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Ramona Hayward v. Leo George Eastman : Brief of Appellant

Utah Supreme Court

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AUG 21 1956

Clerk, Supreme Court, Utah

IN THE SUPREME COURT

of the

STATE OF UTAH

UNIVERSITY, UTAH

JAN 28 1957

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RAMONA HAYWARD,
Plaintiff and Appellant,

vs.

LEO GEORGE EASTMAN,
Defendant and Respondent.

} Case No. 8525

APPELLANT'S BRIEF

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Appellant*

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IN THE SUPREME COURT of the STATE OF UTAH

RAMONA HAYWARD,
Plaintiff and Appellant,

vs.

LEO GEORGE EASTMAN,
Defendant and Respondent.

} Case No. 8525

APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an automobile accident case. The Plaintiff filed suit against the Defendant. The case was tried to a jury and the jury brought in a verdict of no cause of action.

The Defendant and his friend, Kenneth R. Parry, were going east in his automobile and hit the Plaintiff and her companion, Mrs. Fay Osborne, while they were behind the car in which they had been riding, crushing them between the two cars.

The accident occurred about a mile and a half west of Fort Herriman on the Lark-Herriman road, U. S.

Highway No. 111 at about 1 a.m. on November 26, 1953. (Ex. 41, officer's report).

The highway at the point of the accident was a blacktop road, sixteen feet wide, with shoulders of varying widths. (Map, Ex. 32), (Photographs Ex. 29, 4, 42, 45), (Officers report Ex. 41), (R. 246), and with a faint yellow line in the middle. There was a slight down grade with a slight curve for a distance of about 500 feet to the west, (Map, Ex. 28,) (Photographs, Ex. 4, 29, 3, 45), (Officers report Ex. 41), (R. 258, 259, 141, 142), and with a sharp curve 600 feet to the west. (Map, Ex. 28), (Photographs, Ex. 2), (R. 246, 385, 141). Vision was not obscured. It was on a clear night. The road was dry with no defects. (R. 278). It was in open country. The automobile in which the Plaintiff had been riding was parked on the side of the road. The accident occurred close to a telephone pole which could be seen 400 to 500 feet from the west. (R. 142, 218, 232, 248), (Officers report, Ex. 41, and maps).

The Plaintiff, Ramona Hayward, and her husband and family were living in Riverton at the time of the accident. During the afternoon prior to the accident, Plaintiff went to her friend, Mrs. Fay Osborne's home to assist her in preparing Thanksgiving dinner that they were going to have at the Osborne residence on Thanksgiving day.

Mr. Francis Osborne came home from work about 5 o'clock (R. 112), and then went to the store. While he was away, Ralph Crane, a relative of the Osbornes',

came to the Osborne home. Mr. Osborne returned home from the store about 9 o'clock (R. 113) and after they had something to eat, Mrs. Osborne wanted some Kool cigarettes and suggested that they go to Riverton to buy them. So the Plaintiff and Mrs. Osborne and Mr. Osborne and Ralph Crane went to Riverton in the Osborne car. They went to Viv's and Arch's a restaurant and beer parlor in Riverton. (R. 113, 114). They stayed at Viv's and Arch's from about ten thirty to eleven thirty and upon leaving decided to take a ride. (R. 113). They went to West Jordan and from there to Lark. On their way back, Mrs. Osborne stopped the automobile and parked off the side of the road so that she could go to the bathroom. (R. 114, 115).

Plaintiff and Fay Osborne went to the bathroom on a side hill. When they came back, Plaintiff looked both ways. There were no cars coming so they started to go behind their car. Plaintiff heard a noise and she looked up. She could see car lights. She said, "Just a minute, Fay, here comes a car," and she turned her head to see if Fay was with her and had stopped. Plaintiff turned around to see where the car was. Just turned her head and it was almost on her. She tried to step back, but she couldn't move. She couldn't get out of the way. She was scared. (R. 122, 123, 156). She estimated the car was traveling 50 to 60 miles per hour and the car came straight at her (R.157).

After the Plaintiff was hit, she tried to pick herself up off the road. Her hands were in the gravel. She tried to raise herself off the road, but couldn't. She was

lying on her side with both legs bent under and the bottom half of her legs were laid up against the top part of her legs. (R. 124). She was picked up and put in the front seat of the Osborne car and Mrs. Osborne was put in the back seat of the Osborne car. Thereafter they were transferred to Mr. Kaywood's car. Mr. Kaywood lived close to where the accident happened and he drove them to the Bingham Canyon hospital which was closed. (R. 125). They then went to Midvale where they were met by the ambulance (R. 180) and taken to the emergency hospital in Salt Lake City and given blood transfusions R. 180, 185). Plaintiff was in the St. Mark's hospital from November 26, 1953 to February 8, 1954, and was back in the hospital five other times, leaving the hospital in a wheel chair on the 26th day of April, 1955, one year and five months after the accident and thirty-four days before the trial. (Ex. 9).

The Plaintiff contended that the car was being driven by Leo George Eastman, the Defendant; but the Defendant contended that the car was being driven by Kenneth R. Parry and not as his agent Plaintiff relied upon the officer's report (Ex. 41) and the statement made by Leo George Eastman to the police officers that he was driving the car (R. 362, 274, 280), and the conversation between Mr. Hayward and Mr. Osborne and Mr. Eastman, in which Mr. Eastman stated he was driving the car. (R. 241, 242).

There was a lot of aspersions about Plaintiff's and Mrs. Osborne's drinking; but there was very little actual evidence of their drinking. The Plaintiff was not drunk

and Mrs. Osborne had nothing to drink. They are the two persons injured and involved in the accident. (R. 398, 235). The evidence on drinking of the respective parties was that the Defendant, Eastman, had two cans of beer at Viv's and Arch's (R. 355, 366), one drink of beer at the Drift-Inn in Lark and opened a can of beer on the way back to Riverton. (R. 367). Kenneth R. Parry had two beers at Viv's and Arch's (R. 307), drank one beer at the Drift-Inn in Lark (R. 309), and two cans of beer were opened in the car on the way back to Riverton, (R. 367), one can apiece. (R. 317).

