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Maude Cox Peterson v. Joseph Nielson : Brief of Plaintiff and Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

MAUDE COX PETERSON,
Plaintiff and Appellant,

vs.

JOSEPH NIELSON,
Defendant and Respondent.

CLERK, Supreme Court, UTAH

CASE #
NO. 8605 UNIVERSITY UTAH

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Appealed from the Seventh Judicial District Court of
the State of Utah, in and for Sanpete County.

Honorable L. Leland Larson, Judge.

Brief of Plaintiff and Appellant, Maude Cox Peterson

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In the Supreme Court of the State of Utah

MAUDE COX PETERSON,
Plaintiff and Appellant,

vs.

JOSEPH NIELSON,
Defendant and Respondent.

CASE
NO. 8605

Brief of Plaintiff and Appellant, Maude Cox Peterson

PRELIMINARY STATEMENT

This appeal is taken from the judgment of the District Court of Sanpete County, sitting without a jury, the Honorable L. Leland Larson, presiding. The subject matter of this case arises from a collision between an automobile driven by appellant, with a pickup truck driven by respondent, at the junction of U. S. Highway 89 with a county road known as Shumway Road. The trial court found that the collision was caused by the concurring negligence of defendant and plaintiff, and denied recovery upon plain-

tiff's complaint, and upon defendant's counterclaim. From the judgment of the trial court denying plaintiff's right of recovery this appeal is taken. In appellant's Statement of Facts, direct reference will be made to the record, in those cases where we believe the facts are supported by the evidence. Where we believe claimed facts are not supported by the evidence, reference will be made to the transcript.

STATEMENT OF FACTS

U. S. Highway 89 is an arterial highway and extends in a general north and south direction between Ephraim, Utah, and Manti, Utah (R. 35). Approximately 1.1 mile south of Ephraim, Utah, a public road known as Shumway Road, extends in an east and west direction, enters U. S. Highway 89 from the west (R. 34, 35). At the junction of U. S. Highway 89 and Shumway Road, U. S. Highway 89 is hard surfaced with a good grade of asphalt 18 feet in width, and has shoulders extending 5 or 6 feet on either side (R. 35). Shumway Road is a graveled road 26 feet in width. There is a stop sign on Shumway Road approximately 39 feet west of the west edge of the asphalt surface of U. S. Highway 89 (R. 35).

On April 5, 1955, at approximately 5:15 o'clock p. m., plaintiff was driving her 1955 model red-bodied DeSoto automobile south on U. S. Highway 89, at a speed of approximately 50 to 52 miles per hour (Tr. 23, 75). When plaintiff was between 1000 and 900 feet north of the junction of Shumway Road, she observed defendant's truck proceeding easterly on Shumway Road (R. 36). Plaintiff applied her brakes, thereby decreasing the speed of her automobile, and continued to do so until defendant's truck stopped near the west edge of the paved portion of

U. S. Highway 89, at which time plaintiff was between 400 and 500 feet north of defendant's truck (R. 36, Tr. 24). Plaintiff kept defendant's truck in view at all times from the time she first observed it until defendant's truck stopped (Tr. 57, 58). After plaintiff observed defendant's truck stop, she then resumed her speed (R. 36,) of approximately 50 miles per hour (Tr. 69). Although defendant proceeded past the stop sign without stopping, he did come to a complete stop about 6 to 10 feet west of the west edge of the paved portion of U. S. Highway 89 (R. 36). During the same time, a car driven by Yvonne Holbrook was traveling north in the north bound lane on U. S. Highway 89, followed by a heavily loaded truck driven by Elliott Johnson (R. 36). The Holbrook car passed the plaintiff's car going in opposite directions on U. S. Highway 89 at a point approximately 75 feet to 100 feet north of the entrance of Shumway Road (R. 36). At the same time the truck driven by Elliott Johnson was at a point approximately 15/100 mile (792 feet) south of the entrance of Shumway Road (R. 36). Plaintiff observed someone (defendant) in defendant's truck when defendant stopped, but she could not ascertain in which direction he was looking (Tr. 39, 40). When plaintiff was 50 to 75 feet north of the entrance to Shumway Road, defendant drove his truck into the south bound lane of U. S. Highway 89 directly into the path of plaintiff's car (Tr. 27). The speed of plaintiff's car immediately prior to the collision was approximately 50 miles per hour (Tr. 69). Plaintiff immediately applied the brakes on her automobile (R. 36, Tr. 27). Plaintiff's car left tire skid marks on the highway for a distance of 41 to 45 feet to a point at which the plaintiff's car struck the defendant's truck (R. 36). The

