

1956

# Ramona Hayward v. Leo George Eastman : Brief of Respondent

Utah Supreme Court

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Edwin B. Cannon; Don J. Hanson;

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IN THE SUPREME COURT

UNIVERSITY UTAH

of the

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STATE OF UTAH

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Clerk, Supreme Court, Utah

RAMONA HAYWARD,

*Plaintiff and  
Appellant,*

vs.

No. 8525

LEO GEORGE EASTMAN,

*Defendant and  
Respondent.*

RESPONDENT'S BRIEF

EDWIN B. CANNON

DON J. HANSON

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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RAMONA HAYWARD,

*Plaintiff and  
Appellant,*

VS.

LEO GEORGE EASTMAN,

*Defendant and  
Respondent.*

No. 8525

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RESPONDENT'S BRIEF

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NATURE OF THE CASE

This appeal arises out of an action brought by the plaintiff and appellant Ramona Hayward against the defendant and respondent Leo George Eastman to recover for injuries and damages allegedly sustained by the plaintiff in an automobile-pedestrian accident which occurred on the Lark-Herriman road on the 26th day of November, 1953 in Salt Lake County, Utah. Two fundamental questions are raised by the appeal:

1. Was the verdict of the jury justified by the evidence?

2. Were the issues in the case properly submitted to the jury?

## STATEMENT OF FACTS

Plaintiff is the wife of Fred Hayward (R. 111). At the time of the accident they were living in Riverton, Utah (R. 112). The plaintiff and her family had been invited to the home of Faye and Francis Osborne for Thanksgiving, and on the afternoon of November 25, 1953 at about 4:00 o'clock P.M. the plaintiff went to the Osborne home to help Mrs. Osborne get ready for Thanksgiving the next day (R. 112). She and Mrs. Osborne sat around drinking coffee, talking and making pie crust (R. 112). A little after 5:00 o'clock P.M. Mr. Osborne arrived home from work (R. 113). Mr. Osborne had something to eat and then left to go to the store (R. 175-176). At about 7:00 o'clock P.M. a Ralph Crane (whose last name, coincidentally, is the same as plaintiff's first husband's name, Chester Crane, but who, according to the plaintiff, is no relation) arrived (R. 113, 155, 158). He had been drinking and was drunk at the time he arrived (R. 113, 146).

Mr. Francis Osborne returned from the store about 8:30 or 9:00 o'clock P.M. Ralph Crane had brought a fifth of whiskey with him (R. 193). The group remained at the Osborne home eating sand-

wiches (R. 235) and drinking coffee, beer and whiskey. During that time the plaintiff admits having had one can of beer; Francis Osborne had one drink with Ralph Crane and a can of beer; Ralph Crane drank part of the whiskey (R. 147, 176, 303). Mrs. Osborne was unable to drink anything because she had a sore throat (R. 235).

At about 10:30 P.M. the group left the Osborne home and went to Viv and Arch's (a tavern in Riverton) to get a pack of cigarettes for Mrs. Osborne (R. 113). Mr. Crane brought the fifth of whiskey along and the plaintiff had a drink out of that bottle prior to entering Viv and Arch's (R. 146, 147). The group remained at Viv & Arch's until about 11:30 P.M., during which time more beer and whiskey were consumed (R. 148, 149, 227, 298, 308). The group left Viv & Arch's with the intent of going for a ride (R. 236). Ralph Crane and Francis Osborne got in the back of the car and the plaintiff and Mrs. Osborne sat in the front of the car, Mrs. Osborne doing the driving (R. 177).

Mrs. Osborne drove down Redwood Road to West Jordan and then decided to drive to Lark, Utah to see her friend, Gertrude Oliver, whose husband had recently passed away (R. 236, 240). When they arrived at Lark they went by the Oliver house but the lights were out so they drove down through Lark and started on their way home (R.

236) on the road between Lark and Herriman, Utah. As they were driving down through a canyon (R. 237) Mrs. Osborne told the plaintiff that she had to go to the bathroom and asked her if she would go with her, to which the plaintiff agreed. Whereupon Mrs. Osborne slowed down and stopped the car (R. 237). Mrs. Osborne does not recall what happened after that (R. 237).

The area in which Mrs. Osborne stopped the automobile and the area in which the accident occurred is illustrated by two diagrams (Exhibits 32 and 28). The road in this area is a rather narrow two lane hard surface road (see Exhibits 33, 31 and 32) running in a generally easterly and westerly direction. At the west end of the area about 600 feet from the place where the accident occurred as the road makes a rather sharp turn to the southeast from a northeasterly direction and then proceeds on around 400 feet where it makes a gradual turn back to the east (Exhibit 28). The point of impact was located near a telephone pole, the witnesses for the plaintiff testifying that the point of impact was 30 feet west of the telephone pole and the police officers and the defendant's witnesses testifying that the point of impact was 30 feet east of the telephone pole. Exhibit 32, which is a diagram drawn to scale, illustrates that the shoulder of the road west of the telephone pole is





**Looking W. from point 100' E. of pole (with white placard)**



**Looking W. from point 150' W. of pole.**

quite wide, while the shoulder east of the telephone pole is very narrow and was estimated by the police officer to be 4 feet wide (Exhibit 41). We have reproduced for the convenience of the court two photographs, Exhibits 31 and 33, which are generally illustrative of the scene. Exhibit 31 is a view looking west along the highway from a point 100 feet east of the telephone pole near which the accident occurred. Exhibit 33 is a photograph of the same highway looking west from a point 150 feet west of the telephone pole where the accident occurred. In viewing these pictures the court should keep in mind that both automobiles in this case were traveling the opposite direction, that is east, to which the pictures were taken. The defendant's automobile at the time of impact had come around the distant curve shown in Exhibit 33 and had traveled all of the highway and up to somewhere in the vicinity of the telephone pole shown in Exhibit 31 at the time of impact. The scale diagram, Exhibit 32, shows the width of the pavement in the area to vary from 17.5 feet to 18 feet.