That the Plaintiff had one beer in the afternoon at the Osborne home and nothing else to drink during that time (R. 147), one drink of whiskey before going to Viv's and Arch's (R. 148), and one drink of beer at Viv's and Arch's. (R. 114). That Mrs. Fay Osborne had nothing whatsoever to drink. (R. 235).

Mike Humphrey, a mechanic at the Riverton Motor Company, described the Osborne automobile and the amount of blood that was in the automobile. That there was flesh on the right side, underneath on the cross beam of the car (R. 164); that the left side of the car was damaged and the left back panel had to be repaired and the left tail light had to be repaired. (Repair order, Ex. 11), (R. 167), and testified that both sides of the trunk of the Osborne car were bent. Each side of the center of the hood of the Eastman car was damaged.

Hortense Wood, custodian of the records of the St. Mark's Hospital, identified the hospital record of the Plaintiff. (R. 172-174).

Francis Osborne testified that the Eastman car went 30 to 35 feet after the accident, (R. 178) and that the Osborne car went 70 to 80 feet (R. 178); and that thereafter they pushed the car out of the road. (R. 179). That they put the girls in the Osborne car then transferred them to the Kaywood car went to Bingham, then to Midvale, then to the County Hospital (R. 180), had a conversation in which Eastman admitted driving the car. (R. 182), and testified that the Eastman car turned left across the road and that the Osborne car was knocked straight down the road. (R. 183). That his car was three feet on the pavement and three feet on the oil when hit. He testified that he measured from the telephone pole to the curve sign and that it was 408 feet, and that from the telephone pole to the sharp curve was 605 feet. (R. 215, 216), (Ex. 3). That a car parked at the telephone post could be seen 500 feet away. (R. 218). That the park lights on his car were turned on. (R. 215).

That Mr. Osborne on rebuttal testified that his car was 6 feet, 2 inches from fender to fender and that the wheel from wheel to wheel outside measure was 5 feet, 3 inches and that his car from bumper to bumper was 16 feet, 3 inches. (R. 396).

Clara Fay Osborne testified that the Plaintiff was at her home and that they went to Viv's and Arch's and that she had nothing to drink. (R. 233, 235). That she remembered driving off the road, right side of car on the dirt, seeing the telephone pole, taking the keys out of the ignition and after that, she had an entire loss of memory until she was in the hospital. (R. 237, 241). That Dr.

Lamb testified that after injuries and loss of blood, the memory is often affected. (R. 212, 213).

Mrs. Osborne on rebuttal testified that she had put the car in gear and that the park lights were on and that Mrs. Hayward was not drunk. (R. 397 and 398).

Franklin S. Harris, Professor of Physical Science, University of Utah, testified going to the scene of the accident (R. 243 to 246), and making tests with a 1951 Ford, the same model as the Defendant's car, that the car could be stopped in a distance of 66 feet, going 45 miles per hour. (R. 384). That a car parked on either side of the telephone pole could be seen for a distance of 400 feet to 500 feet. (R. 248, 249, 385, 386), (Ex. 28). That it was approximately 600 feet to the sharp turn, (R. 246) and if a person is looking, he can see tail lights from the sharp curve. That a car could be plainly seen for 400 feet if parked on the east side of the telephone pole or on the west side of the telephone pole. Drew diagram (Ex. 28), and marked the places where he carried on the experiments. That a car laying down 72 feet of skid marks would be going 42 miles per hour (R. 387) and if it hit a car or object that would mean the car would be going faster than 42 miles per hour. If the car was going 15 miles per hour at time of impact and laid down 72 feet of skid marks, that would mean the car was going faster than 43 miles per hour. (R. 388, 389). In addition to that, if the car also turned and made marks on the pavement, it would be going still faster (R. 389) and if it hit another object it would

mean additional speed. That a car going 40 miles per hour would travel during the reaction time 44 feet; at 50 miles per hour, 55 feet, at 60 miles per hour 66 feet; and at 70 miles per hour, 77 feet. (R. 389, 390).

Dr. Lamb testified that he was called to the hospital on November 26, 1953; that Plaintiff had a compound fracture. That the bones of her legs were exposed to the out side and the bone fragments were protruding through the soft tissues and he took care of the fracture and put screws in the bones to hold them together (R. 191 to 199). That half or two thirds of the tissue in each leg had been smashed and crushed. (R. 186). That he operated, removing the dead tissue and sutured the remaining tissue (R. 186). Plaintiff was listed as critical on the hospital records, meaning that she might die.

That he exhibited the x-rays (Ex. 18 through 24 inclusive) and described them in details, (R. 188) explaining how it was necessary to scrape the bone, which is called saucerization. (R. 196). He stated it was necessary to take some bone from the hip and graft it onto the leg and described the operation of bone grafting. (R. 197). Plaintiff left the hospital on April 26, 1955, in a wheel chair. That Mrs. Hayward might have to return to the hospital and that the bone graft may not be successful. Exhibit 9 shows that the hospital bill is \$3,509.95. Exhibit 10 shows that Dr. Lamb's bill is \$1,617.75 up to date of trial.

William Tipton testified that he had drawn the map to scale, (Ex. 32), (R. 259), and identified a picture

taken by him 200 feet west of the telephone pole. (Ex. 29). That he had taken Exhibit 30 which is 50 feet west of the telephone pole (R. 256), and that he had taken the picture (Ex. 31), (R. 257) which is looking west from 100 feet east of the telephone pole. That it is 400 feet from the telephone pole to the sign. (R. 260, 261) and an additional 200 fet to the first sharp turn (R. 261), (Ex. 33), that the map was drawn to scale and the survey shows very little curve. (Ex. 28).