front wheels of defendant's truck were on the paved portion of U. S. Highway 89, three feet east of the west edge thereof when the collision occurred (R. 36, 37). The impact caused plaintiff's car to veer to the left on U. S. Highway 89, and left tire skid marks on said highway for a distance of 57 to 64 feet from the point of impact to its place of rest (R. 37). The force of the impact injured plaintiff, and substantially damaged her car (R. 37). Defendant was also injured and his truck was substantially damaged (R. 37). Plaintiff did not at any time prior to the collision sound her horn (R. 37). The brakes on plaintiff's automobile were good, the road was dry, it was daylight, and the weather was clear (R. 36). From the time plaintiff first saw defendant and from the time defendant stopped near the paved portion of U. S. Highway 89 the view of both plaintiff and defendant were unobstructed (R. 36).

On the basis of these facts, the trial court found plaintiff negligent and that her negligence contributed to, and was a part of the proximate cause of her injuries and damage to her automobile. Appellant contends that the judgment of the trial court in this respect is erroneous, and hereby seeks a reversal thereof.

ARGUMENT

POINT I

THERE IS NO COMPETENT EVIDENCE TO SUPPORT A FINDING THAT THE PLAINTIFF WAS TRAVELING AT A RATE OF SPEED IN EXCESS OF 60 MILES PER HOUR AT THE TIME DEFENDANT

DROVE HIS TRUCK ONTO U. S. HIGHWAY 89, INTO THE PATH OF PLAINTIFF'S CAR.

We are mindful of the principle that if there is any competent evidence to support the findings of the trial court, such findings will not be disturbed by this Court on appeal. We have made a careful search of the record and can find no competent evidence to support a finding that plaintiff was at any time material herein, traveling at a rate of speed in excess of 52 miles per hour. Plaintiff testified that her speed was around 50 miles per hour, just as she left Ephraim, Utah (Tr. 23). This was corroborated by the testimony of Wallace Tatton, a disinterested witness who was driving a truck south on U. S. Highway 89, just south of the city limits of Ephraim, Utah, when plaintiff passed him (Tr. 74). When plaintiff passed Mr. Tatton, his speed was approximately 40 miles per hour, and it was his judgment that plaintiff was going 10 to 12 miles per hour faster (Tr. 75). The plaintiff testified that after she slowed down and defendant stopped, and she resumed her speed, she did not exceed her previous speed of 50 miles per hour (Tr. 69). This was again corroborated by the testimony of Wallace Tatton, who testified that after plaintiff had passed him, she did not accelerate or gain greater speed than when she was passing him (Tr. 75). Plaintiff unequivocally testified that her speed was around 50 miles per hour just prior to the impact (Tr. 69).

There were only four other witnesses who were in viewing distance of the collision at the time it happened. Those persons were the defendant, Joseph Nielson, Yvonne Holbrook, Elliott Johnson, and Etta Johnson. The defendant, Joseph Nielson, could make no observation of plain-

tiff's speed, since he didn't even see plaintiff's car (Tr. 286, 291, 333). The witness Yvonne Holbrook observed plaintiff's car approaching on U. S. Highway 89, but she gave no testimony with respect to the speed of plaintiff's car. The witness, Elliott Johnson, who observed the collision (Tr. 121) was driving a heavily loaded truck north on U. S. Highway 89, and was south of Shumway Road 15/100 of a mile (792 feet), at the time of the collision (R. 36, Tr. 126). He gave no testimony with respect to the speed of plaintiff's car.