Referring to the police report, Exhibit 41, which was introduced into the evidence, we find that the automobile of the defendant, car No. 1, was traveling east and the automobile driven by Clara Faye Osborne, car No. 2, was stopped, according to the diagram prepared by the police of-

ficer, on the highway. The police officer's diagnosis of the accident as shown by his investigation report, Exhibit 41, was

“Car No. 2 was standing in road, no lights visible. Car No. 1 came around curve and did not see car No. 2 in time to stop completely, striking two ladies standing behind car No. 2.”

The plaintiff testified that after Mrs. Osborne had stopped they got out of the car and went up on the sidehill and went to the bathroom (R. 115). After going to the bathroom they returned to the road, stopped and looked both ways to see if anything was coming, saw nothing and started behind the parked car when she heard a sound and looked up to see car lights on the sharp curve (R. 122). Plaintiff was dressed in a light tan coat and Mrs. Osborne had a grey fur on (R. 154). Plaintiff extended her hand and said, “Just a minute, Faye, here comes a car.” She then looked again and the car was almost on top of them (R. 123). She claims that she tried to step back but couldn't (R. 123). When she was struck she was about one foot on the oiled surface of the highway and about half way behind the back end of the car (R. 161, 162). She estimated the distance at which she first saw the lights of the car to be 600 feet to the west and admitted that when she first saw the car approaching at a distance of about 600 feet she could have avoid-



ed the accident by walking a few feet to the south (R. 153).

Francis Osborne had gone off in a different direction from the car and did not see the actual accident, at least not at the time of impact (R. 178). Ralph Crane was dozing in the Osborne vehicle at the time of the accident (R. 304). The last thing that Mrs. Clara Faye Osborne can recall is parking her car (R. 237). All of the plaintiff's witnesses place the point of impact as about 30 feet west of the telephone pole.

The occupants of the defendant's car were Kenneth R. Parry and the defendant Leo George Eastman. They had met earlier in the evening at Viv & Arch's Cafe at about 10:15 P.M. (R. 307) where Kenneth Parry had consumed two glasses of beer (R. 307) and the defendant had had one glass of beer. They left Viv & Arch's about 11:30 P.M. (R. 308) and went for a ride in Eastman's car, ending up at the Drift Inn in Lark, Utah (R. 309). The defendant Leo George Eastman drove the car from Viv & Arch's to Lark, Utah (R. 309). They had another glass of beer at the Drift Inn and then started back. The defendant had not had his automobile very long and he and Kenneth Parry had been discussing automobiles, what they liked about them, etc. and when they left the Drift Inn the defendant asked Parry if he would like to drive

the car and see how it handled, so that at the time they left Lark, Utah Kenneth Parry was driving the automobile (R. 309). As he drove around the last curve prior to the point of impact he first saw the two people standing in the road (R. 310). His first impression that it was a cow or a horse. He applied his brakes and thought he was going to stop but slid into the two women. He testified that as he came around the curve the lights were out on the sidehill and that he could not see the women until the lights straightened up on the highway again. According to this witness the Osborne vehicle was on the oiled surface of the highway in the right hand lane going east. When he first saw the women they were facing each other and as his car drew near they turned around and faced him. Neither of them made any motion to get off the highway that he could see.

The defendant Leo George Eastman testified that they were going around 40 miles per hour traveling east and that as the car swerved around to where the lights were on the highway he noticed two light colored objects which he thought for a minute were stock. He estimates that at that time they were about 100 feet away and at that time the driver Kenneth Parry applied the brakes (R. 357, 359, 360). He first realized the objects were women when they were about 25 feet from them. At that point

the women had their backs toward them, facing east, and he did not see them make any movement to get out of the way (R. 359). He does not remember of having seen the Osborne car (R. 357). The point of impact was about a car or two car lengths east of the telephone pole (R. 367). The Osborne car was knocked 20 to 25 feet by the impact. The Osborne car was standing in the highway, the left hand side being right on the yellow line, and facing east. He sent Kenneth Parry to a home located near the scene, Kaywoods, to call the police (R. 357). He then told Mr. Osborne, "The cops or the police, ambulance and doctor will soon be here." To which Mr. Osborne replied, "We don't want them." (R. 358)

Kenneth Parry, Ralph Crane, Mr. Osborne and the defendant then pushed the Osborne car off to the north side of the road because they were afraid another car would hit the car (R. 311). Mrs. Osborne was lying in the middle of the road about where the yellow line would be and Mrs. Hayward was lying a little bit south of her (R. 178). After helping to push his car off the highway Mr. Osborne then went back and took his wife, and then Ramona down to his car and put them in that car (R. 179). About that time Mr. Kaywood arrived and the two women were loaded into the Kaywood car and Mr. Kaywood and Mr. Osborne took off

with the women for the hospital (R. 358). Kenneth Parry and the defendant remained at the scene of the accident (R. 358) and Ralph Crane took off for home (R. 304). During this time Kenneth Parry had observed Mr. Osborne and he testified that Mr. Osborne had been drinking and that he was not too steady on his feet (R. 313).

