which involves a greater risk to those whom he owes a duty, the law holds him to a higher degree of care. At 168-8 of the record it is pointed out that Defendant had seen a sign at the bottom of the road which designated the road as a coasting lane. At T. 167-18 it was pointed out that Defendant had actually seen sleighriders on the road before, and that the night before he knew there had been an accident involving a sleighrider. These facts can be construed in no other way than that the defendant knew or ought to have known that the hill was going to be used by children for sleighriding.

The conduct of small children is unpredictable. They fall within a class which is highly protected by the law. As a result, whenever an adult does anything which involves a risk to children the law imposes upon him an extremely high degree of care.

The act of backing an automobile involves a greater risk than driving the automobile forward. The controls are constructed to facilitate and provide maneuverability only for forward travel. The only wheels capable of turning to alter the direction of the car are the front wheels. When a car is backing these wheels are not in a position to provide maximum maneuverability needed to avoid hitting children. The driver's vision is more obstructed when a car is being driven in reverse than

when moving forward. This all adds up to the fact that driving an automobile in reverse involves greater risk than when driving it forward.

The above points to the fact that the defendant was acting in such a manner as to involve a great risk to those using the sleighriding hill. The following cases illustrate the fact that the law requires of a person in such circumstances a special standard of care:

Callahan vs. Disorda, 16 A. 2d 179, 181.

“(8-10) Taking the evidence in the light most favorable for the plaintiff, as it must be taken, the jury would have been justified in finding that the defendant knew or ought to have known that the child was in the immediate neighborhood. She was charged with the common knowledge that very young children are erratic and likely to move quickly and without regard for their own safety. If one knows that a child is in the highway he is bound to a proportionate degree of watchfulness. *Robinson vs. Cone*, 22 Vt. 213, 224; 54 Am. Dec. 67. She testified that before starting to back her car she looked into the mirror and out of the left-hand window but since the child must have been on the right of the rear of the car it seems clear that these precautions alone could not be relied upon with a due regard for the child’s safety. In a recent Massachusetts case it was said: ‘The backing of any vehicle entails more or less limitation on the view by the driver of the area to be traversed and thus requires corresponding vigilance on his part to avoid causing injury to persons who are known to be, or likely to be there, whether the vehicle

is being backed on a public street or on private land.' *Eaton vs. S. S. Pierce Co.*, 288 Mass., 323, 192 N.E. 831, 832."

Springer vs. Sodestrom, 129 P. 2d 409, 502.

"(7, 8) The conduct of small children is unpredictable, and their propensity to run in any direction is a matter of common knowledge. Having once observed the child on the opposite curb while his vehicle was still motionless in the driveway, defendant's conduct in backing into the street without making any further effort to ascertain the conduct and whereabouts of the small child was not that of a reasonable careful and prudent person under the circumstances.

* * *"

Jenkins vs. Bentley, 268 N.W. 819.

"* * * True, the driver did not see the boy before backing into him, yet the law imposes upon him a duty to ascertain that the way is clear before proceeding backward over it. Backing against plaintiff without making such assuring observation is a lack of ordinary care and is sufficient to constitute actionable negligence. *Kinsley vs. Simpson*, 257 Mich. 7, 240 N.W. 98; *Roach vs. Petrequin*, 234 Mich. 551, 208 N.W. 695. * * * 'And he must not only look backward when he commences his operation but he must continue to look backward in order that he may not collide with or injure those lawfully using such street or highway. (Citing authorities)' See, also, *Embry vs. Reserve Natural Gas Co.*, 12 La. App. 97, 124 So. 472. * * *"

21 *Blashfield* Page 400 1469-Backing

“Where a motorist, proceeding along one street car track while a street car is moving in the same direction alongside of him on the other tract, sees two small children on the tract in front of him, the necessity of the children leaving the track being apparent, and, instead of stopping, turns aside to avoid the children and strikes them as they attempt to run from the track to the street the question of whether the driver exercised proper care towards the children *is for the jury*. Ferris vs. McArdle, 106 A. 460, 92 N.J.L. 580.”

“Where motorist sitting in his automobile in driveway observed through rear view mirror that small child was on the opposite curb, motorist’s conduct in thereafter backing into the street *without making any further effort to ascertain the conduct and whereabouts of the child was negligent* Springer vs. Sodestrom, 129 P. 2d 499, 54 Cal. App. 2d 704.”

McCarthy et al. vs. City of St. Paul et al., 276 N.W. 2.

“* * * This and other courts have frequently commented upon the high degree of vigilance necessary to constitute ordinary care where children may reasonably be expected to be present. In the case at bar the defendants were engaged in resurfacing one of the defendant city’s streets and were using heavy blade and disk machines for that purpose. * * * It was as he started backing that the machine ran into and injured young McCarthy, who was then apparently looking back toward the foreman’s car. * * * The backing process was not naturally to be expected, and we think that the jury might well have considered that Byron was guilty of negligence in not better

looking out for or warning the boys, who, as he knew, were accustomed to play around the machine. * * *”

Whenever a person is acting under such circumstances as to be required to exercise a special degree of care, if he fails to do so he is negligent. At (T. 162-11) of the record it is established that the defendant was on the wrong side of the street for the direction of his vehicle. This court has already dealt with the matter of driving on the wrong side of the street.

