

1956

Leara Ann Deveraux v. General Electric Company and Harold J. McKeever : Brief of Appellant

Utah Supreme Court

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Case No. 8472

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

LEARA ANN DEVEREAUX,

Plaintiff and Appellant,

— vs. —

GENERAL ELECTRIC COMPANY,
a corporation, and HAROLD J.
McKEEVER,

Defendants and Respondents.

FILED
Clerk, Supreme Court

BRIEF OF APPELLANT

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IN THE SUPREME COURT of the STATE OF UTAH

LEARA ANN DEVEREAUX,

Plaintiff and Appellant,

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McKEEVER,

Defendants and Respondents.

Case No. 8472

BRIEF OF APPELLANT

(Numbers in parentheses refer to pages of the record. The parties will be referred to here as they appeared in the trial court.)

PRELIMINARY STATEMENT

This is an appeal by plaintiff from a judgment of no cause of action (195) entered in favor of defendants notwithstanding a verdict was rendered by a jury in plaintiff's favor for \$5,465.00 (190A).

This is an action to recover for personal injuries suffered by plaintiff in an automobile collision which occurred on the north slope of Lindon Hill in Utah County, State of Utah. Defendant McKeever was an employee of defendant General Electric Company and was driving his automobile in the course of his employment (5). After a trial to a jury, a verdict was returned in favor of plaintiff and against defendants, assessing general damages in the sum of \$5,000.00 and special damages in the sum of \$465.00 (190A).

A judgment was entered May 25, 1955, in favor of plaintiff on this verdict. Thereafter the court entered an amended judgment cutting the special damages to \$199.90 (190), leaving a total judgment of \$5,199.90 (191). Defendants moved the court to set aside the verdict and to enter a judgment in favor of defendants in accordance with their motion for a directed verdict and that if that motion be denied to set aside the judgment and grant a new trial (192). November 21, 1955, the trial court granted defendants' motion for a judgment notwithstanding the verdict and denied the motion for a new trial (194). Pursuant to this order a judgment was entered of no cause of action against plaintiff. From this judgment plaintiff appeals.

The review presented by this appeal relates only to defendants' liability. No question arises concerning damages. We will not discuss the injuries or damages which plaintiff suffered. Suffice it to say that in the collision she received injuries to her back, abdomen and head.

STATEMENT OF THE CASE

The scene of this case is laid in Utah County in and between Provo and Orem, and on the highway a little to the north. This action arises out of a collision between defendants' northbound automobile as it ran into the left side of plaintiff's automobile as she was making a "U" turn. This was on June 30, 1954 between 10:00 and 10:30 p.m.

*

Earlier that evening plaintiff discovered her husband's Packard car in front of the home of a Mrs. Frances Smith in Provo (95). After talking with the police, plaintiff had this automobile towed to the Hilltop Garage in Provo. When Mr. Devereaux learned, while at work, that his automobile had been towed away, he left work (144). He went to the home of Mrs. Smith. She borrowed an automobile and drove him to the garage (156). Mr. Devereaux was getting his automobile as plaintiff drove up (81). Mrs. Smith then left in the automobile she had borrowed and Mr. Devereaux then left in his own, whereupon plaintiff started in a northerly direction on the highway leading from Provo to Orem. This was about ten P.M. (81). Mr. Devereaux drove to the home of Mrs. Smith and picked her up (156). The next time plaintiff saw Mr. Devereaux was in Orem in the vicinity of Kirk's Drive-Inn. Mrs. Smith was in the automobile with him. He drove or swung his automobile at plaintiff's automobile a couple of times (82). Plaintiff decided to drive off the highway on the right hand side (82). Mr. Devereaux then drove his car in front of hers. She put on the brake

and just barely hit the Packard on the left-hand side (83). Mr. Devereaux stepped out of his automobile and came towards plaintiff. At that time a highway patrolman passed by going in a northerly direction on the highway. Plaintiff started her automobile after him, honking her horn in an attempt to attract his attention (83). The patrolman finally pulled over to the side of the road and plaintiff did likewise (84). Plaintiff informed the officer of the difficulty she had been having and he told her he would take her back and for her to follow him (84). The officer, Charles H. Allred, testified (29) :

“A. Yes sir. I took and planned an escort for the lady, and told her that I would go back with her to see that everything was safe, and to follow my automobile after I had put the controls on, and stay right behind me, and we would get a break in the traffic, and I would escort her back to the City of Orem.”

The controls were the big oscillating dome lights on the roof of the patrol car. This light was red. It turns in all directions and can be seen from all directions (29). The officer looked for safety. He did not drive out into the traffic until the drivers could discern his signals (30). Automobiles both north and south bound, respected the light and gave the officer the right of way by stopping (30-42). He then made a “U” turn to proceed southerly.