The investigating officer was Carl George, who at that time was a deputy sheriff for Salt Lake County (R. 264). He was assisted by Occie Evans, who was in charge of the traffic department of the Sheriff's Office (R. 328). When Deputy Sheriff George arrived at the scene of the accident he found Mr. Parry and the two automobiles which had been involved in the accident. Neither Mr. Parry nor Mr. Eastman was visibly under the influence of alcohol at that time (R. 274). He found dirt and debris on the highway at a point which he assumed to be the point of impact, 39 feet east of the telephone pole (see the "x" on Exhibit 32). There were two puddles of water directly west approximately 3 feet from the debris (See the circles on Exhibit 32, R. 267). There were skid marks coming straight from the west to the east up to the debris and the water (see the lines drawn on Exhibit 32, R. 267). These marks were 72 feet in length (R. 267). The left hand skid mark was about 3 feet 6 inches from the center of the highway (R. 276). He was told

that the Osborne car had been moved and found it on the north side of the highway, 72 feet from the point of impact. The Eastman car was also on the north side of the highway, 24 feet from the point of impact (R. 291, Exhibit 32). At one other point in his testimony he placed the Eastman vehicle at 32 feet from the point of impact and the Osborne vehicle at 84 feet (R. 279).

The defendant first told the investigating officer that he was driving the car (R. 274). He later told him that Parry was driving and that he had told him he was driving because Parry did not have a driver's license (R. 275). Mr. Eastman further told the investigating officer that they were traveling about 40 miles per hour. They saw the danger at 85 feet and the estimated speed at moment of impact was 15 miles per hour.

The officer took a statement from Kenneth Parry (see Exhibit 41) in which Kenneth Parry stated: "As we were coming around a bend in the road from Lark to Herriman we suddenly saw two women standing at the rear of an automobile in which we a few seconds later saw there were no tail lights on the other car." He stepped on the brakes "But we slid into them, going very slow, turned a little to the left."

When the ambulance arrived Kenneth Parry and the defendant were put in the ambulance and



they drove around Lark, then down to Redwood Road to West Jordan, then east into Midvale, trying to find the Kaywood car. They finally found the car in Midvale, whereupon the women and the defendant were taken to the hospital.

The plaintiff did produce one expert witness, Professor Franklin S. Harris. He testified that a car with the tail lights turned on could be seen just as the driver came around the sharp curve at a distance of about 600 feet (R. 246) and that there is enough light to get some headlights on the car so that the car without tail lights could be seen at around 400 feet (R. 249). He did admit, however, that he went out there for the express purpose of seeing what he could see and that since he was definitely looking for an object he would expect to see it sooner than a person who was not expecting an object to be in the road (R. 249). On direct examination he testified that a car laying down 72 feet of skid marks would be going 42 miles per hour (R. 387). On cross examination he testified that it would take 84 feet to stop a car going 40 miles per hour on a highway with a coefficient friction of 65%, which is the average coefficient friction of the average road surface and the one on which the charts of stopping distances are generally based (R. 391).

Upon the basis of this evidence the plaintiff

seeks to show that the defendant was guilty of negligence as a matter of law; that the court improperly instructed the jury and erred in either admitting or not admitting certain testimony. We will answer plaintiff's argument under two points, which are:

## STATEMENT OF POINTS

POINT 1. THE VERDICT OF THE JURY WAS JUSTIFIED BY THE EVIDENCE.

POINT 2. THE COURT DID NOT ERR IN ADMITTING OR EXCLUDING CERTAIN EVIDENCE OR IN INSTRUCTING THE JURY.

## ARGUMENT

POINT 1. THE VERDICT OF THE JURY WAS JUSTIFIED BY THE EVIDENCE.

The defendant in this case was guilty of negligence which was a proximate cause of this accident as a matter of law only if on the basis of the evidence the jury could not reasonably have found otherwise. In their analysis the jury were not compelled to limit their inquiry to the testimony set out by the plaintiff, assuming for the purpose of argument that those bits of evidence standing by themselves would warrant a finding that defendant was negligent as a matter of law. Indeed, the jury should consider all of the evidence. It is their right, within certain limitations which we need not mention here, to decide which witnesses they believe and which witnesses they do not believe, or,

to say it otherwise, what evidence they consider to be correct and what evidence they consider to be incorrect. The trial court has no alternative but to submit the matter to them regardless of how he personally may feel when they reasonably might arrive at a different result. The jury might well have found from the evidence in this case that these defendants, in full possession of their senses, there being no evidence of excessive drinking on their part, approached the scene of the accident at a speed of 40 miles per hour as testified to by the defendant and that such a speed was reaonable under the conditions prevailing. The jury might further find that because of the nature of the terrain the headlights of the defendant's automobile were deflected off the highway until just prior to the actual impact and that by reason of this fact the defendant might not be able to see the women on the highway until he was at a distance of some 100 feet from them, as claimed by him (R. 360); and that the driver did not see the women at about that point as physically demonstrated by the fact that the driver was able to get the brakes on and lay down 72 feet of skid marks prior to the actual impact. If we grant that the jury might have so found, the authorities cited by plaintiff do not compel a determination of this issue in her favor.

The case of *Nikoleropoulos v. Ramsey*, 61 Utah

465, 214 Pac. 304 involved a pedestrian who was struck while walking on State Street in Salt Lake County, Utah. The highway there runs north and south at the point where the collision occurred and then on to Salt Lake City a distance of 6 or 7 miles. In deciding that case the court quoted from *Lauson v. Fond du Lac*, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N.S.) 40, 135 Am. St. Rep. 30:

“The driver of an automobile, who, while traveling on a dark, rainy night over a *straight* stretch of strange country road, drives his machine at such a rate of speed that he cannot bring it to a standstill within the distance that he can plainly see objects or obstructions ahead of him, is not exercising ordinary care.”