Carl George, the deputy sheriff of Salt Lake County, made the investigation, and arrived at the scene of the accident at 2:08 a.m. The accident occurred about 1 a.m. See exhibit 41. The accident occurred about one and one half miles west of Fort Herriman. That he measured 72 feet of skid marks. (R. 267), (Officers report, Ex. 41, Map Ex. 32).

He identified exhibit 34 and 35 and that they were introduced in evidence over Plaintiff's objection, (R. 270), identified the automobiles in exhibit 36 as being the Eastman car and in exhibit 37 as being the Osborne car. (R. 271).

He talked to Mr. Parry and Mr. Eastman at the scene of the accident, that they had something to drink (R. 274), that Mr. Eastman told him that he was driving the automobile (R. 274). That the skid marks were 3 feet, 6 inches from the center of the highway, (R. 275, 276.) That the skid marks were on the left hand side going east. He didn't go back to the scene of the accident (R. 276) and had never seen the photographs until the

afternoon of the trial, that he marked on the accident report that vision was not obscured, the pavement was dry, and no defects. (R. 278). The Eastman car was going 40 miles an hour; he thinks he got this information from Defendant, Eastman. The Eastman car went 32 feet after the impact. (R. 279). The Osborne car traveled 84 feet after the impact. (R. 279). He made some rough notes at the scene of the accident and they were his original work sheets which is part of exhibit 41, (R. 281). That he had written over some of his marks (R. 282). He has it marked on his work sheet, girls 35 feet, but doesn't remember what it means. (R. 283). That he determined the point of impact as being 1/10 of a mile from the Kaywood residence (R. 284). That 72 feet of skid marks is a line running down the left side of the Defendant's car. That the map shows 40 inches which is 3 feet, 6 inches from the center line to the left front wheel (R. 284), (Ex. 41), that he marked 74 feet or inches to a tree, couldn't remember what the measurement was for. The statement made by Kenneth R. Parry was part of the report (Ex. 41). He drew a map on the yellow accident report sheet (Ex. 41) and that as part of the report, he stated car number two (the Osborne car) parked on side of road; car number 1, (the Eastman car) going east, hit two ladies that were standing at rear of car number two, knocking both ladies up against the bumper of car number two. He got this information partly from Mr. Eastman, partly from Mr. Parry, and from observation. (R. 286). Officers report introduced as evidence (R. 286), that he got the full skid

marks of the rear tire as 72 feet (R. 287, 288), did not smell the breath of Mr. Eastman or Mr. Parry (R. 288), said there was very little blood on the pavement (R. 288), did not examine the shoulder of the road for skid marks (R. 289). That his report shows that the car traveled 32 feet after impact, although he put 24 feet on the board. (R. 292). That the Osborne car was in gear. (R. 295, 296).

Archie C. Brown, one of the owners of Viv's and Arch's, testified that he didn't let anyone pour liquor in his place (R. 300), that he has known Mr. Eastman for 12 years and that he comes to his place quite often, and that Kenneth R. Parry comes to his place quite often, oftener than Eastman. (R. 300). He doesn't know how many glasses of beer that he served to anyone that night. (R. 301).

Ralph Crane testified that he went to the Osborne home about 9 o'clock. He had been drinking before he arrived at the Osborne home. He doesn't recall drinking whiskey at the Osborne home; doesn't know whether he let anyone drink out of his bottle, that he saw the girls laying in the road and in a minute or two thereafter he helped put them in the Osborne car. (R. 304).

Kenneth R. Parry testified that he works for Archie McFarland & Sons Packing Co., on the killing floor. He had two glasses of beer at Viv's and Arch's Tavern (R. 307), did not know Mrs. Hayward. Left Viv's and Arch's at closing time; went to the Drift-Inn at Lark and did some drinking there. That he drove the car back because

Defendant hadn't had his Ford very long and they had been talking about cars and he would like to drive the car to see how it handled (R. 309, 317, 324). Saw two people standing in the road facing each other; could see they were women. Applied brakes, but slid into them. (R. 310). His driving license had been revoked for drunken driving (R. 315), took one can of beer apiece out of the Drift-Inn with them (R. 317). Lights were good and on high beam (R. 318), was driving 40 miles per hour and was going 15 miles per hour at time of impact. One girls fell directly back of car; other one toward center (R. 318. Was familiar with the road, with the turn, and with the particular place where the accident happened. (R. 318). Had been over the road a thousand times girls (R. 320). Could only see west, up the road from the opposite direction. (R. 319). Both girls turned around before they were hit (R. 319, 320), applied brakes 10 to 15 feet before he slid into the girls. Girls were only 15 feet away from the Osborne car when they were put into it. Could see up the road 75 feet where he hit the girls (R. 320). Could only see west, up the road from the telephone pole 100 feet in day time and 75 to 100 feet at night (R. 321). Changed stories, could only see 50 to 75 feet with the lights of the car on a straightaway. (R. 322, 323), drank two beers at Viv's and Arch's (R. 323), went to try out the car (R. 324). Did not see the Osborne car until he hit it (R. 325). Changed testimony, could see a long ways down the road (R. 327), when confronted with his deposition.

Occie Evans testified that he works for the Salt Lake County Sheriff's Department. He helped Sheriff George make the measurements. That the skid marks were on the hard surface of the highway on the south or right hand side of the road going east and that the skid marks ended up on the dirt shoulder. (R. 330). Thinks possible point of impact was about 20 feet east of the telephone pole, (R. 331) and that he had written on the report, car number two parked on side of road, car number one going east. Hit two ladies who were standing at rear of car number two, knocking both ladies up against bumper of car number two. (R. 332).

Lyle Bates testified that he was a Claims Adjustor and Attorney for the Farmers Underwriters Association (R. 334). He went to the scene of the accident and examined it and took pictures at the scene of the accident and was allowed to make marks on the pictures (R. 350) and conclusions as to what the pictures showed over Plaintiff's objection (R. 339) and that he testified that there was blood all over the place (R. 342). Pools of blood were between 2 and 3 feet. (R. 342). Other skid marks in Exhibit 38. (R. 343). Identified circle on hood where car was damaged. (R. 351). Exhibit 43 shows or looks like a line from a car with brakes on it.