At the time plaintiff drove over to the side of the road, her lights were on and she did not turn them off (85). With her signal lights, she signaled a left-hand turn. She looked both ways and did not see an automo-

bile. She went to make the turn and an automobile hit her automobile on the left side between the door and the rear fender (85). The officer testified he made the turn and plaintiff attempted to follow behind him. When he had completed his turn, he heard the crash as another automobile was propelled into plaintiff's automobile (30). At the time of the crash, the officer was on the west side of the highway in about the outside lane (39). He was headed south and had just completed the "U" turn and was just west of two stopped automobiles when he heard the crash. The officer did not see the collision or defendants' automobile before the crash (40).

Joseph L. Breeze, immediately before the collision, was driving an automobile northerly in the second lane of traffic from the center line for northbound vehicles. As he approached this particular area, he saw a red light on the side of the road about two or three hundred feet ahead of him. He pulled over into the center lane (66,67). The red light started to turn around in the middle of the road and he stopped to permit the turn to be made (67).

These happenings occurred on the slope of what is known as Lindon Hill. The officer estimated that he stopped about half way between the crest of the hill and the bottom (36,37).

Defendant McKeever lived in Salt Lake City and was an employee of defendant General Electric Company. He had spent the afternoon and early evening playing golf at the Country Club in Provo. He played from two o'clock until approximately eight or eight thirty. After

he came into the club house he had a couple of drinks of whiskey (134). He left the golf club about nine o'clock and went to dinner. He left the restaurant at approximately ten o'clock and started north on highway 91 towards Salt Lake City (135). He testified that he was driving northward at approximately fifty miles an hour when he came over the rise of a hill and then things happened so fast that his recollection was hazy (136). He knew, as he was driving along, that he was approaching a hill and he knew that there was more danger in driving toward a hill than merely driving along a straight level road (140). When he reached the crest, he saw automobiles at an estimated two hundred feet ahead of him (136, 140). He saw the officer's car with the light on top (140). He was driving in the lane closest to the middle of the road. He observed a car stopped in that lane and turned to the right to avoid hitting it. He clipped it as he passed and then collided with plaintiff's automobile (67,141).

Highway patrolman Neldon Evans made measurements after the collision. From debris and brake marks and marks from that point to where the cars finally came to rest, the officer determined the location of the point of impact. There is a driveway east of the highway which appears on Exhibit 4. He placed the point of impact seven feet north of the north edge of this driveway and seven feet east of the line dividing the two north-bound traffic lanes (55). These lanes were twelve feet wide. Brake marks extended from the point of impact in a southerly direction for sixty feet. At the southerly

point of these brake marks, the western most started about a foot from the center line of the highway and extended in a diagonal direction to the point of impact in the eastern lane of northbound traffic (56). The officer estimated the point of impact to be from two to three to four hundred feet from the crest of the hill (60).

Plaintiff's automobile came to rest facing in an easterly direction forty-four feet north from the point of impact to the side of the automobile and ten feet nine inches east from the middle line of the northbound traffic lanes to the rear of plaintiff's car (58). McKeever's automobile also came to rest heading in an easterly direction. The side of his automobile was twenty feet north of the point of impact. The rear end of his automobile was two feet seven inches east from the middle line of the northbound traffic (57,58).

Patrolman Evans talked with McKeever at the scene of the collision. McKeever said that he was going between fifty and sixty miles per hour and that he was within two hundred feet of the danger when he first noticed it (52,53). The patrolman could smell alcohol on his breath. He staggered a little and his talk was a little thick (53,54). Because of this, the patrolman questioned him about drinking. He told the officer that he had gone to Provo for supper and had a few drinks. He was asked where he was and he stated that he was at Draper, and that he remembered going past the point of the mountain (53,54). The place where the collision occurred is some twenty to twenty-five miles south of Draper.

STATEMENT OF POINTS

POINT I

PLAINTIFF WAS DENIED HER RIGHT TO A JURY TRIAL IN VIOLATION OF THE CONSTITUTION AND APPLICABLE AUTHORITIES.

POINT II

THERE WAS SUBSTANTIAL EVIDENCE INTRODUCED WHICH WOULD SUPPORT A FINDING THAT DEFENDANTS WERE NEGLIGENT IN THE OPERATION OF THE AUTOMOBILE AND THAT SUCH NEGLIGENCE PROXIMATELY CAUSED PLAINTIFF'S INJURIES.

POINT III

THE TRIAL COURT ERRED IN HOLDING PLAINTIFF GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

ARGUMENT

POINT I

PLAINTIFF WAS DENIED HER RIGHT TO A JURY TRIAL IN VIOLATION OF THE CONSTITUTION AND APPLICABLE AUTHORITIES.