The witness Etta Johnson was a passenger in the front seat of the Holbrook automobile (Tr. 196). She gave no direct testimony of the speed of plaintiff's automobile. Her testimony was that she first observed plaintiff's automobile when the Holbrook car was 200 feet south of Shumway Road (Tr. 197). She testified that at that moment the plaintiff's automobile was in the approximate location of the two white posts designated at points number 3 and 4 of defendant's Exhibit Number 2, which she estimated to be 1000 feet north of Shumway Road (Tr. 203). She then testified that the Holbrook automobile passed plaintiff's automobile when both automobiles were approximately 150 to 200 feet north of Shumway Road (Tr. 198). Apparently the defendant intended to establish by such testimony that the plaintiff's automobile traveled a distance of 800 to 850 feet during the same interval of time which the Holbrook automobile traveled 350 to 400 feet. The Holbrook automobile during such interval, was traveling at a rate of 50 to 55 miles per hour (R. 35, Tr. 12, 203). A computation based upon the extremes of the foregoing, would indicate that the speed of plaintiff's automobile was between 100 to 133 miles per hour. Mrs. Johnson also

testified it could be that the plaintiff was going four times as fast as the Holbrook automobile, i. e. 200 to 220 miles per hour, which, of course, is preposterous (Tr. 203).

Such inferences and statements by this witness are speculative and are solely based upon conjecture. It is clear from the record that her judgment and concept of distances are grossly exaggerated and erroneous. For example, Mrs. Johnson testified that in her judgment it was 200 feet from where she was sitting in the courtroom to a certain red brick house in front of which there was a new pickup truck (Tr. 207, 208). The same distance was paced off by a Deputy Sheriff, Park Miner, and was actually found to be in excess of 549 feet (Tr. 325).

It is obvious that the testimony of Mrs. Johnson is based upon such gross misjudgment of distances that it would not be entitled to any weight whatsoever. Although we cannot tell with certainty what weight, if any, the trial court gave to her testimony, it appears that no credence was given it at all. This is apparent from the court making a finding that the Holbrook automobile and the plaintiff's automobile passed each other when the Holbrook automobile was 75 to 100 feet north from defendant's truck (R. 36). Mrs. Johnson testified to the very same distance as being 150 to 200 feet (Tr. 198).

If, however, we are in error, and the findings of the trial court that plaintiff was traveling at a rate of speed in excess of 60 miles per hour was based upon the testimony of Mrs. Johnson, we submit that such finding cannot stand. Such a finding cannot be based on mere speculation or conjecture, but must be based on the preponderance of the evidence. *Alvarado vs. Tucker, et al*, 2 Utah 2d 16, 268 P. 2d 986. There must be competent, credible

evidence to support the findings made by the trial court. Jensen vs. Gerrard, 85 Utah 481, 39 P. 2d 1070; Buckley vs .Cox, 122 Utah 151, 247 P. 2d 277. The testimony of Mrs. Johnson could not by any stretch of the imagination be considered competent and credible. It was the duty of the trial court as the trier of the fact to completely disregard such evidence. The only other testimony relating to the speed of plaintiff's automobile was that of Dr. H. Reed Christensen. The testimony of Dr. Christensen falls in the same category as that of Mrs. Johnson. The trial court permitted Dr. Christensen to give his opinion upon a hypothetical question supposedly encompassing the facts of this case. His opinion was that the speed of plaintiff's car was between 63 and 85 miles per hour. We presume that this opinion was the basis of the finding of the trial court that plaintiff was traveling at a speed in excess of 60 miles per hour, since the record is devoid of any other evidence to support such a finding.