Leo George Eastman, the Defendant, testified that he was employed as a miner at Lark. That he went to Viv's and Arch's and that he saw Ralph Crane, Mrs. Hayward, and Mrs. Osborne. He didn't see them drink any liquor. (R. 354). Eastman didn't particularly notice then and did not actually see them drink beer. (R. 354).

That he started talking to Kenneth R. Parry and that he had two glasses of beer (R. 355). That he left Viv's and Arch's at a quarter to 12 o'clock and went to Lark. Had beer at Drift-Inn in Lark and took beer out with them. Parry wanted to drive the car (R. 356). He let him drive. Car was going 40 miles per hour at time of accident (R. 356, 357). That he saw objects in the road; he thought for a minute it was stock, either horses or cows. Doesn't remember seeing the car at all. (R. 357). That he did not see the girls until they were 25 feet away from him. (R. 359). That the girls were facing east and did not change their position. That they were 100 feet away when he first saw the objects in the road. (R. 360). That the Osborne car only went 20 to 25 feet. (R. 361). Mrs. Osborne, after the accident, was lying along side of the yellow line and Mrs. Hayward was lying to the right of her on the oil. (R. 361). The girls were picked up and put in the Osborne car and then transferred to the Kaywood car. (R. 364). That he had Sealed Beam head lights. That he could see objects from 150 to 200 feet, but could not see them 350 feet ahead (R. 364). Went to Lark for beers. Went to Viv's and Arch's for a beer, (R. 364, 365, 366). Opened the beers in the car. (R. 367). Put the place where the curve started on the map and initialed it. (R. 368), and testified that the accident occurred right at the curve. (R. 369). Said that Exhibit 2 showing sharp curve was substantially the way it looked at the time of the accident. (R. 369). During the testimony of Mr. Eastman, Mr. Hansen stated to the Court that the map was drawn to

scale, there were 50 foot intervals, that it is 400 feet to the curve sign, but if you followed the curve of the road it is about 430 feet. (R. 371). That exhibit 44 and 45 were pictures where the accident occurred. Mr. Eastman testified that he could see about 300 to 400 feet up the road in the day time (R. 372, 373). Could see 75 to 100 feet with lights (R. 373). In a straight line could see 200 feet west of the telephone pole. (R. 374). Changed stories, could only see 100 feet (R. 376). Doesn't know how far the lights would shine to the side of the road (R. 377). Could see the car up the road approximately 80 feet (R. 380). Said place of impact was at curve or 5 to 10 feet from the curve (R. 380.) Changed testimonies and said could see the car up the road only 80 feet and admitted that in his deposition he testified he said he could see up the road 150 feet (R. 381). That the girls were 5 feet apart after the impact. (R. 378).

STATEMENT OF POINTS

POINT I.

THE DEFENDANT WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

POINT II.

THE COURT IMPROPERLY INSTRUCTED THE JURY AND FAILED TO GIVE THE PLAINTIFF'S REQUESTED INSTRUCTIONS.

POINT III.

THE COURT ERRORED IN ADMITTING CERTAIN TESTIMONIES.

POINT IV.

THE COURT ERRORED IN EXCLUDING CERTAIN TESTIMONIES.

POINT V.

THE COURT ERRORED IN NOT ALLOWING THE QUESTION OF LIGHTS AS ONE OF THE GROUNDS OF NEGLIGENCE TO BE SUBMITTED TO THE JURY.

POINT VI.

THE COURT ERRORED IN OVER EMPHASIZING INTOXICATION AS TO THE PLAINTIFF AND MINIMIZING THE DEFENDANT'S INTOXICATION.

POINT VII.

THE COURT ERRORED IN OVER RULING PLAINTIFF'S MOTION FOR A NEW TRIAL.

POINT VIII.

THE COURT MADE ERRORS IN LAW OCCURRING BEFORE, DURING, AND AFTER THE TRIAL.

ARGUMENT

POINT I.

THE DEFENDANT WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

The argument which Plaintiff will make in regards to Point Number 1 will also apply to Points Numbered 2, 5, 7 and 8.

We have divided Point Number 1, for convenience, into 4 subdivisions as follows: A. Speed; B. Lights; C. Control; D. Failure to keep a proper look out.

A. SPEED

Defendant was traveling at an excessive rate of speed under the circumstances and conditions. The evidence on speed is that there were 72 feet of skid marks (R. 267), (Officer's report, Ex. 41). That the Osborne car, which was in gear, was knocked 70 to 80 feet (R. 178), according to Mr. Osborne. According to the officer's report, the car was down the road 84 feet. The Eastman car swerved to the left, leaving tire marks across the highway for 32 feet. (Officer's report, Ex. 41 and pictures.)

Professor Harris testified and according to Mr. Hansen's chart (R. 388, 389), a car going 43 miles per hour will lay down 73 feet of skid marks. The Eastman car also knocked the Osborne car, which was in gear, from 70 to 80 feet and in addition to all that, left tire marks across the road which means that the car was being driven at a terrific rate of speed under the circumstances and conditions.

Mrs. Hayward testified that she had never seen a car coming so fast on that road, and that she judged it was going 50 to 60 miles per hour (R. 157).

It is interesting to note that Mr. Parry was trying out Mr. Eastman's car, and it is fair to infer from the facts that he was trying to see how much of a pick up it had and how fast the car would go. The fact that the accident did occur is strong evidence of excessive speed. The fact that the driver did not bring the car to a stop within the vision in which he could see objects upon the

road is also strong evidence of excessive speed or drunkenness.

The road was dry. There was only a slight curve. Vision was not obscured.

B. LIGHTS

The final evidence on lights by the Defendant was that he could only see 80 feet (R. 380) and it is apparently what he expected to be believed.

The final evidence on lights by Mr. Parry, was that he could see 75 feet on a straightaway (R. 322, 323).