The trial court submitted this case to the jury for its verdict. It returned a verdict in favor of plaintiff. Thereafter the court granted defendants' motion for a judgment notwithstanding the verdict and entered judgment in favor of the defendant no cause of action. To support this ruling it must be found that the evidence was entirely insufficient to support a finding in favor of plaintiff and required a judgment for defendants. This ruling denies to plaintiff her right to a jury trial.

This Court in *Stickle v. Union Pacific R. Co.* (Utah) 251 P. 2d 867 (1952) made a splendid statement of the right of a citizen to a trial by a jury. This Court there stated:

“The court should exercise caution and forbearance in considering taking questions of fact from the jury.

“In our democratic system, the people are the repository of power whence the law is derived; from its initiation and creation to its final application and enforcement, the law is the expression of their will. The functioning of a cross-section of the citizenry as a jury is the method by which the people express this will in the application of law to controversies which arise under it. Both our constitutional and statutory provisions assure trial by jury to citizens of this state.

“Courts, as final arbiters of law, could arrogate to themselves arbitrary and dangerous powers by presuming to determine questions of fact which litigants have a right to have passed upon by juries. Part of the merit of the jury system is its safeguarding against such arbitrary power in the courts. To the great credit of the courts of this country, they have been extremely reluctant to infringe upon this right, and by leaving it unimpaired have kept the administration of justice close to the people. Of course, the rights of litigants should not be surrendered to the arbitrary will of juries without regard to whether there is a violation of legal rights as a basis for recovery. The court does have a duty and a responsibility of supervisory control over the action of juries which is just as essential to the proper administration of justice as the function of the jury itself. Never-

theless, we remain cognizant of the vital importance of the privilege of trial by jury in our system and deem it our duty to zealously protect and preserve it."

Another excellent statement of the rule is found in *Newton v. Oregon Short Line R. Co.*, 43 Utah 219, 134 Pac. 567, 570.

"Where, therefore, the circumstances are such that it may reasonably be said that different minds, in viewing and considering the evidence, might arrive at different conclusions with respect to whether or not the injured person exercised ordinary care, the question of negligence must of necessity be determined as one of fact and not of law. While the substance of the foregoing statement is often found in the books and may be said to be a correct statement of the doctrine, yet such statements often leave the reader in doubt whether a given case falls within or without the doctrine. But, notwithstanding this, it is impossible to formulate a rule by which all cases can be determined.

"All that can be said is that, unless the question of negligence is free from doubt, the court cannot pass upon it as a question of law; that is, if after considering all the evidence and the inferences that may be deduced therefrom the court is in doubt whether reasonable men in viewing and considering all the evidence, might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court. The court can pass upon the question of negligence only in clear cases. All others should be submitted to the jury. The reason of this is apparent from the fact that in this state all questions of fact are for the jury;

and therefore, unless it is clear that in viewing and considering the evidence reasonable minds might not arrive at different conclusions, the case should go to the jury."

We submit the ruling of the court that the evidence was insufficient and required a judgment for defendants, constitutes a plain violation of plaintiff's right to a trial by jury secured to her by the Constitution of the State of Utah and by the foregoing authorities.

POINT II

THERE WAS SUBSTANTIAL EVIDENCE INTRODUCED WHICH WOULD SUPPORT A FINDING THAT DEFENDANTS WERE NEGLIGENT IN THE OPERATION OF THE AUTOMOBILE AND THAT SUCH NEGLIGENCE PROXIMATELY CAUSED PLAINTIFF'S INJURIES.

We do not anticipate that there will be any contention made by defendants that the evidence was insufficient to support a finding that defendant McKeever was guilty of negligence as he drove his car in a northerly direction and into the automobile of plaintiff.

By Instruction No. 4 (11-12) the trial court submitted two grounds of negligence. One was speed and the other failure to keep a proper look-out.

The testimony established that the highway at this point was in a fifty mile speed zone (53). Defendant McKeever admitted to the police officer that he was driving between fifty and sixty miles per hour. Under applicable statutes this was prima facie evidence that McKeever was driving at a speed which was not then

reasonable, Utah Code Annotated, 1953, section 41-6-46. On his cross examination he admitted he knew he was approaching a hill and knew that there was more danger approaching a hill than merely driving along a straight, level road (140). He took no precautions to bring his car under control so that he could stop it within the range of his vision. As a matter of fact, he clipped the bumper of another car which had previously stopped to permit the police car to make the "U" turn. After clipping this car, he went on into the other lane of traffic and into the car driven by plaintiff. The statutes of this State require that a driver shall drive at an appropriately reduced speed when approaching a hill crest, Utah Code Annotated, 1953, section 41-6-46 (c).