We submit that the opinion of Dr. Christensen was incompetent, irrelevant, and immaterial, and it was error for the trial court to admit such evidence over the objection of plaintiff, if such evidence were admitted. As a matter of fact, we are unable to determine from the record whether the opinions of Dr. Christensen were even admitted as evidence. When the witness was asked for his opinion as to the speed of plaintiff's automobile prior to the impact, we strongly objected (Tr. 245, 246, 247, 248). In ruling on the objection, the trial court stated, "Well, I don't think he could get into any court but this one." Then the court asked the witness for his opinion on how quick a car can stop that is traveling 50 miles per hour on an open highway under laid cement, assuming there was

no car in front of him, and no obstructions (Tr. 248). The witness answered, "Well, all I could do there is take what the State Engineer says", referring to the card marked Defendant's Exhibit 6 (Tr. 247). On page 249 of the transcript the court, acting as the interrogator, asked the witness, "What did you get on that? I won't accept it as evidence, but I would like to hear you." We then moved that all of the testimony of Dr. Christensen be stricken (Tr. 256). The trial court ruled, "I'm not going to admit it except for what it is worth." Again on page 257 of the transcript, the trial court stated, "I don't consider it a proper interrogatory under all the circumstances I will just have to use it for its worth". On page 258 of the transcript, the court stated: "Well, I won't accept it as a hypothetical question at all." All of the foregoing statements by the trial court would lead us to believe that the testimony of Dr. Christensen was not admitted as evidence. However, when the trial court made its finding that plaintiff was traveling at a rate of speed in excess of 60 miles per hour, we must assume that the testimony of Dr. Christensen was considered. If such testimony was considered, we submit that it was prejudicial error by the trial court to do so.

The only basis upon which Dr. Christensen could testify was by giving his opinion in response to the hypothetical question. Dr. Christensen was not an eye witness to the collision, he observed no skid marks relative to the collision, and he never saw the defendant's truck, or pictures of it, even before or after the collision (Tr. 256). Although the question of whether a witness is qualified to give an opinion generally rests with discretion of the trial court, the record clearly shows that Dr. Christensen was

not qualified to give an opinion of the speed of plaintiff's automobile immediately prior to the collision. On voir dire examination he admitted that he had never before calculated speed of automobiles from skid marks involved in collisions (Tr. 242). He made some experiments on measuring coefficient of friction, and did some experimentation in the theory of the subject (Tr. 242). He could not express an opinion on how quickly an automobile could stop under certain conditions, but could only testify as to the corresponding figure shown on the Utah Highway Patrol chart (Defendant's Exhibit 6, which strangely enough was admitted in evidence only to illustrate the testimony of the witness (Tr. 244, 245). The only qualifications shown was that the witness holds a degree of Doctor of Physics, (Tr. 241), has been a teacher of physics for 28 to 30 years, and did some special work for the government in physics during the war from 1942 to 1946 (Tr. 243). We objected to his qualifications (Tr. 243). We submit that it was an abuse of discretion of the trial court to permit him to testify as an expert in the application of impact and momentum theories to automobiles. We strongly contend that the testimony of Dr. Christensen insofar as it related to the speed of plaintiff's automobile was wholly incompetent.

There is some confusion among the adjudicated cases of the extent to which experts who are not eye witnesses to the collision may be permitted to give an opinion. Although it is well settled in Utah that the use of tire marks of a skidding automobile is used as the basis for expert testimony (State v. Lingman, 97 Utah 180, 91 P. 2d 457), we have grave doubt about such rule being scientifically sound. In this connection we respectfully call the Court's attention to the excellent book entitled, "Tire Dynamics", by

Andrew J. White, First Edition, published by Motor Vehicle Research, Inc., which is a comprehensive experimentation in the field of tire marks and their relationship to vehicle velocity prior to brake application. On page 62 thereof, the following statement is made:

“The measurement of physical marks with a measuring tape is one method generally used by police and others in an effort to relate tire mark length to vehicle velocity prior to brake application. While this method is an acceptable one for measurement, it accomplishes just one thing, namely the length of tire marks. When the information gathered is used in an attempt to establish even the minimum speed, the vehicle must have been traveling, the number of variables involving road surface differentials, tires, atmospheric temperature, time of year and others, render almost any estimation of speed invalid.”

The author then gives numerous reasons to support the foregoing statement.