The defendants testimony was that they were traveling about 40 miles per hour which means they would travel 44 feet during reaction time, and there were 72 feet of skid marks, total of 116 feet, and the car was still traveling. So they were not driving at a speed within which they could stop their car within the distance their lights would show objects on the road; or if they were lying about the distance they could see with the lights, then they must have been going altogether too fast.

This is a far cry from having lights which will show objects on the road 350 feet as required by the Utah Statute.

If this were the condition of the defendants' lights, the car should not have been going any where near the speed defendants were traveling.

Mr. Eastman testified that he had sealed beam head lights. If this were the case, of course they met the statu-

tory requirements of showing objects on the road for 350 feet, and their evidence about lights is not true.

C. CONTROL

If the car had been under proper control, certainly they could have turned the car to the left. The road was dry. It was a clear night. No cars were coming from the opposite direction and the road was practically straight. Certainly if he had sealed beam head lights, which Eastman testified he had, the driver could have seen any objects on the road in time to have turned to the left. The car and the ladies did not move according to the Defendant's testimony. According to Plaintiff's testimony, they couldn't get out of the way, they didn't have time.

D. LOOKOUT

If the driver had been keeping a proper look out, he would have seen the objects on the road and could have either turned the car to the left or could have stopped the car. Or if the driver had kept a proper look out, he would have decreased the speed so he could stop within the distance that his lights revealed objects on the highway.

Mr. Eastman and Mr. Parry made certain statements about how far they could see down the road which testimony is contrary to the physical facts and cannot be believed.

When testimony is contrary to the physical facts, then that testimony should be disregarded. The following authorities so held:

HAARSTICH vs. OREGON SHORT LINE RAILROAD CO., 70 U. 552, 262 P. 100. The Court says, page 104, bottom of the first column of the Pac. that:

“It only need be stated here that the testimony of Mr. Howlett in that respect flies in the face of uncontroverted physical facts and therefore is not substantial evidence.”

Also see SPANG vs. COTE, 68 A. (2d) 823, (Me) and DOMINGUEZ vs. AMERICAN CASUALTY CO. (Louisiana) 47 So. (2d) 72. The last two cases are also authorities that a person must drive so he can see objects on the highway within the range of his lights.

Certainly the driver was traveling too fast under the circumstances with which he was confronted and further with the fact that he had been over the road a thousand times. He knew the place and he knew all the curves in the road.

This Court has had this question before them a number of times, and we submit that under the facts and circumstances as they were presented by the defendant himself, that he was guilty of negligence as a matter of law.

There are a number of Utah cases dealing with this proposition, as to when a person is guilty of negligence as a matter of law. They are familiar to this Court, but we think it advisable to review them.

In the O'BRIEN vs. ALSTON ET AL case, 61 U. 368, 213 P. 791. At page 792 this Court says:

“Independent of any statute, it is negligence to run an automobile on a highway at night without sufficient lights to enable the driver to see objects ahead of him in time to avoid them.”

This Court in the case of *NIKOLEROPOULOS vs. RAMSEY*, 61 U. 465, 214 P. 304 held that it was error to refuse the following instructions:

“A driver of an automobile at night is required to use such reasonable and ordinary care, to have his machine under such control as to not overtake and run down people within the range of his lights, as would be used by a man of average and reasonable care and prudence in his situation.”

DALLEY vs. MID-WESTERN DAIRY PRODUCTS CO. ET AL., 80 U. 331, 15 P. (2d) 309. This Court held that it was negligence for an automobile driver who collided with a truck parked on a highway without lights was negligent as a matter of law. We quote from page 310 of the *Pac.*

“In this jurisdiction the doctrine is established “that it is negligence as matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him.” In the case of *Nikolerooulos vs. Ramsey*, 61 Utah, 465, 214 P. 304, the language just quoted is said to be a correct statement of the law and that the refusal of the trial court to so instruct the jury was prejudicial error. In the case of *O'Brien vs. Alston*, 61 Utah, 368, 213 P. 791, 792, it is said:

“But entirely apart from any statutory requirements, the law requires that, if a person desires to operate his automobile on the public streets or highways after dark, he must see to it that it is equipped with proper, suitable, and sufficient lights, so that the operator may discover any objects or obstructions that may be encountered on the highway.”

In the case of *HANSEN vs. CLYDE*, 89 U. 31, 56 P. (2d) 1366, this Court says at page 1369 of the Pac.:

“When a driver upon a public highway with his light equipment cannot see more than 50 feet ahead of him, it is his duty to drive at such speed as will enable him to stop within that distance. *Dalley vs. Mid-Western Dairy Products Co.*, 80 Utah, 331, 15 P. (2d) 309.”

In the case of *NIELSON vs. WATANABE* 90 U. 401, 62 P. (2d) 117, the Supreme Court cited and discussed the *O'brien vs. Alston* case 61 U. 368, 213 P. 791; *Nikoleropoulos vs. Ramsey*, 61 U. 465, 214 P. 304, 306; *Dalley vs. Mid-Western Dairy Products Co.*, 80 U. 331, 15 P. (2d) 309, and did not modify the doctrine therein set out, but distinguished the facts in that case in that the person was blinded by lights coming from the opposite direction. The exception made in the *Nielson vs. Watanabe* case had no bearing on the present case because by the Defendant's own evidence in instant case, the map and the photographs and by Plaintiff's evidence, the Osborne car was clearly visable for 400 feet and there were no lights coming from the opposite direction; the night was clear; the pavement was dry.

The NIELSON vs. WATANABE case, 90 U. 401, 62 P. (2d) 117, held as set out in the headnote number 4, as follows at page 118 of the Pac.:

“It is negligence as a matter of law for a person to drive automobile at such speed that automobile cannot be stopped within distance at which driver of automobile is able to see objects on highway in front of him.”

