

1957

Loa Johnson v. Elizabeth F. Syme : Brief of Appellant

Utah Supreme Court

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APPEAL No. 8547

IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH

OCT 3 1957

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LOA JOHNSON,

Plaintiff and Appellant,

—vs.—

ELIZABETH F. SYME, Adminis-
tratrix of the Estate of Bailey Syme,
Deceased,

Defendant and Respondent.

APPELLANT'S BRIEF

LEE W. HOBBS

Attorney for Appellant

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STATEMENT OF FACTS

The action giving rise to this appeal arose out of an automobile collision occurring on October 8, 1954, at the hour of 11:00 P.M., at 13800 South State Street, said South State Street being designated as U. S. Highway 91. At the point of collision a road, 13800 South, known as the South Draper road, intersects with U.S. Highway 91. At this point Highway 91 is a four lane divided highway, being 2 lanes for northbound traffic and 2 lanes for southbound traffic. The 2 inside lanes of Highway 91 are each 16 feet wide. The two outside lanes of Highway

91 are each 24 feet wide. The dividing island or area between the lanes for northbound and southbound traffic is 35 feet wide, for a total highway width at this point of 115 feet. The South Draper road runs in an easterly direction from its intersection with U.S. Highway 91 to the vicinity of Draper, Utah. The South Draper road does not continue west of U.S. Highway 91 as a public highway, but makes a T intersection with U.S. Highway 91. A private road extends west from Highway 91 in a direct continuing line with the South Draper road and is a private road maintained by the Utah State Prison as a patrol road. Neither Highway 91 nor the South Draper road are artificially lighted in the area of this intersection. Approximately 600 feet south of the intersection and on the east side of U.S. Highway 91 is a sign one foot high and 3 feet high with the word "Draper" and a small arrow pointing to the east. This was the only sign or marker indicating to northbound traffic on Highway 91, the imminence of the intersection of the south Draper road. Westbound traffic on the South Draper road is controlled by a conventional stop sign located on the north side of the South Draper road and approximately 30 feet east of the edge of U.S. Highway 91.

The speed limit along U.S. Highway 91 at the scene of the accident is and was 50 miles per hour. The stated speed limit along the South Draper road is and was 35 miles per hour. The plaintiff and appellant, Loa Johnson, was driving a 1953 Buick Roadmaster sedan north along U.S. Highway 91. The decedent, Bailey Syme, was driving a 1953 Ford sedan west along the South Draper

road. The two automobiles collided at the intersection of the roads, the collision resulting in the death of Mr. Syme and in personal injuries to the appellant, Mrs. Johnson.

The appellant herein, Loa Johnson, thereafter commenced an action for personal injury against the respondent herein as Administratrix of the estate of the decedent. The plaintiff in her complaint alleged two causes of action, the first cause of action alleging that her injuries were a proximate result of the negligence of the decedent. The plaintiff's second cause of action alleged that her injuries were a proximate result of the wilful and wanton misconduct of the decedent. The defendant's answer denied the negligence of the decedent, alleged the contributory negligence of the plaintiff and appellant herein as a defense and also made counterclaim for damages resulting from the death of the decedent.

The complaint and counterclaim were set for jury trial and on May 5, 1956, a pretrial hearing was held before the Honorable A. H. Ellett.

In the course of the pretrial proceedings, it was admitted by respective counsel that if the police officer who investigated the accident, Highway Patrolman Seddon, were called as a witness that he would testify that he found the body of the decedent upon Highway 91 approximately 80 feet in a northwesterly direction from the point of impact from the two vehicles, and that the decedent's body at that time carried an odor of alcoholic

beverage. In the course of the pretrial proceedings counsel for the plaintiff stated that he intended to call as witnesses the following:

1. Mr. O. F. Stanley of Salt Lake City, Utah. Plaintiff's counsel stated that Mr. Stanley would testify that at about 11:00 o'clock P.M. on October 8, 1954, he was a passenger in a car driven by Harry Jones traveling north on U.S. Highway 91 near the Utah State Prison at the point of the mountain, and that he sat in the center of the front seat of Mr. Jones' automobile. That he would testify that he was traveling at about 50 miles per hour and that as he neared the Draper road he noticed the head lights of a car which was westbound. Further, that Mr. Stanley would testify that he was about three-fourths of a block away from the intersection when he first saw the westbound car. That he would estimate the speed of the westbound car in the neighborhood of 40 miles per hour and was about 300 feet of the intersection when he was first seen by Mr. Stanley. That the westbound car continued through the intersection without stopping for the stop sign and collided with another northbound car. Mr. Stanley would testify that he had not seen the northbound car until after the impact.