The conduct of the driver, Joseph Breeze, indicates that if defendant McKeever had been driving at a proper speed and had been keeping a proper lookout he would have been able to discern the situation that existed and would have been able to bring his automobile to a stop short of colliding with plaintiff.

The evidence shows that Breeze saw the police car 200 or 300 feet ahead of him, yet plaintiff laid down only 60 feet of brake marks indicating that he must not have been keeping a proper lookout or did not take steps to bring his car under control and reduce its speed to a reasonable one under the facts and circumstances which faced him.

We believe that there was sufficient evidence to submit to the jury the proposition that defendant McKee-

ver was under the influence of intoxicating liquor and, hence, was negligent in that regard. The evidence indicated that he talked thick, that he staggered a little and that he smelled of liquor (53, 54). He believed that he was at Draper and stated he had passed the point of the mountain, when, as a matter of fact, he was twenty to twenty-five miles to the south of that point and had not reached the point of the mountain or Draper.

The evidence supports a finding of proximate cause. If defendant had kept a proper lookout he would have been able to stop or bring his car under proper control and thus avoid the collision. A reasonable rate of speed would have permitted him to bring his car to a stop and thus avoid the collision. This evidence supports a finding of proximate cause.

We have concluded not to make any extensive arguments on this proposition. Our remembrance is that defendants did not contend an insufficiency of evidence to support a finding of negligence on defendants' part and proximate cause. However, we feel it necessary to refer to this evidence because the trial court in granting the motion for judgment notwithstanding the verdict did not specify the particular ground upon which he ruled.

We submit the evidence supports a finding that defendants were negligent, proximately causing plaintiff's injuries.

POINT III

THE TRIAL COURT ERRED IN HOLDING PLAINTIFF

GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

The record does not indicate the ground upon which the trial court ruled. Based upon comments of the trial court and the argument of counsel, it is our belief the trial court ruled that plaintiff was guilty of negligence as a matter of law and that such negligence as a matter of law proximately caused plaintiff's injuries. Ordinarily, these two questions are questions which should be submitted to a jury for its consideration. The burden of proof, or as it is sometimes known, the burden of persuasion, is upon defendant to satisfy the jury by a preponderance of the evidence that plaintiff was guilty of negligence and that such negligence proximately caused her injuries.

The recent case of *Coombs v. Perry*, 2 Utah 2d 381, 275 P. 2d 680 (1954) has made a very clear statement of the test which must be applied to the evidence here. It is there stated:

“The test we apply is whether from all of the evidence reasonable minds could fairly say that they were not convinced by a preponderance of the evidence that she failed to use reasonable care under the circumstances and that this resulted in proximately contributing to cause her injury. Or, to state the proposition affirmatively, was the evidence so clear and compelling that all reasonable minds must say that it was established by a preponderance of the evidence that she was negligent and that such was a proximate cause of her injuries?”

Also in *Stickle v. Union Pacific Railroad Company*, (Utah) 251 P. 2d 867 (1952), the Court set forth the tests which should be used in considering a contention such as is made by defendants in the case at bar:

“It should be kept in mind that so far as the quantum of proof necessary to take the question of contributory negligence from the jury is concerned, the tests are the same as with respect to primary negligence. For instance, in a given case, there may be *some* evidence upon which a finding of negligence by the defendant *could* be based, yet the jury may remain in such a state of mind that they may fairly say that they are not convinced by preponderance of the evidence that the defendant was negligent, and based upon such failure of proof may refuse to find a verdict against him. It would only be when the defendant’s negligence had been established with such certainty that all reasonable men must conclude that he did not exercise reasonable care, that the court would rule as a matter of law that he was negligent and direct the jury to find a verdict against him; conversely, if evidence were such that reasonable men may fairly say that they are not convinced from a preponderance of the evidence that he was guilty of negligence, the court could not rule that he was negligent as a matter of law and take the case from the jury.

“These principles apply in identical fashion to the question of plaintiff’s contributory negligence except that the defendant has the burden of proof. That the evidence is such that the jury *may* find from a preponderance of the evidence that the plaintiff failed to use due care for his own safety is not sufficient. The proof must establish his failure to do so with such certainty that

all reasonable minds must so conclude before the court may rule as a matter of law that he is precluded from recovery on that ground."

We will treat each of these propositions separately considering first the problem of negligence and second the problem of proximate cause.

NEGLIGENCE

In Instruction No. 5 (13, 14), the trial court submitted to the jury two grounds of negligence. First, he instructed the jury that if they found from a preponderance of the evidence that plaintiff attempted to make a "U" turn on U. S. Highway 91, at the time and place of the collision complained of, and upon the approach to or near the crest of a grade where such vehicle could not have been seen by the driver of any other vehicle approaching from either direction within five hundred feet, and that such turn could not be made or accomplished with reasonable safety, then they could find that plaintiff was negligent. The second proposition submitted to the jury was that if the jury found, from a preponderance of the evidence, that plaintiff attempted to make a "U" turn at the time and place of the collision without keeping a proper lookout for other persons or motor vehicles lawfully using said highway, then the jury might find that plaintiff was negligent.