The case of State vs. Lingman, cited above, goes further than any other case we have examined in permitting the expert testimony as to the speed of automobiles, based on a hypothetical question. We believe that the admonitions expressed by Chief Justice Wolfe therein, are very pertinent to the case at bar. To begin with, in the Lingman case objections were raised to the qualifications of the expert, who was a professor in the Department of Mechanical Engineering at the University of Utah, and had been teaching there for over 35 years; whether this qualified him was left up to the trial court. The professor testified that the loss of impact of bodies were applicable to automobiles, whereas in the instant case Dr. Christensen had nothing to say on this point.

Secondly, the witness (in the Lingman case) based his opinion on a formula which included only the purely physical facts of directions of the two cars, and their weights, the points of impact, the coefficient of restitution, the frictional resistance of the surface over which the struck car was pushed, and the distance of the sideward movement in the struck car. A comparison of the factors employed in the hypothetical question in the Lingman case with those of the instant case shows that the latter was so lacking in so many material physical facts that any opinion based thereon would be of no value whatsoever. For example, in the instant case, the question made no reference to the coefficient of restitution, although the witness assumed an elastic impact. The question made no mention of the speed or momentum of defendant's truck, and the witness did not take into consideration the speed of the truck (Tr. 250), although the truck was in motion at the time of impact (Tr. 27, 123). The witness assumed that all of the energy which propelled the defendant's truck was transferred from plaintiff's car (Tr. 255), yet there was no evidence to support such fact. The question did not take into consideration the manner in which the defendant's truck whirled around, namely, whether the truck pivoted on its own rear wheels, and skidded only on the front wheels, or whether all four wheels skidded. The witness did not take into consideration the direction the truck moved after the impact (Tr. 262). The question did not take into consideration the nature of the surface of the ground over which the truck skidded. The question asked the witness to assume that the defendant's truck moved in a circular direction for 30 feet (Tr. 246), whereas the witness based his calculations on a total movement of 60

feet for the truck (Tr. 260). The question did not take into consideration whether the tire marks left by plaintiff's automobile resulted from a locked-wheels, or impending-skid phenomena, which is an important consideration. (See "Tire Dynamics" by Alfred J. White, pages 34, 35, and 38). The witness assumed that all four wheels were completely locked (Tr. 261), yet there is no evidence to support such fact. The question did not take into consideration whether the tires on plaintiff's car were natural rubber or synthetic rubber, which is important since the co-efficient of friction for both are not the same. (See "Tire Dynamics", supra, page 151). There are numerous other material factors which were omitted from the hypothetical question that should be mentioned; however, in the interest of brevity we shall not discuss them further.

Referring back to the Lingman case, supra, on page 462 of the Pacific Reports, this Court expressed some doubt as to whether the testimony in that case would be admissible if there was an unreliable personal equation for which the experts could not make allowance, such as skill of the drivers and their reactions in an emergency, in addition to the unknown speed of one or both of the cars where that was of controlling importance (Citing cases including Blashfield, Permanent Edition, Section 6312). It was then pointed out that those unpredictable factors were of no significance in that case under the hypothesis of the witness, since the skid marks of the pushed car showed only a direct sideward movement **with no twirling motion** of the car from which it could be inferred that the factors of human reaction **and momentum** were of no significance. We wish to emphasize the fact that in the Lingman case, supra, there was no twirling motion of the struck car, whereas

in the instant case the trial court found that defendant's truck was knocked completely around (R. 37). If such factor had existed in the Lingman case, *supra*, the opinion therein suggests that the result could well have been different. On page 463 of the Pacific Reporter, it is stated:

"We do not mean to state that in all cases of impact such evidence by experts as was here introduced is admissible. But under the physical circumstances of this case, as shown by the tire marks demonstrating that the car had been pushed sidewise and not twisted, the evidence was admissible."