Station et al. vs. West Macaroni Mfg. Co.,
174 P. 817, 52 Utah 426.

“* * * More especially, we think, the strongest kind of a presumption of negligence should be held to prevail against a party, where, as here, the defendant is found encroaching on that portion of the much-used street of a city assigned by the statute to another. * * *”

Weenig Bros. vs. Manning, 262 P. 2d 491,
1 U. 2d 101.

“* * * It is to be conceded that being on the wrong side of the highway is usually a strong indication of negligence. * * *”

In this particular instance driving on the wrong side of the street was particularly negligent. The defendant had placed himself in a position requiring the highest degree of care.

Oklahoma Natural Gas Co. et al. vs. Courtney, 79 P. 2d 235;

Butts vs. Anthis, 73 P. 2d 843.

“A person guilty of negligence involving a breach of his duty should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the facts and circumstances which in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought of at the time of the negligent act as reasonably possible to follow, if they had been suggested to his mind.”

Under the high degree of care imposed upon defendant he should have foreseen the fact that when sleds come around a sharp corner traveling on ice and snow, they do not hug the inside of the curve, but rather slide or skid towards the outside of the curve due to the effect of inertia or centrifugal force upon a body in motion. *The defendant by backing his automobile up the coasting lane on the wrong side of the street had actually followed the outer edge of the curve, the probable side of the road which would be used by children.*

Courts have held that there is a duty under similar circumstances for a defendant to give warning of his approach. *It is to be noted that the defendant herein GAVE NO WARNING.* The following cases illustrate the necessity of warning and make it a duty:

Cleveland et al. vs. Grays Harbor Dairy Products, Inc., et al, 74 P. 2d 909.

“Where the driver is backing in a narrow street where other automobiles are parked and *children are playing, it is his duty to sound his horn repeatedly when backing.*

“The law does not forbid the backing of an automobile upon the streets or highways, and to do so does not constitute negligence, but the driver of an automobile must exercise ordinary care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured. It is his positive duty to look backwards for approaching vehicles and to give them timely warning of his intention to back, when a reasonable necessity for it exists; and he must not only look backward when he commences his operation, but he must continue to look backward in order that he may not collide with or injure those lawfully using such street or highway. Berry on Automobiles, 7th Ed., § 2.236.

“To the same effect is *Taulborg vs. Anderson*, 119 Neb. 273, 228 N.W. 528, 67 A.L.R. 642. With notes thereto beginning on page 647. *J. Cr. Sheldon vs. James*, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

“It may be positively said that the above texts and cases state the general rule and there are, apparently, none to the contrary.”

SLEIGHRIDING

Kovacs et al. vs. Ajhar et al., 196 A. 876.

This case is almost directly in point. One difference is that the plaintiff, in the case at bar was using a

designated coasting lane, which in the case cited plaintiff was not. The following are statements which appear in the case:

“It is well settled that in determining whether judgment n.o.v. should be entered for defendants the testimony should not only be read in the light most favorable to plaintiffs, all conflicts therein being revolved in their favor, but they must be given the benefit of every fact and inference of fact pertaining to the issues involved which may reasonably be deduced from the evidence.

“Where, under the undisputed facts, coasting upon a street is clearly and manifestly dangerous, it may be the duty of the court to so declare as a matter of law, but where the evidence is conflicting, and the inferences to be drawn are not clear, the *question* whether *plaintiff* has exercised care and diligence to avoid danger while coasting, such as to be expected of a reasonably carefully and prudent man under like circumstances, is *for the jury*.

“*On the other hand, where a driver can see children at least 50 feet away from a crossing or knows they are riding on a hill, he is required to give warning of his approach and take other reasonable means to guard against accident consistent with the circumstances.* Yeager vs. Gately & Fitzgerald, Inc., 262 Pa. 466, 106 A. 76; Idell vs. Day, *supra*; Rossheim vs. Bornot, 310 Pa. 154, 165 A. 27; Fisher vs. Duquesne Brewing Co., *supra*; Morris vs. Kauffman, *supra*. Also Meyers vs. Central R. Co. of New Jersey, *supra*. The courts attention is invited to the fact that defendant gave absolutely no warning in the case at bar.”

Smith et al. vs. Pachter, 19 A. 2d 85.

“In determining whether the court was justified in giving binding instructions for the defendant, not only should the testimony be read in a light most favorable to plaintiffs, all conflicts therein being resolved in their favor, but plaintiffs must be given the benefit of every fact and inference of fact pertaining to the issues involved which may reasonably be deduced from the evidence.

“On the other hand, where a driver can see children on a cross street or knows or ought to know that children are riding on a hill, he is required to give warning of his approach and take other reasonable means to guard against accident consistent with the circumstances.

Everybody knows that a sled has no brakes. Once in motion it continues until the force of gravity fails to act upon it, and the force of inertia is overcome by friction. It has been pointed out that the defendant was under a duty to exercise the highest degree of care, that he failed to do so. Now may it further be pointed out that defendant was so careless in keeping a lookout for young sleighriders that he failed to notice the plaintiff until he was only 10 feet from the defendant's car (T. 163-8) at which time the defendant stopped his car directly in the path of the plaintiff to his serious injury.

In the interest of justice this court should not only order a new trial but should also direct a verdict for plaintiff and require only proof of damage on the said trial.

Respectfully submitted,

E. L. SCHOENHALS