Section 41-6-67 Utah Code Annotated 1953 provides as follows:

"No vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon

the approach to, or near the crest of a grade, where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within 500 feet.”

There was no evidence in this case which required a finding that plaintiff's automobile could not have been seen by the driver of any other vehicle approaching from either direction within five hundred feet. There was evidence that the place where the “U” turn was attempted was anywhere from seventy-five feet to four hundred feet from the crest of the hill. It did not appear that the road south of the crest was on a downward grade toward the south. In other words, the jury could have found that as a car was driving in a northerly direction approaching the crest of the hill, it was on a plateau and the view of such motorist would not necessarily be obscured for five hundred feet or more.

Also plaintiff was instructed by a police officer to follow him and he would escort her after he had put the lights on the patrol car and after there was a break in the traffic. The officer turned on his lights, the traffic stopped and the officer made the “U” turn followed by plaintiff. The statute was not meant to cover a situation such as this. A state statute requires a motorist to comply with any lawful direction of police officer. Section 41-6-13, Utah Code Annotated, 1953.

We submit there was no evidence requiring a finding that there was a violation of this statute and hence the matter should have been left to the determination of the jury.

Concerning her preparations to make the “U” turn, the testimony of plaintiff supports a finding of

ordinary care and hence the second ground of negligence was a jury question. Plaintiff testified that while she was on the side of the road the patrolman told her to follow him. He put on the oscillating light on top of his automobile and made ready to make the "U" turn. He did not attempt to go in front of traffic until all traffic had stopped, both northbound and southbound. When he observed that he could turn in safety, he started to make the "U" turn. Plaintiff followed. She stated that before she moved, she put on the signal light indicating she was about to make a lefthand turn. She looked in both directions and saw no automobiles which constituted a danger. She then commenced to make the turn and after she entered the highway, the automobile driven by McKeever collided with her automobile on the left side between the left rear door and the left rear fender.

Plaintiff's attention was demanded in more than one direction and in more than one place. Since her attention could not be in all places and in all directions at once, it was of necessity a question of human judgment how her attention should be distributed among the several competing demands. Plaintiff had to look north, south and west. It was for the jury to say whether she used reasonable care in distributing her attention.

This Court had held where the attention of a motorist must be distributed over several directions whether the motorist is negligent in her distribution is a question of fact for the jury. In *Martin v. Stevens*, (Utah) 243 P 2d 747, the collision occurred in an intersection and it was held a jury question as to due care on plaintiff's part

was presented. Considering the distribution of attention the court stated:

“We must remember that there were three other streets to give some attention to as he approached the intersection. All of the attention could not very well or safely be focused on any one at any given instant. Remaining aware of the others and giving them secondary attention, the plaintiff would look to the west, as he stated he did, to observe for the favored traffic to which he must give right of way, if any was near. He then looked to the east and saw no car within the extent of his vision, 150 to 200 feet. At that instant he was entitled to assume, absent anything to warn him to the contrary, that any car approaching from that direction would do so at a lawful rate of speed, that is, not to exceed about 25 miles per hour. He then changed his main attention back to the intersection and the south and west and proceeded. * * *

“As hereinabove suggested, we must avoid measuring the plaintiff’s duty and charging him with negligence because he may have failed to anticipate and avert negligence on the part of the defendant. We do not believe that it can be said that all reasonable minds must agree that the plaintiff’s action in looking to the east and then proceeding, relying on his right of way over traffic from that direction, and the assumption that any such traffic would not exceed a reasonable and lawful rate of speed, amounted to negligence on his part.”

In *Coombs v. Perry*, 2 Utah 2d 381, 275 P 2d 680, this Court considered this same question in a pedestrian

case but the same principle is applicable here. The court stated:

“She must of course be watching for automobiles or other vehicles on the street, particularly from the north whence traffic was most likely to come. But due care requires that she also keep a lookout ahead for other pedestrians, possible holes or obstructions in the street, and at least remain aware of the possibility of other traffic, lest she be guilty of failing to use reasonable care for her own safety in regard to other dangers. For these reasons she obviously is not necessarily required, and likely in due care cannot give her entire attention to any one particular point of hazard. All that is required of her is that she use that degree of care which ordinary and reasonable persons usually observe under such circumstances.

“Under the evidence here the jury may well have found that when the plaintiff looked to the north there was no car approaching within a distance of immediate hazard to her, and in view of the considerations above discussed as to her right-of-way, and the necessity of remaining aware of other conditions around her, that her conduct in placing some reliance upon the observation she made and proceeding westward across the street was consistent with her duty of ordinary and reasonable care for her safety.”