2. Mr. Marvin Taylor of Salt Lake City, Utah. Counsel for the plaintiff stated that Mr. Taylor would testify that he was occupying the automobile of Mr. Harry W. Jones and was sitting on the right side of the front seat, beside Mr. Stanley. That they were traveling approximately 50 miles per hour and were staying ap-

proximately a block behind another northbound car which was proceeding at approximately the same speed as the car in which he was riding. That as they were traveling north on U.S. Highway 91 near the State Prison Mr. Stanley who was sitting to the left of Mr. Taylor suddenly called the attention of the people in the Jones' automobile to a westbound car on a side road. That the westbound car was almost to the intersection when Mr. Taylor first observed it. That Mr. Taylor observed the automobile come through the stop sign without stopping or slowing down and saw the westbound automobile collide with the northbound automobile which was ahead of Mr. Jones' automobile. That Mr. Taylor would testify that he could not estimate the speed of the westbound car but that he did observe that the westbound car did not stop or slow down for the stop sign.

3. Harry W. Jones of Salt Lake City, Utah. Plaintiff's counsel stated Jones was driving his automobile north on U.S. Highway 91 near the Utah State Prison and that Mr. O. F. Stanley and Mr. Marvin Taylor were sitting in the front seat beside him. That he was traveling about 45 miles per hour in the outside lane of northbound traffic and that he noticed the tail lights on a car approximately a block in front of him which he would estimate was traveling at approximately the same speed as his own automobile. That he suddenly observed a grey car swinging around in a circle and that he had not observed the westbound automobile until he saw a cloud of dust and the car swinging around. That Mr. Jones would testify that he did not actually remem-

ber seeing the impact and was not sure of details because he was very intent on his driving. At this time it was admitted and agreed by respective counsel that the testimony of the witnesses as proposed by the plaintiff's counsel could not be contradicted at that time by any other witnesses known to the defendant. (Pretrial Trans. Page 3, line 28, to Page 5, line 5, incl.) At this stage of the pretrial hearing the counsel for the plaintiff moved that the counterclaim of the defendant be dismissed on the grounds that all of the evidence would indicate that the decedent had been negligent as a matter of law and that such negligence had been the cause or in any event had contributed to his death. This motion to dismiss was granted by the court.

Thereupon on motion of counsel for the defendant, the deposition of the plaintiff, the appellant herein, was published. The testimony of the plaintiff as it appeared in the deposition disclosed that she had been visiting friends in Provo, Utah, and had left there about 10:30 or quarter to 11:00 (Page 9, line 6). That she proceeded north on U.S. Highway 91 from Provo to Salt Lake (Page 9) that at the time of the collision it had been raining but had stopped and that the roads were wet (Page 10, lines 3, 4, 5); that she was watching the road straight ahead with her lights on dim because of approaching traffic (Page 12 line 25) when she saw the automobile belonging to the decedent. When asked how far she was from the decedent's automobile when she first saw him, she first stated (Page 13, line 16):

- “A. Well I can’t judge on feet; I couldn’t tell you; how many feet would your dim lights show?
- Q. Well, let’s say, this how about car lengths? A car is pretty close to 20 feet long, 18 to 20 feet.
- A. Well it was 20 to 30 feet I guess before I seen him.
- Q. You would estimate then that it would be a little bit more than one car length and less than two car lengths?
- A. Oh I think it would be probably, yes, about that.”

The plaintiff further stated that she estimated the speed of the defendant at the time she first saw him as ten or twenty miles per hour (Page 14, line 24). The plaintiff further testified that the first time she saw the decedent’s automobile was when her car lights first picked it up on the road (Page 16, line 13) and that prior to that time she was watching the road straight ahead of her (Page 16, line 18; page 17, line 9 and 10; page 17, line 19 and 20, 21 and 22). The plaintiff testified that immediately from the time she had left Provo to the point of the collision she had been traveling at approximately 50 miles per hour and not to exceed 55 (Page 11, line 6 and 7).