In the case of *Dalley v. Mid-Western Dairy Products Co.*, 80 Utah 331, 15 Pac. (2d) 309 we are again concerned with a straight stretch of highway. Said the court:

“ \* \* \* As plaintiff approached the place where the truck was standing on the night in question, the highway was straight and level for a distance of at least a mile. The truck was directly in front of him and in his course of travel. According to his testimony he was keeping a constant lookout ahead. If he was not keeping a lookout ahead, he was guilty of negligence in failing to do so. There was nothing to obstruct his view. It was an ordinary clear, quiet summer night with no moon. So far as appears there was nothing



to divert his attention from the road in front of him. \* \* \* In such case it must inevitably follow that plaintiff did not keep a lookout ahead, or, if he did, he either did not heed what he saw or he could not see the truck because his lights were not such as were prescribed by law.”

When we come to the case of *Nielsen v. Watanabe*, 90 Utah 401, 62 Pac. (2d) 117 and introduce the element that the driver may not have been able to see by reason of some obstruction, a different rule is announced. That case involved a demurrer to a complaint wherein it was alleged that the brilliant lights from a car coming from the opposite direction completely blinded and destroyed the vision of the plaintiff and her husband and destroyed the effects of the lights of their own car so that they were unable to see defendant's truck parked upon the highway. This court held that the court below was in error in sustaining the demurrer, and said:

“ \* \* \* In the case of *Dalley v. Mid-Western Dairy Products Co.*, supra, it was held that a nonsuit was properly granted on the grounds of contributory negligence where the plaintiff, while driving an automobile at night along a straight level highway without anything to obstruct his view or detract his attention, ran into a truck without a tail-light parked on the highway. None of the cited cases are controlling of the case in hand. The complaint here questioned is silent as to

whether the highway near where the truck was parked is straight or crooked, level or otherwise. If the truck could not, because of some obstruction, be seen as plaintiff and her husband approached it prior to the time they were blinded, and if plaintiff's husband was driving at a lawful rate of speed an automobile properly equipped with lights and brakes without any reason to believe the headlights of another automobile would suddenly or unexpectedly blind him, that while so blinded the collision occurred without time for him to reduce his speed or stop his automobile, the rule announced in the cases relied upon by defendant and heretofore cited in this opinion would not apply. Under such circumstances it may not be said that plaintiff's husband was, as a matter of law, guilty of contributory negligence."

The case of *Hansen v. Clyde*, 89 Utah 31, 56 Pac. (2d) 1366 merely held that a contractor was not negligent in placing a barricade which was invisible due to a curve until the driver was about 50 feet away from the barricade. The court in that case did not say whether or not the driver of the automobile in which the plaintiff was riding was guilty of negligence.

The case of *Moss v. Christensen-Gardner*, 98 Utah 253, 98 Pac. (2d) 363 also involved a demurrer to a complaint in which it was alleged that the defendant erected a barricade across the highway and that because of accumulation of smoke and

mist and impaired visibility by glare of headlights the plaintiff could not see the unlighted barricade in time to safely avoid running into the same. This court held that the complaint alleged a cause of action and said of the rule announced in *Dalley v. Mid-Western Dairy Products*

“\* \* \* While this rule is recognized generally in other jurisdictions as well as in our own, it is certainly not a rule without limitation or restriction.”

Likewise, it was held in *Trimble et ux v. Union Pacific Stages*, 105 Utah, 457, 142 Pac. (2d) 674 that where automobile in which plaintiffs' decedent was riding had been pulled onto the highway after sliding off the slippery pavement in a dense fog, at night, and, while parked on left shoulder of highway without lights burning, the automobile was struck by a bus, the bus driver was not negligent as a matter of law.

The cases of *Horsley v. Robinson*, 112 Utah 227, 186 Pac. (2d) 592 and *Shiba v. Weiss*, 3 Utah (2d) 256, 282 Pac. (2d) 341 did not involve accidents which happened at night, and merely announced the general conceded proposition of law that no person shall drive a vehicle on a highway at a greater speed than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then and there existing. However,

neither of these cases holds that the mere fact that a collision occurs proves that the defendant was traveling at a speed greater than was reasonable and prudent. As said in *Horsley v. Robinson*, supra:

“The mere happening of the accident of course does not prove that the defendants were negligent. Nor does the fact that the rate of speed at which they traveled brought them at the scene of the accident at the time that the Reinhardt car went out of control and into the course of travel of the bus, because that is something that they could not anticipate and guard against.”

Moreover, the case of *Shiba v. Weiss*, supra, again involves a straight stretch of highway. As said by the court in that case:

“The accident having occurred on a stretch of highway which was straight and level for at least a distance of about  $\frac{1}{2}$  mile west of the point where the collisions occurred and there being no evidence of any obstructions to the view of the driver, the facts in the instant case are very similar to those in *Dalley v. Mid-Western Dairy Products Co.*, (supra) \* \* \*.”

A case on all fours with that before the court at this time is *Hodges v. Waite*, 2 Utah (2d) 152, 270 Pac. (2d) 461. In that case the jury determined from the facts in the case that the proximate cause of the accident was occasioned by the negligence of the defendant, by reason of the fact that he had



stopped and parked his truck and trailer upon the Logan-Bear River Highway below a curve in said highway which obstructed the view of motorists driving down the canyon, and this factor alone was the sole proximate cause of the accident. In sustaining the verdict the court said:

“The defendant in this case, in support of his position, relies on the Utah cases *Nikoleropoulos v. Ramsey*, 61 Utah 465; 214 P. 304; *Dalley v. Mid-Western Dairy Products Co.*, 80 Utah 331, 15 P. 2d 309; and *Wright v. Maynard*, Utah, 235 P. 2d 916. After a review of the decisions in these cases, we conclude that the law enunciated there, as a hard and fast rule, does not apply in the instant case. In *Dalley v. Mid-Western Dairy Products Co.* the facts disclose that the defendant’s truck was parked upon the highway in the nighttime, which highway was straight, unobscured for over a mile, there were no curves, and no canyon highway was involved. In *Wright v. Maynard*, this Court held that the District Court committed error in directing a verdict in favor of the plaintiff, and held further that it was a question for the jury whether defendant’s inability to stop his automobile was the proximate cause of the accident.”