To the same effect as the Nielson vs. Watanabe case 90 U. 401, 62 P. (2d) 117, is the case of MOSS vs. CHRISTENSEN-GARDNER, INC. 98 U. 253, 98 P. (2d) 363, holding that the person was blinded by lights coming from the opposite direction and therefore distinguishes it on the facts, but reaffirms the rule in the Nikoleropoulos case and the Mid-Western Dairy Products Co. case.

In the case of FARRELL vs. CAMERON 98 U. 68, 94 P. (2d) 1068, the Court held, headnote 3:

“In action for injuries to passenger in automobile colliding with defendant’s automobile, facts found by trial court held to warrant his finding that defendant had ample time after seeing other automobile approaching when 100 feet away to turn slightly to right and avoid collision.”

In the instant case, there is no reason why the Defendant should not have swerved his car and avoided the collision if he had been driving within the distance in which he could see objects on the road.

In the case of *TRIMBLE ET UX. vs. UNION PACIFIC STAGES ET AL.* 105 U. 457, 142 P. (2d) 674, they set out the rule of law in this state to be: we quote from page 676 of the Pac:

“In support of the contention that the court should have instructed that as a matter of law defendant was guilty of negligence. These cases lay down the rule that it is the duty of a driver of a motor vehicle moving along the highway at night to so drive his vehicle that he can stop before colliding with any object within the range of his headlights. And further, if the lights with which the vehicle is equipped are not up to the standard set by law, the driver must reduce his speed proportionately. Failure to observe this standard of care is negligence as a matter of law.”

The Court then goes on to distinguish the case in that Defendant ran into a fog and that it was similar to the *Nielson vs. Watanabe*, 90 U. 401, 62 P. (2d) 117, 119. There is no fog or light in the instant case.

In the *WRIGHT vs. MAYNARD* case, 120 U. 504, 235 P. (2d) 916, this Court said at page 917:

“In *Dalley vs. Midwestern Dairy Products Co.*, 80 Utah 331, 15 P. 2d 309, 310, a case in which the plaintiff ran into a truck parked on the highway without lights, this court declared that it was the established law of this state, quoting from *Nikoleropoulos vs. Ramsey*, 61 Utah 465, 214 P. 304: “That it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance

at which the operator of said car is able to see objects upon the highway in front of him."

And the Court goes on further to distinguish the above set out rule in the Wright vs. Maynard case saying that the driver *did* see the Defendant in time to do something about it and that he did do something about it, which was he swerved to the right and if the Defendant had not stepped into his way, that he would have avoided the accident. In this case, the Osborne car remained in the same place and the girls remained in the same position according to Defendant and Parry, and the driver of the car ran into them.

In the case of HODGES vs. WAITE 2 U. (2d) 152, 270 P. (2d) 461, the Court again affirms the rule in the Nikoleropoulos vs. Ramsey case, 61 U. 465, 214 P. 304; and the Dalley vs. Mid-Western Dairy Products Co. case 80 U. 331, 15 P. (2d) 309, and distinguishes on the fact that the Defendant, while rounding a SHARP CURVE in Logan Canyon, after seeing the truck, swerved his truck to the left; but could not avoid striking the rear of the trailer.

There is no SHARP CURVE in the case at bar, you can tell this from Defendant's own photograph, which was taken 200 feet away from the point of the accident, that there was nothing to obstruct the view. You can tell from Defendant's map, (Ex. 32) and from all the pictures in evidence, that there was nothing to obstruct the view and the testimony of Professor Harris and others that the car could be seen from 400 to 500 feet. Any testimony that the car could not be seen is

contrary to the physical facts and is not worthy of belief. See page 20 of this brief for authorities. So instant case does not come within the exception in the Hodges vs. Waite case.

In the HORSLEY vs. ROBINSON, 112 U. 227, 186 P. (2d) 592, this Court, speaking through Justice Wade sets out section 57-7-113 U. C. A. 1943 which provides:

“(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care. * * * * *

“(c) The driver of every vehicle shall, * * * drive at an appropriate reduced speed * * * when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.”

And from page 597, second column, the Court cites with approval as follows:

“In Nikoleropoulos vs. Ramsey, 61 Utah 465, 214 P. 304, the defendant was driving his car at night during a heavy rain storm at about 12 miles per hour; in the distance the lights of oncoming cars reflected on the wet pavement into his eyes so that at the time of the accident he was unable to see the plaintiff walking on the pavement in front of him until he was within 6 feet and then it was too late to avoid running him down. We

held that defendant was negligent as a matter of law, no matter how dark and stormy the night or how bad the visability, if he drove at such a rate of speed that he was unable to avoid running plaintiff down within the distance plaintiff could be seen walking ahead of defendant's car on the highway. To the same effect see: Dalley vs. Mid-Western Dairy Products Co., 80 Utah 331, 15 P. 2d 309; Haarstrich vs. Oregon Short Line R. Co., 70 Utah 552, 262 P. 100; O'Brien vs. Alston, 61 Utah 368, 213 P. 791.

The Nikoleropoulos vs. Ramsey case is in substance a holding that it is negligence to operate a vehicle on the highway at any time without having it under sufficient control so that others using the highway will not be unreasonably endangered thereby, regardless of how slow it is required to travel to accomplish that end."

In the case of TAKATARO SHIBA vs. WEISS, 3 U. (2d) 256, 282 P. (2d) 341, the Court reaffirms the doctrine we are contending for and speaking through Justice Wade says as follows on page 342 of the Pac.:

"The facts in the instant case are very similar to those in Dalley vs. Midwestern Dairy Products Co., 80 Utah 331, 15 P. 2d 309, where this Court held that the driver of a car which ran into a parked truck under such conditions was negligent as a matter of law."

After a review of the Utah case it appears therefrom that it is still negligence as a matter of law in the state of Utah to drive your automobile at such a rate of speed that you cannot see objects on the highway in front of you.

The cases that have been distinguished are the ones in which the driver has been blinded by lights coming from the opposite direction which does not apply in this case because there were no cars coming from the opposite direction; or where there is fog which does not apply in this case because it was a clear night and vision was not obstructed, and no fog.