Thereupon counsel for the defendant moved to dismiss the complaint of the plaintiff on the basis of the proposed testimony and on the basis of the testimony of

the plaintiff as appeared by her deposition. The court thereupon ruled:

1. That the conduct of the plaintiff constituted negligence as a matter of law.

2. That the negligence of the plaintiff contributed as a matter of law to the proximate cause of her injuries, and

3. That the evidence proposed by the plaintiff was insufficient as a matter of law to raise a question of fact for the jury as to any wilful and wanton misconduct on the part of the decedent. The court thereupon dismissed the first and second causes of action of the plaintiff's complaint.

From the findings of the court, first, that plaintiff was guilty of contributory negligence as a matter of law, second, that such contributory negligence was a proximate cause of her injuries as a matter of law and, third, that the evidence proposed by the plaintiff was insufficient as a matter of law to raise a question of fact for the jury as to any wilful and wanton misconduct on the part of the decedent and from the consequent dismissal of plaintiff's first and second causes of action, the plaintiff takes this appeal.

STATEMENT OF POINTS

POINT I

THAT THE COURT ERRED IN HOLDING THAT THE CONDUCT OF THE PLAINTIFF AND APPELLANT CONSTITUTED NEGLIGENCE AS A MATTER OF LAW.

POINT II

THAT THE COURT ERRED IN ITS HOLDING THAT THE NEGLIGENCE OF THE PLAINTIFF AND APPELLANT CONTRIBUTED AS A MATTER OF LAW TO THE PROXIMATE CAUSE OF HER INJURIES.

POINT III

THAT THE COURT ERRED IN ITS RULING THAT THE EVIDENCE PROPOSED BY THE PLAINTIFF AND APPELLANT WAS INSUFFICIENT AS A MATTER OF LAW TO RAISE A QUESTION OF FACT FOR THE JURY AS TO ANY WILFUL AND WANTON MISCONDUCT ON THE PART OF THE DECEDENT.

ARGUMENT

POINT I

THAT THE COURT ERRED IN HOLDING THAT THE CONDUCT OF THE PLAINTIFF AND APPELLANT CONSTITUTED NEGLIGENCE AS A MATTER OF LAW.

The court indicated in the pre-trial proceedings that his finding that the plaintiff was guilty of contributory negligence as a matter of law was based on the fact that the plaintiff did not see the defendant until immediately before the crash (Pretrial Tr., Page 6, lines 5 to 8).

This court has heretofore held that the questions of negligence in failing to observe an approaching automobile at an intersection is one of fact for the jury. In the case of *Hess v. Robinson*, 163 Pac. 2nd 510, 109 Utah 60, a case involving a fact situation almost identical to the instant case, this court stated at Page 512:

“As to what the circumstances were at the time the plaintiff entered the intersection, and as to whether entering under such circumstances was an act from which persons of ordinary prudence and caution would have foreseen some injury would likely result, are matters upon which reasonable minds may differ. As such they are properly for the jury.”

Discussing the failure of the plaintiff to observe the approach of the defendant's vehicle, the court stated at Page 512:

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

In the case of *Martin v. Stevens*, 243 Pac. 2nd 747, a case in which the plaintiff entered an open intersection at 18th East and Stratford Streets in Salt Lake City, the plaintiff entering the intersection from the north along 18th East Street and the defendant proceeding west along Stratford Avenue, the trial court held that the plaintiff was guilty of contributory negligence as a matter of law in failing to observe the defendant's automobile in time to avoid the collision. This court, in discussing the duty of the plaintiff to exercise due care, states at Page 750:

“But in doing so he had the right to assume, and to rely on the assumption that others would do likewise.”

The court holding the defendant's negligence to be a question of fact for the jury, reversed the decision of the trial court and remanded the cause for trial. See also *Spackman v. Carson*, 216 Pac. 2nd 640:

“Unless all reasonable minds must say that a party did not use due care under a particular set of circumstances, it is a question for the jury.” In this case the plaintiff driving a motorcycle on a country road at approximately 45 miles an hour observed the defendant's truck parked on the side of the road approximately 200 feet ahead of him. His testimony was that he next saw the truck pulling in front of him when he was approximately 30 feet away, that he applied his brakes and was unable to avoid the collision. The court observing that the plaintiff had not been alerted to any immediate danger by his first observation of the truck and there being no indication to the plaintiff that it was about to be moved into his path observes at Page 642:

“Under these circumstances we are convinced that the issue of whether the plaintiff was negligent in failing to keep a more diligent lookout ahead was properly submitted to the jury.”