“We are inclined to follow the law enunciated by this Court in the case of *Trimble v. Union Pacific Stages*, 105 Utah 457, 142 P. 2d 674, and we believe the rule laid down in said case is applicable to the situation and the facts in the instant case. In this case this Court said: ‘Where automobile in which plain-

tiffs' decedent was riding had been pulled onto the highway after sliding off the slippery pavement in a dense fog, at night, and, while parked on left shoulder of highway without lights burning, the automobile was struck by a bus, the bus driver was not negligent as a matter of law', but a question of fact existed."

Plaintiff's argument loses sight of the fact that the negligence of the defendant, should we assume for the purpose of argument that he was negligent, may not have been the proximate cause of the plaintiff's injury. In this connection the case of *Wright v. Maynard*, 120 Utah 504, 235 Pac. (2d) 916 is pertinent. In that case the appellant, at night, was traveling between 25 and 30 miles per hour when he rounded a slight bend in the road in the northern outskirts of Orem. After he rounded this bend his lights disclosed an unlighted car protruding in the highway on the side he was traveling and a man in white coveralls standing next to it waving at him. Appellant immediately applied his brakes but on account of the ice his car commenced sliding directly toward the other car and the man standing by its side, whereupon appellant swerved his car onto the shoulder east of the highway just to the east of the stalled car. Just as he did this respondent jumped to the east in front of appellant's car and was hit. Citing the *Dalley v. Midwestern Dairy Products Co.*, *Horsley v. Robinson* and *Nikoleropoulos v. Ramsey* cases, the court, in distinguishing this case, said:

“In the instant case, the facts are different. Although appellant was not able to stop within the distance, he could observe substantial objects in front of him, still he saw them in time and had sufficient control of his car to turn aside and avoid running into them had they remained stationary. Had respondent herein not moved from his position near the door of the stalled car and jumped to the east as appellant swerved his car to the east, appellant would have avoided hitting him. Under such a state of facts, the principles enunciated in the *Nikoleropoulos* and *Dalley* cases do not apply. Even though appellant may have been driving too fast under existing conditions to stop in time to avoid hitting substantial objects disclosed by his carlights had he kept on a straight course, still such inability to stop where he had the ability to avoid a collision with those objects by some other means, such as turning aside, presents a different question from that decided in the two previous cases above referred to. It was a question for the jury to determine whether his inability to stop was the proximate cause of the accident or whether that cause was the unexpected change of position by plaintiff. The court therefore erred in ruling as a matter of law that appellant’s negligence was the proximate cause of the respondent’s injuries.”

In the case we are now considering the evidence shows that the plaintiff heard the defendant’s car coming, saw the lights from a distance of 600 feet away at a time when she was only about a foot from the edge of the oil surface of the highway,

and could have avoided the accident simply by either remaining off the highway or by stepping off the highway. Under these circumstances the jury may well have found that the negligence of the defendant, if any, was not a proximate cause of the injury to the plaintiff.

By our argument that the rule of the *Dalley v. Midwestern Dairy Products Company* case does not apply to this case, we do not mean to infer that defendant is not subject to any restriction, for we believe that he is still subject to the rule that no person shall drive a vehicle on the highway at a speed greater than is reasonable and prudent under the conditions then and there existing, which is in effect what the court told the jury in its Instruction 6A (R. 69). To hold that the *Dalley v. Midwestern Products Company* rule does apply in a case where the view of the driver is obstructed by curves in the road would be to utterly disregard the realities of present-day driving and to impose upon the drivers of vehicles a standard of conduct with which it would be impossible for them to comply. A person driving a vehicle down a canyon at night, where the lights would alternately be shining directly into a canyon wall or out over the valley below, would either have to practically "feel" his way around each curve or proceed at the risk of being negligent should he collide with another object on the highway.

Not only can the verdict of the jury in this case be sustained upon the theory that the defendant was not negligent or, if negligent, that his negligence was not the proximate cause of the accident, but upon the further theory that the plaintiff's own negligence was the proximate, or at least a proximate, cause of her own injury. The evidence shows that she and Ralph Crane and the Osbornes had been together all afternoon and evening, during which time there had been considerable drinking. And while she states that when she saw the defendant's automobile 600 feet away she was too scared to move, the jury may have found that her senses had been dulled and her ability impaired to the point where she was unable to respond to the situation. Moreover, there is considerable evidence to the effect that the Osborne vehicle was parked without lights on the traveled portion of the highway and while she did not park the vehicle she, as a reasonable and prudent person, could not have been oblivious to the dangerous situation which had been created and, being conscious of the situation, may have been guilty of contributory negligence in attempting to cross behind said vehicle and into the left door of the vehicle when it would have been much safer for her to have approached the vehicle from the right side and to have entered the vehicle through one of the right doors.



This, of course, presumes that she and Mrs. Osborne actually left the road and went up on the hill to go to the bathroom. The two puddles of water would indicate that they may never have left the highway but had gone to the bathroom behind the Osborne vehicle, in which event the jury may have found them guilty of negligence in placing themselves in this position of danger. In this connection we have already cited the case of *Wright v. Maynard*, supra. The court's attention is also invited to *Mingus v. Olsen*, 114 Utah 505, 201 Pac. (2d) 495; *Reid v. Owen*, 98 Utah 50, 93 Pac. (2d) 680; *Cox v. Thompson*, 254 Pac. (2d) 1047; and *Smith v. Bennett*, 1 Utah (2d) 224, 265 Pac. (2d) 401.