The other exception was the case in which there was a SHARP CURVE in the canyon and this does not apply in this case because there was only a slight curve. The physical facts are so that any testimony to the contrary is not worthy of belief.

POINT II.

THE COURT IMPROPERLY INSTRUCTED THE JURY AND FAILED TO GIVE THE PLAINTIFF'S REQUESTED INSTRUCTIONS.

The argument which Plaintiff will make in regards to Point Number 2 will also apply to Points Numbered 5, 7 and 8.

Instruction 6-a (R. 69) is erroneous and ambiguous. The Court lays down the general rule of stopping within the range of the headlights, and then qualifies it by the following language:

“But in connection with this instruction you must consider the evidence of the highway and the conditions to determine whether the lights would shine on the highway far enough ahead for the driver to stop before the impact in this case occurred.”

The physical facts and the uncontradicted facts in this case are such that this qualification should not have been given.

The Court further qualifies the general rule by the following language:

“This rule of law that I have given you does not apply on a curve but only on a section that is sufficient straight for a person to stop within 350 feet which is the required range of their head lights.”

What does the Court mean by a curve? Does it mean a one degree, two degree, five degree, forty-five degree or a ninety degree curve? Does the Court mean that after you have come around a ninety degree curve that you have 350 feet before you have to see objects in the road? Does the Court mean that on a one degree curve the general rule does not apply and that you have 350 feet in which to stop your car if any object is in front of you?

When you look at Defendant's map, (Ex. 32), Defendants pictures and Plaintiff's pictures and the oral evidence, it is apparent that such an instruction should not have been given.

Section 41-6-134 of the Utah Code Annotated 1953 provides:

(a) “There shall be an uppermost distribution of light, or composite beam so aimed and of such intensity as to reveal persons and vehicles at a distance of at least 350 feet ahead for all conditions of loading.”

By instruction 6-a (R. 69) the jury was told that any curve in which your lights would not show objects 350 feet ahead of you and if you hit such objects, you are not negligent. We think this instruction is erroneous. We submit that instruction 6-a does not state Utah law and that such an instruction should not have been given under the facts in this case.

Instruction 6-d (R. 72) pertains to the intoxication of the driver of the car. In contrast to that, the Court in instruction number 12 (R. 79) states:

“You may consider her” (Plaintiff) “condition of sobriety in connection with the problem of why she did not move back.”

Immediately thereafter, in instruction number 13, (79 B) the Court instructs on intoxication as against the pedestrian which is entirely more severe than instruction 6-d (R. 72) and emphasizes intoxication as to the plaintiff and minimizes it as to the defendant. Instruction number 14 (R. 80) pertains to both of the parties drinking. The way these instructions are given and the way they are located over emphasize drinking and intoxication as to the Plaintiff and minimize intoxication as to the Defendant and is certainly highly prejudicial. This is a mighty touchy point before a jury.

In instruction number 6-e, (R. 73) the Court says that Kenneth R. Parry's not having a drivers license can not be considered as approximate cause of Plaintiff's injuries. This nullifies the effect that Kenneth R. Parry had been drinking that night and was driving a car when he had no license to drive it, and that his

license to drive was revoked because of drunken driving. This factor should be considered in the case, but by instruction number 6-e, it is practically eliminated from the deliberation of the jury.

Instruction number 9, (R. 76) entirely leaves out the question of driving within the distance that the Defendant could see with his lights. We called this matter to the Court's attention in our request for instruction number 22, (R. 61) where we set out the various things upon which the court should instruct and we feel this in the light of the other instruction was very prejudicial.

In instruction number 11 (R. 78), the court says:

"It is no legal excuse for the Plaintiff to say that she did not look or to say that she did not see at a time when by reasonable care an ordinary prudent person would have seen."

In the next instruction, number 12, (R. 79) the Court states that:

"the plaintiff admitted that she saw the car coming and did not move; she claims that at first she thought she was safe and later she was unable to move."

Certainly there was no reason to give instruction number 11 in the light of number 12, and that over emphasizes the duty of the Plaintiff to look and was highly prejudicial. Throughout the instructions to the jury, the court has over emphasized the duty of the Plaintiff and minimized the duty of the Defendant.

Instruction number 15, (R. 80 A) is a very interesting question. The Court instructed that they should

not consider insurance, but do they intend to have the adjustor, who went to the place and took pictures, not considered as an interested party in the law suit when the insurance company is actually responsible to pay any judgment up to the limits of their policy?

We asked the Court in our requested instruction number 1 (R. 40) to instruct the jury that Defendant was guilty of negligence as a matter of law.

On the motion for a new trial, Plaintiff argued to the Court that the Defendant was guilty of negligence as a matter of law and, therefore, the Court should grant a new trial which the trial court failed to do.

The Court should have given Plaintiff's requested instruction 2, (R. 41) without the exceptions, as the Court did in instruction number 6-a heretofore discussed.

The Court should have given the Plaintiff's requested instructions 8 and 9, (R. 47, 48). That if the Defendant had been keeping a proper look out, he would have seen Plaintiff in plenty of time to have swerved to the left and avoided hitting the Plaintiff. We were also entitled to instructions numbers 8 and 9 under the last clear chance doctrine and on the facts and authorities of *BECKSTROM v. WILLIAMS*, 3 U. (2d) 210, 282 P. (2d) 309. Under the facts and the reasoning in the Beckstrom case, the driver of the automobile in the instant case had sufficient time to avoid hitting Plaintiff.

Instruction number 14, (R. 53) said as follows:

“You are instructed that the law provides that a persons automobile must be equipped with lights so as to reveal persons and vehicles at a distance of at least 350 feet ahead.”

This is the Utah law as set out in section 41-6-134 Utah Code Annotated 1953, and under the Defendants' testimony in this case that he and his agent could only see from 75 to 80 feet with their lights. This instruction should have been given or the Court should have instructed as a matter of law, that the Defendant was negligent.