This Court then goes on to admonish the trial court and counsel to be very cautious in the use of opinion evidence, and clearly states the rule as follows:

"Experts may give answer to such questions both on their own observations as a foundation, or on evidence adduced from other sources which may for the purposes of the question be assumed as facts. (Citing cases). But experts cannot give an opinion on matters not observed by them, or not in evidence by the testimony of others. We have discussed with perhaps too much particularity the claimed omission and intrusions of fact claimed not to be in evidence. We do not consider it necessary to further discuss this question, save to advance the admonition that the Court and counsel should be careful to see that a hypothetical question presents or assumes no fact that is not in evidence; that it does present all facts or elements necessary to the determination to be made by the witness, or to enable him properly to form an expert opinion; and that no material element or fact is used by the witness in his determination that is not presented in the question as asked."

Applying the foregoing rule to the facts of this case as shown by the record, and as discussed above, any opinion as to the speed of plaintiff's automobile given by the witness, Dr. Christensen, is wholly incompetent. The conclusion is inescapable that it was error to permit Dr. Christensen to give his opinion of the speed of plaintiff's automobile.

The record is devoid of any other evidence to support a finding that plaintiff was traveling at a rate of speed in excess of 60 miles per hour. The burden was upon defendant to prove that plaintiff was speeding. Such a finding cannot be based on mere speculation or conjecture, but must be based on the preponderance of the evidence. (*Alvarado vs. Tucker, et al*, 2 Utah 2d 16, 268 P. 2d 986.) We submit that the finding made by the trial court in this respect cannot stand, and is wholly unsupported by any competent evidence.

POINT II

THERE IS NO COMPETENT EVIDENCE TO SUPPORT A FINDING THAT THE SPEED AT WHICH PLAINTIFF WAS TRAVELING WHEN DEFENDANT'S TRUCK MOVED ONTO THE HIGHWAY DIRECTLY IN FRONT OF PLAINTIFF CONTRIBUTED TO, OR WAS A PART OF, THE PROXIMATE CAUSE OF HER INJURIES.

Even if there were competent evidence to support a finding that plaintiff was traveling at a speed in excess of 60 miles per hour, there still must be competent evidence to support the finding that such excess of speed was the proximate cause of the collision. *Alvarado vs. Tucker*,

et al, 2 Utah 2d 216, 268 P. 2d 986. In the Alvarado case, a child darted out from behind a moving car into the path of defendant. The only contention made as to defendant's negligence was that defendant was speeding. The area was zoned for 25 miles per hour. An experienced police officer testified on cross examination that his opinion of the actual speed of defendant's car, based on tire skid marks, was 25 to 30 miles per hour. It was held that such evidence would support a finding of a speed of only 25 miles per hour. On the subject of proximate cause, the court stated on page 988 of the Pacific Reporter as follows:

“Even if the plaintiff were correct in her contention that the evidence would justify a finding of 5 or 10 miles per hour in excess of the speed limit, she would still be faced with the necessity of proving that such excess of speed was the proximate cause of the injury. Under the facts here shown, that as the defendant was proceeding southward, the plaintiff darted westward across the street and came out from behind the north bound car into defendant's course of travel. Nothing appears in the evidence, either directly or from reasonable inference, to indicate that he could have stopped in time to avoid striking plaintiff, even if he had been traveling only 25 miles per hour. In other words, from anything that appeared, the fact of such excess speed would not have made the difference between hitting or avoiding plaintiff.”

The fact that an automobile was going at an unlawful or excessive speed, in violation of either common law rules or a statute or ordinance, at the time of the collision, does not constitute a bar for injuries sustained in the collision, if such violation was not a proximate cause of the accident. Stated in other words, the act of a motorist in driv-

ing at an improper rate of speed at the time of a collision will not prevent his recovering for injuries from such collision, if the accident would have happened if his speed had been proper. *Blashfield Cyclopedia of Automobile Law and Practice*, Section 2611.

In the instant case, the trial court found that the plaintiff's car and the Holbrook car passed each other going in opposite directions at approximately 75 to 100 feet north of Shumway Road (R. 36). Plaintiff testified that she was 50 to 75 feet from the Shumway Road, and that she was even with the Holbrook car when she first realized defendant was going to move onto the highway in front of her (Tr. 27, 40). This testimony is corroborated by the testimony of Elliott Johnson, who stated that defendant's truck began to move onto the highway just as the Holbrook car passed the intersection (Tr. 124, 125), at which time plaintiff's car and the Holbrook car were very close together (Tr. 135), or very near parallel (Tr. 136).