In *Hayden v. Cederlund*, 1 Utah 2d 171, 263 P. 2d 796 (1953), this Court refused to rule as matter of law that it constituted negligence for a driver of an automobile to give a signal for a left-hand turn and not make any observation to the rear through a rear view mirror or otherwise. Here plaintiff testified that she not only

gave a signal, but that also she looked for both north and south bound traffic.

The underlying reason for the ruling in the Hayden case is that plaintiff took some precaution for his safety and whether it was enough to amount to reasonable care was for the jury to decide. This principle is well established in this jurisdiction as is reflected in *Stickle v. Union Pacific R. Co.*, (Utah), 251 P 2d 867, where plaintiff tested the tie band which passed over the tanks on a flat car by placing his weight upon it. He could have done more to ascertain its safety. The court held the question of whether he did enough was for the jury.

The case at bar is not one where plaintiff did nothing. She did something for her own safety and certainly went farther than did plaintiff in the Hayden case.

See also *Lloyd v. Southern Pacific Co.*, 111 Cal App. 2d 626, 245 P. 2d 583, where it was held the evidence established that the driver of an automobile in a crossing accident had exercised some care and therefore the question of contributory negligence was for the jury. The court quoted at length from *Koch v. Southern Calif. Ry. Co.*, 148 Cal. 677, 84 P. 176, the material part of which is as follows:

“ * * * * where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient, will always be a matter for determination by the jury.”

The court, referring to the Supreme Court, concluded:

“ * * * * It thus appears that that court has now adopted or restated the rule of the Koch case, and we of course are bound to follow it if there is any evidence in this record that Lloyd exercised *some* care — whatever the quantum thereof.”

We have here the evidence that the officer told plaintiff to follow him in making the “U” turn. He made it successfully and plaintiff was merely following his lead, which she could do as a reasonably prudent person.

While plaintiff testified she had no recollection of seeing other cars stopped on the highway, the jury could find she was actually aware of them and because of being distraught did not recollect their presence. In any event, seeing these cars stopped would give her added reason to make the turn and would lead to an assurance upon which she could act as a reasonably prudent person. In *Hardman v. Thurman*, (Utah) 239 P. 2d 215, plaintiff driving south, made a left-hand turn in an intersection. There were three lanes for northbound traffic. In the first two lanes east of the center line were cars which were stopped. Defendant was driving north in the third lane and collided with plaintiff. The court held the question of plaintiff’s negligence was one for the jury and stated:

“In the instant case, the jury might reasonably conclude that when the tanker truck stopped in the first lane east of the center of State Street and another motor vehicle stopped in the second lane, Mrs. Hardman was in the exercise of reasonable care in assuming that it was safe to proceed eastwardly.”

We submit that plaintiff's negligence, if any, was a question of fact to be determined by the jury. In this very case the question was at first submitted to the jury and the verdict for plaintiff established that eight citizens of this community believed plaintiff was not guilty of negligence.

PROXIMATE CAUSE

Even if we assume for the purpose of argument that plaintiff was guilty of negligence as a matter of law, still the trial court erred because proximate cause in this case is a question of fact for the jury.

Hayden v. Cederlund, 1 Utah 2d 171, 263 P. 2d 796, is very similar to the case at bar. There plaintiff's verdict was by the trial court set aside and a judgment notwithstanding the verdict entered for defendant. The judgment was reversed and the verdict reinstated. Plaintiff was riding in a truck with his son driving. The negligence of the son was imputable to plaintiff. The son was driving at a speed of approximately 15 miles per hour. The truck was hit in the rear by an automobile driven in the same direction by a peace officer at a speed of 45 or 50 miles per hour. The son testified he was going to make a left hand turn and about 100 feet before making the turn, he put out his left arm, signaling the turn. Just before he turned an automobile passed him on the right side. The collision occurred as he commenced his turn at a time he was from 3 to 15 feet beyond the center line. He heard no siren, saw no flashing light and did not look

to the rear or through the rear vision mirror at any time after he signaled the turn. Defendant testified his siren and red flasher were operating and he saw no signal given by plaintiff's son. He was attempting to pass the truck to the left. When he realized it was turning to the left, he threw on his brakes and laid down 75 feet of brake marks before the impact.

In holding that proximate cause was a question of fact the court stated:

"We have said that violation of a traffic law constitutes negligence as a matter of law, but that such violation may not be the proximate cause of an injury. Without determining the correctness of the trial court's interpretation of the statute as applicable to the facts here, we believe in error the ruling that the driver's negligence, if any, because of violation of the statute or independently thereof, was a proximate cause of the injury.