Illustrative of the doctrine laid down in these cases is *Sant v. Miller*, 115 Utah 559, 206 Pac. (2d) 719. In that case plaintiff and his wife were crossing the main street of Logan, Utah from east to west at a point between intersections. They stopped somewhere over the center line of the highway on the west side of the street to allow south bound traffic to pass. Plaintiff was gazing in a southwesterly direction when defendant's automobile approaching from the north struck plaintiff and injured him. Plaintiff's wife had seen the impending danger and stepped out of the way. A verdict was directed in favor of the defendant by the lower court and affirmed on appeal, the court saying:

“Appellant was aware of the fact that he was taking a chance in crossing the street at a place contrary to law. He should also have known that a driver of a vehicle would not ordinarily anticipate the presence of pedestrians on the street at the time and place of the accident. Knowing that his presence might not be anticipated and knowing that traffic on the west side of the road was approaching from the north and with nothing of importance to distract his attention, it was appellant’s duty to watch the traffic he knew was approaching his location. \* \* \* Having omitted to continue to watch, he failed to exercise the degree of care required of a pedestrian who leaves a place of safety and places himself in a position of peril. A greater degree of care is necessary upon the part of a pedestrian who undertakes to cross a city street at a prohibited place than is placed on one who uses a marked crosswalk. \* \* \* ”

And, finally, the jury in this case may have concluded that the defendant Leo George Eastman was not driving the car but that the car was driven by Kenneth R. Parry and that he was not acting under the control or direction of the defendant at the time. Such was the testimony of both Kenneth Parry (R. 309, 310) and the defendant Leo George Eastman (R. 356).

Mere ownership of an automobile does not establish a prima facie case that the owner is liable for damages caused by the negligence of the driver. See *Saltas v. Affleck*, 99 Utah 65, 102 Pac. (2d)

493. The presence of the owner in a vehicle being operated by another does raise a rebuttable presumption that the owner has control and direction of it. This, however, is a rebuttable presumption. See the case of *Fox v. Lavender*, 89 Utah 115, 56 Pac. (2d) 1049, 109 A. L. R. 105. As is said in *Blashfield's Cyclopedia of Automobile Law and Practice*, Volume 5, page 158:

“A man may, however, be a guest in his own automobile, and an owner, who, although present in his car while it is being driven by another not his agent, is present merely as a guest and has no control of the machine, which is not being used in the furtherance of his business or undertaking, is not liable, in absence of any statute imposing liability for the negligence of such person in operating it.”

The evidence in this case shows that the defendant and Kenneth Parry were not on any business of the defendant but that Kenneth Parry had merely wanted to drive the automobile and the defendant had permitted him to do so (R. 309). So we see that it would have been error for the court to have instructed the jury, as contended by the plaintiff, that the defendant was guilty of negligence as a matter of law, for the reason that the jury might reasonably have found under the evidence in this case that the defendant was not even driving his automobile; if not driving that he was not liable for the acts of the person who was driving; that if



he was driving or was responsible for the actions of the driver he was not guilty of any negligence; and, even if he was guilty of negligence, the negligence may not have been the proximate cause of the injury to the plaintiff, the same having been caused by her own negligence.

POINT 2. THE COURT DID NOT ERR IN ADMITTING OR EXCLUDING CERTAIN EVIDENCE OR IN INSTRUCTING THE JURY.

Plaintiff complains of the actions of the court in permitting certain evidence, excluding certain evidence and in instructing the jury in a certain manner. We will attempt to cover those matters in this section of our brief.

#### *A. Admission of Evidence*

The plaintiff complains that the court allowed the witness Lyle Bates to make certain marks upon photographs and give certain opinions about blood spots, anti-freeze spots and skid marks which should not have been allowed. He refers us to the Record on pages 337, 339 and 350. Let us examine that Record.

The Record shows that the witness had testified about certain conditions which he found at the scene of the accident and he said on page 337 that he found two spots which he determined to be blood stains. He was then asked to make a circle on a photograph around the two spots which he deter-

mined to be blood stains, when plaintiff's counsel objected to his making circles on the picture. That was the only objection made, the only ground given, and the court overruled the objection and allowed the witness to make a circle on a picture. We submit that this was not only proper but that it could in no way prejudice the plaintiff.

On page 339 of the Record the same witness was asked if a certain picture was a picture of the Osborne automobile (see Exhibit 37). There was never any contention made that the automobile in Exhibit 37 was not the automobile purported to be shown (R. 340). Moreover, the court sustained the plaintiff's objection and counsel for the defendant carried on for three pages of the Record laying a foundation, finally identifying the automobile by the license number on the automobile and showing that that license number was the same as was shown on the police report by the investigating officer.

On page 350 of the Record the same witness was shown Exhibit 43 and asked to draw a line to the side of the skid marks he had previously testified about. Plaintiff's counsel objected on the ground that it would destroy the photograph, but was overruled. The witness was then asked to put an outline around anti-freeze he had previously testified about. Again plaintiff's counsel objected to making marks on the photograph. The witness was then

asked to put a circle around what he had previously identified as blood stains, which was again objected to and again overruled.

We submit that allowing the witness to so mark the photographs lay within the discretion of the court and the plaintiff was not prejudiced in any way by the court's allowing the exhibits to be marked. None of the objections recited were, as plaintiff infers, to the qualification of this witness to identify blood spots, anti-freeze and skid marks.