It is the contention of the appellant that her position immediately preceding the collision was identical to that of the plaintiff in the Spackman case, in that had she observed the decedent's automobile at any time prior to his entering the intersection she would have had no indi-

cation that the decedent was about to proceed through the stop sign without slowing down or stopping.

The further issue of the plaintiff's speed at the time of the collision was also raised as an issue by the counsel for defendant at the pretrial hearing (Pretrial Transcript, Page 2, lines 13 to 17 inclusive). However, the trial court made no indication that its ruling was based in any way on the plaintiff's rate of speed. In any event, the speed of the plaintiff at the time of the collision was never stated by her in her deposition nor was this question asked her by defendant's counsel. The only reference to her speed in the deposition was in answer to the question (deposition, page 11, line 4) :

- “Q. About how fast had you been traveling from the time you left Provo?
- A. Oh approximately 50, or—to my knowledge, it was between 50, and—I don't think I got over 55.”

The only evidence proposed as to speed at the pretrial hearing was the proposed testimony of Mr. Marvin Taylor, a passenger in the car following the plaintiff's automobile, whose proposed testimony would indicate that he was in an automobile traveling approximately 50 miles per hour, and that the car in front of them (the plaintiff) was traveling at approximately the same speed, and the proposed testimony of Mr. Harry W. Jones, who was the driver of the automobile following the plaintiff and in which Marvin Taylor was a passenger, whose proposed testimony would indicate his speed to be about 45 miles per hour, and that the car in front of him, the

plaintiff, was traveling at approximately the same speed. Therefore the appellant submits that there is no evidence of excessive speed, or at the most a possible question of fact for a jury. See 5 American Jur. 882, Sec. 689, where it is stated:

“ . . . it is generally for the jury to decide whether . . . such speed was excessive, considering in connection therewith the hazards of the surrounding circumstances.”

See also, Blashfield Cyclopedic of Automobile Law & Practice, Part 2, Page 111, Section 2611, reading as follows:

“It is usually a question for the jury whether an excessive rate of speed is a contributing cause of an accident. . . .”

See also the case of *Poulsen v. Manness*, 241 Pac. 2nd 152, wherein this court held that the issue of contributory negligence on the part of the plaintiff was properly submitted to the jury.

Appellant respectfully submits that there is no evidence in the proceedings had in the pretrial hearing before the trial court in this matter which will support the ruling of the trial court that the plaintiff and appellant herein was guilty of contributory negligence as a matter of law.

POINT II

THAT THE COURT ERRED IN ITS HOLDING THAT THE NEGLIGENCE OF THE PLAINTIFF AND APPELLANT CONTRIBUTED AS A MATTER OF LAW TO THE PROXIMATE CAUSE OF HER INJURIES.

ARGUMENT

Assuming for the purpose of this argument that the plaintiff and appellant is guilty of contributory negligence as a matter of law in failing to see the approach of the decedent's automobile and in traveling at an excessive speed, it is the position of the plaintiff and appellant that in this event the question as to whether such negligence was a proximate cause of the accident and of the consequent injuries to the appellant is properly a question of fact for the jury.

In the case of *Hess v. Robinson*, 163 Pac. 2nd 510, 109 Utah 60, the plaintiff was traveling on a through street and was struck by the defendant's automobile when the defendant ran a stop sign. The facts of the Hess case are almost identical with the facts of the instant case in that both cases the respective plaintiffs failed to see the defendant vehicle approaching the stop sign. In the Hess case this court held that, even assuming the negligence on the part of the plaintiff, the question of proximate cause was properly one for the jury. Quoting the opinion of the court at Page 512:

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

In the case of *Martin v. Stevens*, 243 Pac. 2nd 747, involving a collision of two automobiles at an uncontrolled intersection, after discussing the proposition that the plaintiff was guilty of contributory negligence as a matter of law and after determining that he was not, the court stated at Page 753:

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

See also *Lowder v. Holley*, 233 Pac. 2nd 350.

See also *Poulsen v. Manness*, 241 Pac. 2nd 152, wherein this court ruling that the issues of negligence and proximate cause were properly for the jury stated:

“Another way of stating it is that a motorist driving on a fast arterial highway need not treat every country lane or relatively minor side road as an intersection. He has the right of way for a much greater distance.”