Plaintiff's requested instruction number 10, (R. 49) states that the driver of an automobile should be careful because he is driving a vehicle which is able to inflict serious injuries or death, and we think the case of COOMBS vs. PERRY, 2 U. (2d) 381, 275 P. (2d) 680 is in point where on page 682 of the Pac. the Court says:

“It is to be borne in mind that although the motorist and pedestrian are both required to exercise the same standard of care, that of the ordinary prudent person under the circumstances, that standard imposes upon the motorist a greater amount of caution than upon the pedestrian because of the potential danger to others in the operation of an automobile.”

As an illustration of the Courts' instructions being more favorable to the Defendant, take example instruction number 2, (R. 64). The Court says as to the Plaintiff:

“The plaintiff in this case has the burden of showing BY A PREPONDERANCE of the evidence that the defendant was negligent.” and as to the Defendant, the Court says:

“And the defendant has the burden of proving that the plaintiff was contributorily negligent.”

but did not add the words, “by a preponderance of the evidence.”

Instruction number 8, (75A) on sympathy only mentions the Plaintiff and doesn't mention the Defendant. It is unilateral. It tells the jury by innuendo that the Plaintiff doesn't have a case. We ask this Court to please compare it with the instruction given on sympathy in the suggested Uniform Jury Instructions of the Utah State Bar which is as follows:

“4. (BAJI 4.)

RE: SYMPATHY, PREJUDICE, PASSION

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against (ANY) (EITHER) party to the action.”

Which instruction was taken from California Jury Instructions, Civil, Volume 1, page 54, number 4, which quotes the above and the note says:

“This instruction given: Gray vs. Brinkerhoff, 249 P. 2d 571, 41 Cal. 2d 180, 258 P. 2d 834.”

Key number: Trial 217, 232 (3).

We think that because of the errors made in the instructions and because of the over emphasizing of the

instructions in Defendant's favor, that the Plaintiff was prejudiced and this Court should grant a new trial and the following authorities so hold.

In the case of JENSEN vs. UTAH RY CO. 72 U. 366, 270 P. 349. On page 355, the court says as follows:

"and in such particular invokes the rule stated in Konold vs. Rio Grande W. Ry. Co., 21 U. 379, 60 P. 1021, 81 Am. St. Rep. 693, that the giving of inconsistent instructions is error and sufficient ground for a reversal of the judgment, because, after verdict, it cannot be told which instruction was followed by the jury, or what influence the erroneous instruction had on their deliberations, and, as stated in Randall, Instructions to Juries, 537, that where instructions of the successful party state an erroneous rule, and those of the defeated party state the rule correctly, the only presumption permissible is that the jury disregard the true rule for the false; that an error of an instruction presenting a wrong theory of the case is not cured by other instructions announcing a right theory; and that, where instructions are in irreconcilable conflict, or so conflicting as to confuse or mislead the jury, the rule requiring instructions to be read together has no application."

On page 357, the court says as follows:

"The rule is well settled that instructing a jury as a mere abstract or general statement as to the law should be avoided, and that all instructions should be applicable to evidence on either one or the other of the respective theories of the parties."

And also on page 358 the court says as follows:

“Thus the charge falls within the familiar rule that it is error to give instructions based on a state of facts which there is no evidence tending to prove, or which the undisputed evidence in the case shows did not exist, even though such instructions contain correct statements of law.”

In the case of *SHIELDS vs. UTAH LIGHT & TRACTION CO.* 99 U. 307, 105 P. (2d) 347, the court held it is prejudicial error to emphasize certain portions in favor of one party and the court says on page 349, second column:

“Moreover, it must be borne in mind that the plaintiff by copying into her complaint certain sections of our statute (with the hope, no doubt, that the trial judge would include the same in the instructions relating to the pleadings) has been able to secure, in effect, an emphasis upon certain propositions of law as against others which are entitled to equal weight.”

In the case of *DEVINE vs. COOK*, 3 U. (2d), 134, 279 P. 1073, the headnote 5, states as follows:

“In automobile accident case, instructions stating that contributory negligence which in any degree contributed to accident, or in any degree proximately contributed to accident to any extent, however slight, would be a defense was prejudicially erroneous, in view of other instructions concerning contributory negligence.”

And on page 1075, the court stated:

“The instructions prejudicially accentuated the duty of the plaintiffs and minimized the duty of the defendants.”

POINT III.

THE COURT ERRORED IN ADMITTING CERTAIN TESTIMONIES.

POINT IV.

THE COURT ERRORED IN EXCLUDING CERTAIN TESTIMONIES.

These two points will be treated together.

Plaintiff offered in evidence the hospital records and certain x-rays which the Court refused. Exhibit sheet (R. 62). These records were identified by Hortense Wood (R. 172, 173), the custodian of the records at the St. Mark's Hospital. Dr. Lamb testified from them. (R. 199, 200, 201, 203, 204, 207, 208). They showed the condition of the Plaintiff and showed the basis of her treatment and would also come under the rule of law of records being made in the regular course of business and should have been admitted in evidence.

The Court allowed the insurance adjuster, Lyle Bates, to mark on the photographs and to give his opinion about the blood spots, anti-freeze spot and skid marks which should not have been allowed. (R. 337, 339, 350).

CONCLUSION

We believe that the Defendant was guilty of negligence as a matter of law and the Court should have so instructed the jury, failing to do this the Court should have granted Plaintiffs' motion for a new trial.

Because of the exception that the Court made to the rule that a person must drive within the distance in which he could see objects on the road. Because of the various erroneous instructions. Because of the Court's over emphasizing the duty of the Plaintiff and minimizing the duty of the Defendant. Because the Court over emphasized intoxication as to the Plaintiff and minimized it as to the Defendant, prevented the Plaintiff from having a fair trial. For all or any one of these reasons, the case should be remanded to the District Court for a new trial.

We, therefore, respectfully submit that the judgment of the lower court should be reversed.

Respectfully submitted,

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and Appellant*