*B. Evidence Excluded.*

The evidence which the plaintiff claims the court erroneously excluded was the hospital records. Reference to the Record will show that these were identified by the Custodian of the Hospital Records, Hortense Wood, as the hospital records and that Dr. Lamb, plaintiff's physician, was allowed to use these records and testify at great length both from the information found on the hospital records, the x-rays and other information he may have had (R. 184 to R. 214). On page 254 of the Record plaintiff's counsel proffered all of the hospital records as an exhibit to the case. Objection was made on the ground that they had not been properly verified by Dr. Lamb or anyone else, with the statement that defendant would have no objection to those parts of the hospital records which Dr. Lamb him-

self signed or made out but that he had not specifically identified that part of the record. This objection was sustained on the ground that the hospital records contained reports made by a number of persons, such as nurses and others (R. 254) and that the plaintiff had failed to lay a proper foundation for their admission, not having shown that the persons who made the entries were unavailable or that the records were made in the regular course of business of the hospital.

As was said in the case cited by defendant's counsel in his objection (R. 254), *Clayton v. Metropolitan Life Insurance Company*, 92 Utah 331, 85 Pac. (2d) 819:

“None of the cases there cited as supporting admissibility of hospital records go so far as appellant would have us go in this case. Before such records can be admitted, in the absence of a statute, the offering party must show the necessity of admitting the records without requiring the person or several persons who made the records to testify. He must then show the custody from which the records were taken and that they were prepared in the due course of hospital work.”

*C. Instructions To The Court.*

Plaintiff complains of that part of Instruction 6A wherein the court, after instructing the jury that an operator must operate at a speed at which he is able to stop his vehicle within the distance

of his headlights, goes on to qualify the rule with the statement:

“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.”

This is exactly what this court has said the rule is in the cases of *Hodges v. Waite* and *Wright v. Maynard*, supra, as we have discussed in Point 1 of our Brief. The court then goes on to say:

“This rule of law that I have given you does not apply on a curve but only on a section that is sufficiently straight for a person to stop within 350 feet which is the required range of his headlights. If you find that in consideration of the bends in the road, and the conditions existing at that time, that the driver of the defendant’s automobile was driving faster than an ordinary prudent man would have driven, then you should find the driver negligent, and in that event, the negligence would also be a proximate cause of the collision.”

The plaintiff then questions, what does the court mean by a curve? We think the definition of what the court means by a curve is implicit in the instruction itself, that is, a section of road that is not sufficiently straight for the lights of a car to remain on the highway and reveal objects 350 feet

ahead. Of course, whether or not the road in the area in which this accident happened was so curved was a question of fact to be ascertained by the jury from the evidence in the case and not to be decided by the court.

What in effect the court told the jury by this instruction is that an automobile must be equipped with lights which will reveal persons and vehicles at a distance of at least 350 feet, and that he must so drive and so control his automobile as to be able to stop within that distance, except in situations such as where there is a curve on the highway where the lights could not shine upon the road for a distance of 350 feet, but that in those instances the driver is still required to exercise ordinary and reasonable care. We submit this is a correct statement of the law.

Plaintiff complains of Instructions No. 12, 13, and 14 (R. 79, 79B and 80) and states that these instructions over-emphasize drinking and intoxication as to the plaintiff.

In Instruction No. 12, which is a long instruction and has to do with the plaintiff's failure to move out of the pathway of the oncoming automobile, the jury is instructed that they may consider a number of things in determining whether an ordinary prudent person would have stepped aside. The instruction is quite long and detailed and only



one phase of that instruction deals with intoxication, when the jury is told that one of the things they may consider is plaintiff's condition of sobriety.

By Instruction No. 13 the jury were told that if they found from the evidence that the plaintiff was under the influence of alcohol to the extent that she failed to appreciate the danger or to make a reasonable effort to avoid a collision, the plaintiff was negligent. This is similar to Instruction No. 6d, in which the jury were told that if the defendant's ability to drive was impaired as a result of the use of intoxicating liquor this was negligence.

Of course, Instruction No. 14 merely defined intoxication and applies equally to the plaintiff and the defendant.

Both the plaintiff and the defendant had a right to have the theory of his case or defense presented to the jury, and that is all that the court has done in this instance. To have done less would have been error.

By its Instruction No. 6e, of which plaintiff also complains, the jury was instructed:

“There is evidence in the case that Kenneth R. Parry did not have an operator's license. Even though you might find Kenneth R. Parry was the driver of said automobile, you are not to consider this lack of a license as the proximate cause of plaintiff's injuries.”

What this instruction has to do with the fact

that the plaintiff had been drinking all night, as argued by the plaintiff, is not apparent. It does withdraw from the jury the question of whether or not his having a license to drive and whether or not the fact that his license had been revoked by reason of drunken driving was a proximate cause of the plaintiff's injuries, and does eliminate them from the jury's deliberation in arriving at liability in this case. This, however, is good law. The fact that Kenneth R. Parry did not have a driver's license, or the fact that his license had been revoked was not, and could not under the circumstances of this case have been, the proximate cause of this accident.

Plaintiff then complains of Instruction No. 9 (R. 76), which instruction merely outlines what the jury must find in order to return a verdict in favor of the plaintiff and, of course, tells them they must find defendant negligent, and in doing so uses general language, to-wit: That he was negligent (a) in that said driver was driving too fast for existing conditions; (b) that said driver was not keeping a proper lookout; (c) that said driver was operating a car while under the influence of intoxicating liquor.

The question of whether or not the driver was driving too fast for existing conditions and whether or not the driver was keeping a proper lookout go



to the point of whether or not the defendant was over-driving his lights, which issue plaintiff claims was not covered. If by her criticism the plaintiff means that defendant's lights were faulty, we find that no such issue was involved in the case. See the court's pre-trial order on page 13 of the record in which the plaintiff's contentions are set out. There are six contentions of negligence, but none of these says anything about the defendant's automobile having been equipped with faulty lights, nor is there any evidence whatever in the record that the defendant's lights were faulty. If this is what was intended by the plaintiff, to have given such an instruction would have been error.