"Viewing the evidence favoring the plaintiff, and recognizing that causation ordinarily is a matter for the jury unless reasonable minds could not differ as to its existence or the lack of it, we believe and conclude that there were facts here relating to proximate cause which, if believed by the jury, were such that reasonable minds could conclude that the end result was not efficiently caused or concurred in by the driver's negligence. In this connection, a car passed on the right just before the attempted turn, which, along with other facts, may have given rise to a reasonable conclusion that those to the rear had seen and heeded the driver's signal. It is not unreasonable to anticipate that no one will attempt to pass another on the left in an intersection. Although such

anticipation of itself may not preclude a finding of negligence in a given case, other facts, such as the passing of a car to the right, failure of one intending to pass to give an audible or visible signal of such intention, the high speed of a car approaching from the rear, physical facts which may tend to show that one approaching from the rear may have attempted to change his course and pass to the right of the truck (as another car a moment before had done), but was unsuccessful in the maneuver because of speed or miscalculation, in the aggregate may combine to make a factual situation essentially for the jury in conjunction with its privilege of appraising the credibility of the witnesses and the character of the evidence.

“The jury resolved doubt in favor of the plaintiff, and with deference to the learned trial court’s determination, we believe the facts do not demand a finding, as a matter of law, that the jury’s conclusion was unreasonable or unfounded on competent evidence.”

Let us assume plaintiff did not keep a proper lookout. Had she looked properly she should have seen the Breeze car and the southbound cars stopped. She would have believed that traffic had seen the police car and her own and was giving them an opportunity to make the turn. The speed of the defendant’s automobile and his failure to keep a lookout could have been regarded as the sole proximate cause of the collision.

Another case closely analagous to this case is *Lowder v. Holley*, 120 Utah 231, 233 P. 2d 350 (1951). Plaintiffs were in an automobile driven by one of them in a

westerly direction and as he approached an intersection, he slowed to 10-15 miles per hour, looked north and south and saw no automobile. Defendant was driving his truck south and it hit the rear right side of plaintiff's automobile. A verdict and judgment for plaintiffs were affirmed. Defendant argued plaintiffs were guilty of contributory negligence as matter of law. The court stated:

“Appellants strenuously argue that respondent Amasa Lowder's contributory negligence precludes both him and his wife from any recovery for damages and injuries. They argue that he failed to look and see Ruth Holley's truck before he entered the intersection and had he looked he would have seen the truck and it would have been his duty to refrain from entering the intersection until he could do so safely. Appellants are correct in stating that before entering an intersection the driver of a car must look and determine whether it is safe to enter. However, under the facts as the court found them, had Amasa Lowder observed the truck just before he entered the intersection he would have been justified in considering it safe to enter because at that point, if the truck was being driven at the rate of 50 miles per hour, and Amasa Lowder was driving at from 5 to 10 miles per hour, as the trier of the facts could reasonably have found, then the truck would have been at least 250 feet from the intersection since his car had traveled almost the entire distance across the intersection before the impact, and this being so he could have assumed and acted on the assumption that the driver of the truck would exercise ordinary and reasonable care in its driving and that it would be safe to cross the intersection. Had Ruth Holley exercised such reasonable and

ordinary care the collision would not have occurred. Under such a state of facts Amasa Lowder's failure to see the truck could in no way have contributed to the accident. The court, therefore, did not err in finding that Amasa Lowder was not contributorily negligent."

This quotation is clearly applicable to the case at bar. If plaintiff had seen the defendant's car some 300 or 400 feet to the south, with other cars stopped, she could have assumed he would also bring his car to a stop and could consider it safe to make the turn. Had the defendants here exercised reasonable care as did the other drivers, the collision would not have occurred. According to the Lowder case, this being so, proximate causation was a question for the jury and defendants' negligence could have been the sole cause.

In *Gibbs v. Blue Cab*, (Utah) 249 P. 2d 213 (on rehearing 259 P 2d 294), a cab collided with a bicycle. The rider of the bicycle was held by the trial court to be guilty of contributory negligence as a matter of law because he had no lamp on his bicycle. The Supreme Court reversed. It held this was a violation of a city ordinance and a state statute "which established some negligence as a matter of law." The court then held proximate cause was a question of fact, stating:

"Assuming that in one aspect, by showing a violation of the city ordinance, defendant established some negligence on the part of deceased as a matter of law, the problem remains as to whether absence of the lamp under all the facts was or was not a contributing proximate cause of the collision, — particularly in view of the fact

that immediately prior to the time of impact the bicycle, and therefore the lamp, was pointed away from the vision of the defendant—a proper jury question.

“We are committed to the principle that matters of negligence, contributory negligence and proximate cause generally are jury questions, unless the evidentiary facts are of such conclusive character as to require all reasonable minds to conclude that the ultimate fact of negligence, contributory negligence or proximate cause does or does not exist.”