See also 5 American Jurisprudence, Page 882, Section 689, wherein the court stated:

“ . . . it is generally for the jury to decide whether the speed of the vehicle proximately contributed to the accident. . . .”

See also 10 Blashfield Cyclopedia of Automobile Law & Practice, Part I, Page 662, Section 6607, where it is stated:

“Speed in excess of that permitted by statute, ordinance, or other traffic regulation may constitute negligence per se; nevertheless there is still a jury question as to whether or not such violation was the proximate cause of the injury or damage complained of.”

Appellant submits that under all of the facts and circumstances shown or indicated in the pretrial proceedings in this cause, that the question of the proximate cause or causes of the collision of the appellant's automobile with that of the decedent is properly a question of fact to be determined by the jury.

POINT III

THAT THE COURT ERRED IN ITS RULING THAT THE EVIDENCE PROPOSED BY THE PLAINTIFF AND APPELLANT WAS INSUFFICIENT AS A MATTER OF LAW TO RAISE A QUESTION OF FACT FOR THE JURY AS TO ANY WILFUL AND WANTON MISCONDUCT ON THE PART OF THE DECEDENT.

The evidence of the plaintiff as proposed at the pretrial hearing, if submitted to a jury, would support a finding by the jury that the decedent approached an

arterial highway along a small side road at a speed of about 40 miles per hour, and that the decedent drove directly through the stop sign and on to the highway without stopping or slowing down and directly into the path of the plaintiff. The jury might also find from the testimony of the investigating officer that the decedent had partaken of alcoholic beverages sometime prior to the collision. It is the contention of the appellant that should a jury so find, they might also find that such conduct on the part of the decedent constituted wilful and wanton misconduct and further that such wilful and wanton misconduct was the proximate cause of the injuries to the plaintiff.

The crime of reckless driving is defined at Utah Code Annotated 1953 Section 41-6-45(a) as follows:

“Any person who drives any vehicle in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving.”

For the purpose of this argument, the appellant submits to the court a hypothetical situation identical to the actual situation in the instant case, except that we will ask the court to assume that Mrs. Johnson, the plaintiff and appellant herein, had been killed as a result of the collision and that Bailey Syme, the decedent herein, had survived the collision and had been prosecuted for manslaughter. That this evidence, had it been presented against Bailey Syme, in the course of a prosecution for manslaughter, would sustain his conviction by a jury appears from the reasoning of this court in the following previous decisions.

In the case of *State v. Lingman*, 91 Pac. 2nd, 457, 97 Utah 180, the defendant was convicted of the crime of involuntary manslaughter based on an automobile collision occurring September 29, 1937, at the intersection of 21st South Street and 2nd West Street, when the defendant's car going north on 2nd West Street collided with car driven west on 21st South Street, by the decedent. The defendant was charged at driving at a speed in excess of 40 miles an hour which speed was dangerous and excessive in view of the width and obstructions of the said driver's view along the said highway and the hazard of the intersection hereinbefore mentioned. The jury was also instructed that failure to yield the right of way could be the unlawful act not amounting to a felony to support the conviction. Because of an erroneous instruction by the court with reference to a municipal speed ordinance the cause was remanded for new trial, the court holding that under proper instruction the evidence was sufficient to raise a question for the jury. The court states at Page 198:

"We think the unlawful act that is the infraction must be done in such a manner as to more than constitute a mere thoughtless omission or slight deviation from the norm of prudent conduct. It must be reckless or in marked disregard to the safety of others. When it does that it passes the stage of mere *malum prohibitum* and approaches the unsocial aspects of *malum in se*."

Again quoting from Page 200:

"And if such act totally prohibited is done recklessly or with marked disregard for the safety

of others, it will be done with criminal negligence and if death results will sustain a charge of manslaughter under arm A."

Again quoting from Page 201:

"Paradoxically the lawful act of driving in an unlawful manner is an unlawful act, hence if done with recklessness or with marked disregard for the safety of others, it may as well be considered as falling under arm A and of course if the act is fraught with danger to life and done in an unlawful manner, it could hardly be other than done recklessly." Arm A being "An unlawful act not amounting to a felony."

Quoting from page 204:

"In consequence the instruction of the court on this question in this case may be substantially as follows: If the jury finds that Mrs. Layton was killed by the impact and that the impact was caused by the driving of the defendant in a reckless manner or for marked disregard for the safety of others, as charged in the information, then such driving being unlawful and in violation of the provisions of Title 57 as set out, would sustain a conviction of manslaughter."