Instruction No. 11, which is criticized by the plaintiff as being a duplication of Instruction No. 12, defines the plaintiff's duty to keep a reasonable lookout for automobiles using the highway and to continue to look and observe the automobile as it approached her. Whereas Instruction No. 12 is addressed to a different point, that is her duty to move back from the path of danger if an ordinary prudent person would have stepped aside under similar circumstances.

For this reason both instructions were necessary and in view of the fact that it is admitted that the plaintiff did actually see defendant's automobile neither instruction is prejudicial.

Instruction No. 15 did not tell the jury that they might not consider the bias and prejudice, if any, of Lyle Bates in determining what credibility to give to his testimony, which is what plaintiff would infer. It merely told the jury it was entirely immaterial whether the defendant or either party carried insurance protecting such persons against loss or liability and that the jury were to disregard any reference to insurance and in no wise speculate or consider the existence or non-existence of insurance in arriving at their verdict. There is nothing whatever said in the instruction as to what weight is to be given to Lyle Bates' testimony.

Plaintiff cites a number of cases in her argument to the effect that the court should not give inconsistent instructions; that the instructions should be applicable to the evidence and the respective theories of the case; and that they should not accentuate the duty of one person and minimize the duty of the other, or vice versa. However, we submit that the instructions given in this case do not violate any of these principles. We submit that an analysis of all the instructions as a whole will show that they adequately define both parties' theories; that they were not inconsistent and were sufficiently detailed as to apply to the evidence in the case. Reviewing the instructions only generally:

Instruction No. 1 merely outlines the contentions of both parties.

Instruction No. 2 has to do with the burden of proof.

Instruction No. 3 is a “stock” instruction defining what is meant by the burden of proof.

Instruction No. 4 contains “stock” definitions of the term “negligence” and the like.

Instruction No. 5 merely lays down the test for negligence.

Instruction No. 6 directs the jury that they should first decide whether the driver of the defendant’s automobile was negligent and, if so, whether the negligence was a proximate cause of the plaintiff’s injuries.

Instruction No. 6a we have already discussed and has to do with the duty of an individual to drive his car within the range of his headlights on a straight road.

Instruction No. 6b has to do with whether or not the defendant was driving too fast.

Instruction No. 6c has to do with the defendant’s ability to avoid the accident.

Instruction No. 6d has to do with whether or not the defendant was driving under the influence of intoxicating liquor.

Instruction No. 6e tells the jury that they cannot find that the fact that Kenneth R. Parry did not have a driver’s license was a proximate cause of plaintiff’s injury.

Instruction No. 6f has to do with the question of agency between Kenneth R. Parry and the defendant.

Instruction No. 7 further amplifies this question of agency.

Instruction No. 8 tells the jury they should not allow sympathy to influence their verdict.

Instructions No. 9 and 9a define the issues between the parties.

Instruction No. 10 defines "contributory negligence".

Instruction No. 11 defines the plaintiff's duty to maintain a lookout for automobiles on the highway.

Instruction No. 12 has to do with the duty of the plaintiff to step back and avoid injury.

Instruction No. 12a is merely a statement of the rule that a driver who is faced with a sudden emergency cannot be expected to exercise the same care as if he had time for cool and deliberate deliberation.

Instructions No. 13 and 14 deal with intoxication.

Instruction No. 15 tells the jury they may not take into consideration whether either of the parties is protected by insurance.

Instruction No. 16 has to do with damages.

Instruction No. 17 is a "stock" instruction on damages.

Instruction No. 17a tells the jury that Mrs. Osborne is not a party to the lawsuit.

Instruction No. 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 are "stock" instructions.

You will note from this admittedly brief resume that the instructions are not inconsistent, do not over-emphasize the plaintiff's duties and adequately present the theory of the plaintiff's case.

## CONCLUSION

As we said at the outset, there are really only two questions to be resolved in this appeal. Might the jury have found as they did under the evidence; and were the issues properly submitted to them? Both of these questions must be answered in the affirmative. The evidence did not show negligence on the part of the defendant as a matter of law. The jury might well have found that the defendant was not negligent, in fact, might have found that he was not even driving his vehicle and that he was not responsible for the negligence of the person who was. Plaintiff attempts to bring this case within the rule announced in *Dalley v. Mid-Western Dairy Products Company* supra, that a person must drive his car so as to be able to stop within the range which his headlights will or ought to reveal objects or persons upon the highway. We find that that is not the rule to be applied in this case, but rather the law enunciated by *Hodges v. Waite*, supra, and *Wright v. Maynard*, supra, to the effect that this rule does not apply when conditions of the highway are such that the lights are precluded from shining on the highway, as in the case of fog, or are diverted



from the highway, as is the case of curves.

The jury might well have further found that the proximate cause of this accident was the failure of the plaintiff to remove herself from a position of danger after having observed the defendant's automobile, either by reason of a disregard for her own safety or because her physical ability to respond to the situation had been impaired by the drinking she had admittedly done during the evening.

Nor does the record show that any evidence which should have been admitted or evidence which should have been excluded was either wrongfully admitted or excluded to the plaintiff's prejudice.

It is most always easy to take instructions bit by bit or excerpt by excerpt and convincingly argue that they were either erroneous or prejudicial. However, when we consider the instructions as a whole in this case we find that the jury was adequately and properly instructed on all of the issues in the case and the plaintiff's theory; that the instructions were not slanted in the defendant's favor; and that there is no error in the instructions which was prejudicial to the plaintiff's rights.

We, therefore, respectfully submit that the result reached in this case should be affirmed.

Respectfully submitted

EDWIN B. CANNON  
DON J. HANSON