This court considered whether proximate cause was a jury question in *Hess v. Robinson*, 109 Utah 60, 163 P. 2d 510 (1945). The trial court instructed the jury that both plaintiff and defendants were guilty of negligence as matter of law but left to the jury the question of proximate cause. The jury returned a verdict for plaintiff. Defendants contended that the negligence of plaintiff was a proximate cause of his injury as matter of law. The verdict for plaintiff was affirmed.

Plaintiff was driving a truck south on an arterial highway. Defendants were driving an ambulance east on an intersecting street. The court instructed the jury that plaintiff was negligent in not looking. In distinguishing proximate cause and remote cause the court stated:

“By ‘proximate cause’ is intended an act which directly produced, or concurred directly in producing, the injury. By ‘remote cause’ is in-

tended that which may have happened and yet no injury has occurred, notwithstanding that no injury could have occurred if it had not happened.”

It then started the consideration of whether plaintiff's negligence was a proximate cause of the injuries as matter of law by asking the following questions:

“The trial court instructed the jury that the plaintiff was negligent in not so looking. But does it follow as beyond dispute that had plaintiff looked and seen the ambulance approaching, reasonable and prudent conduct would have dictated that he stop until the ambulance had crossed the intersection? Are the facts revealed by the evidence so clear and certain that the court could say that for plaintiff to drive into the intersection without stopping was not the act of an ordinarily prudent and careful man?”

Asking and answering these same questions in the case at bar the same answers would be forthcoming. If plaintiff had looked and had seen the oncoming defendants' car, she could have concluded that it would stop as had the other cars. The police car had made the turn in safety. It is not beyond dispute that had plaintiff looked and seen defendants' car approaching, reasonable prudent conduct would have dictated she not make the turn. The evidence is not so clear and certain that the court could say that for plaintiff to start the turn was not the act of an ordinarily prudent and careful person.

Similar reasoning prevailed in *Martin v. Stevens*, (Utah) 243 P. 2d 747, where proximate cause was held

to be a jury question. Plaintiff drove south and defendant west into an intersection. Defendant hit plaintiff broadside in the intersection. Plaintiff only saw defendant when the brakes were set just before the collision. The trial court granted defendants' motion to dismiss and this was reversed. The court stated:

"There is also the question of proximate cause. Should we assume that all reasonable men must conclude that plaintiff's failure to keep more of a lookout to the east amounted to negligence, would they also all agree that such failure to observe proximately caused the collision? Suppose he had looked continuously to the east as he approached and proceeded into the intersection and had seen defendant coming. Could he not, within the limits of reasonable care, have assumed defendant would slow up and yield the right of way, or would the defendant's speed and proximity to the intersection have been a warning to the plaintiff that he would not do so? Under the rulings in *Hess v. Robinson*; *Lowder v. Holley*; and *Poulsen v. Manness*, all cited above, this was also a jury question."

Other cases which support plaintiff's position are *Dieckmann v. Signorini*, 47 Cal. App. 2d 481, 118 P. 2d 319; *Shattuck v. Pickwick Stages Corp.*, 135 Kan. 602, 11 P. 2d 996; *Ford v. Wilson*, 107 Cal. App. 131, 290 Pac. 120; *Burns v. Standring*, 148 Wash. 291, 268 Pac. 866.

We submit the evidence here supports a finding that if defendant McKeever had reduced his speed as he should have done upon coming toward the crest of the hill

and kept a proper lookout as he should have done and attempted to bring his automobile under control before he did, this collision would never have occurred. We believe that under the authorities such a finding would permit the jury to also find that the negligence of defendant was the sole proximate cause of the collision and that the negligence, if any, of plaintiff was the remote cause, if a cause at all.

CONCLUSION

A jury of eight citizens of Salt Lake County concluded that under the instructions of the court the defendants were negligent and the plaintiff was not guilty of contributory negligence. The trial court saw fit to exercise his power to nullify that determination. In so doing he has set his mind against eight minds on a factual determination. The exercise of such power is a serious course to pursue in the orderly trial of a law suit. It should only be done with great hesitation.

We believe and submit that the trial court has denied to plaintiff her right of trial by jury and that he has usurped the function of the jury. Under the foregoing authorities and argument the question of negligence, proximate causation and contributory negligence were all questions for the jury and the jury determination should have been respected and held to have been supported by the testimony in this case.

We respectfully ask that this Court reinstate the verdict of the jury and recognize and uphold the function of the jury which it properly exercised in this case.

We respectfully ask this court to reverse the judgment of no cause of action and remand the case to the District Court with instructions to reinstate the verdict and enter judgment for plaintiff in the sum of \$5,199.90.

Respectfully submitted,

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