In this case there was no evidence of intoxication on the part of the defendant.

The case of the *State v. Lingman* was cited and approved in the case of *State v. Barker*, 196 Pac. 2nd, 723, 113 Utah 514. In this case the defendant was found guilty of involuntary manslaughter resulting from an automobile collision at 33rd South and 23rd East Streets, Salt Lake County. The defendant was driving north on

23rd East Street and the decedent was riding in another automobile traveling east on 33rd South Street. 33rd South Street is a through highway and there are stop signs against the traffic entering 33rd South from the north and south on 23rd East Street. The evidence indicated that the defendant saw the stop sign when he was 75 to 100 yards from it, and at that time he was traveling from 30 to 35 miles per hour. He testified that he slowed his car nearly to a stop and shifted into an intermediate gear and began to pick up speed when he came even with the stop sign. He then stated that he saw the lights of the other car approaching from the west and applied his brakes but was unable to stop. On appeal the defendant contended that the evidence was not sufficient to sustain the conviction and second that the court had committed prejudicial error in instructing the jury. The court, holding that certain instructions had been erroneous, remanded the cause for a new trial. The court in denying the argument of the defendant that the evidence was insufficient to sustain a conviction stated as follows at Page 526:

“The fact that he (the defendant) entered this intersection at a time when another car was approaching so near as to constitute an immediate hazard made it highly dangerous to the occupants of that car regardless of whether he came to a complete stop, or merely slowed down or drove through without even slowing down.”

Again quoting:

“If under these circumstances his failure to yield was the result of inattention on his part or

because of his failure to observe and see in time that there was a car approaching on the intersecting highway, or if he saw the approaching car in time to yield the right of way and failed to do so, then the jury from those facts would be justified in finding that he was guilty of conduct which was reckless or in marked disregard for the safety of others. That inattention to the traffic and other persons on the highway which results in a driver's failure to avoid great danger and injury to others who are on the highway, has been repeatedly held by this court to constitute recklessness and to justify a verdict of manslaughter."

Quoting again:

"The evidence was sufficient to justify the court in submitting the case to the jury, but on account of the erroneous instructions, the case is reversed and remanded for a new trial."

In the case of *State v. Anderson*, 116 Pac. 2nd 398. The defendant Anderson was convicted of the crime of involuntary manslaughter arising out of an automobile collision at 21st South and 3rd East Streets in Salt Lake City. The defendant was proceeding northward on 3rd East Street. The decedent was traveling westward on 21st South Street, a through highway. On the southeast corner of the intersection and facing south was the usual state highway stop sign. The evidence was uncontroverted that the defendant did not stop at the stop sign. He stated he did not know there was a stop sign there until he saw it. That he applied his brakes and tried to stop, but skidded into the other car. The evidence was that the defendant entered the intersection at a speed

of between 40 and 45 miles an hour. The court, discussing the sufficiency of the evidence, stated at Page 401:

“We need not enter into a discussion of these matters, it would add much detail to do so and might not be helpful. The instructions, objectionable as they are, nevertheless covered the issues and the evidence. Under the evidence the jury was justified in finding the verdict of guilty.”

Appellant submits that if such evidence will support a conviction of involuntary manslaughter with the attendant burden of proof beyond a reasonable doubt that the same evidence will support a finding in a civil action and particularly in the instant case of wilful and wanton misconduct on the part of Bailey Syme. Each of the cases cited is almost identical to the conduct of the decedent, Bailey Syme, in this case. That a jury might find the decedent herein acted recklessly would seem to follow. As stated by this court in the Lingman case:

“ . . . and of course if the act is fraught with danger to life and done in an unlawful manner, it could hardly be other than done recklessly.”

From the statute defining reckless driving as driving with “wilful and wanton disregard for the safety of others” appellant submits to the court that the conclusion must follow that a jury in the case now before this court might well find in favor of the plaintiff and appellant on her Second Cause of Action, and that such a finding would properly be within the province of the finder of fact.

CONCLUSION

It is, therefore, respectfully submitted that the order of the lower court dismissing plaintiff's First Cause of Action and the order of the lower court dismissing plaintiff's Second Cause of Action should each be reversed and that both causes of action of plaintiff's complaint should be remanded for jury trial.

Respectfully submitted,

LEE W. HOBBS

Attorney for Appellant