Assuming that the plaintiff was traveling at a speed of 50 miles per hour, or 74 feet per second, in point of time only 1 to 1.35 seconds of time would elapse in closing the respective distances of 75 feet to 100 feet. The reaction time for an average person as shown by table 4 on defendant's Exhibit Number 6, is $\frac{3}{4}$ second, during which interval a car moving at a speed of 50 miles per hour would travel a distance of 55 feet. Deducting the reaction time, there would remain from .25 to .60 second of time within which to stop plaintiff's car after the brake pedal had been depressed, or in terms of distance from 20 feet to 45 feet. The respective time intervals and distances would proportionately decrease if it were assumed that plaintiff was traveling at a speed in excess of 60 miles per hour. It would

appear from table four of defendant's Exhibit Number 6, that it would take an average driver a distance of 100 feet to stop an average automobile traveling at a speed of 35 miles per hour on good pavement from the instant he observes the danger. Applying the foregoing to the instant case, it is apparent that if plaintiff were traveling at a rate of 35 miles per hour at the instant she observed defendant's truck move onto the highway, it would have taken 100 feet to stop her automobile, and the collision still would have occurred. Likewise, if the distance were 75 feet her speed could have been slightly less than 30 miles per hour, and the collision still would have occurred.

It is obvious from the foregoing that when defendant moved onto the highway in front of plaintiff at the instant plaintiff was 75 to 100 feet away, the collision would have occurred regardless of whether the speed of plaintiff's automobile was in excess of 60 miles per hour, 50 miles per hour, 35 miles per hour, or possibly 30 miles per hour. Under the rules set forth in *Blashfield*, and the case of *Alvarado vs. Tucker, et al*, cited above, we are at a loss to understand upon what evidence the trial court could find and conclude that the speed of plaintiff's automobile was a proximate cause of the collision. We submit that no such evidence exists in the record. Such a finding cannot stand when there is no competent evidence to support it.

POINT III

THERE IS NO COMPETENT EVIDENCE TO SUPPORT A FINDING THAT THE SPEED AT WHICH PLAINTIFF WAS TRAVELING AT THE TIME DEFENDANT DROVE ONTO HIGHWAY 89, INTO THE

PATH OF PLAINTIFF'S CAR, WAS NOT REASONABLE OR PRUDENT UNDER THE EXISTING CIRCUMSTANCES.

U. S. Highway 89 is an arterial highway between the cities of Ephraim and Manti, Utah (R. 35). The posted speed limit along the foregoing section of highway is, and was, at the time of the collision, 60 miles per hour (Tr. 98). Section 41-6-46, Utah Code Annotated, 1953, fixes the speed limit on the highways of this state, and highway 89 in the area in question falls within subdivision 41-6-46(b) (3), which is fixed at 60 miles per hour. This statute requires that a driver shall not drive at a speed greater than is reasonable in view of the existing conditions and hazards on the highway; that his speed shall be controlled so as to avoid colliding with other vehicles entering upon the highway in a lawful manner, and that the speed shall be appropriately reduced when special hazards exist with respect to other traffic, or by reason of weather conditions. *Horsley vs. Robinson*, 112 Utah 227, 186 P. 2d 592. There can be no question about the fact that the conduct of defendant in driving onto the highway directly into the path of plaintiff's automobile when she was 75 to 100 feet north of defendant, was unlawful.

Plaintiff was driving her automobile south on highway 89, at a speed of approximately 50 to 52 miles per hour (Tr. 23, 75). When she was between 1000 and 900 feet north of the junction of Shumway Road, she observed defendant's truck proceeding east on Shumway Road (R. 36). She decreased her speed until she observed defendant's truck stop near the west edge of the paved portion of Highway 89, at which time she was approximately 400

to 500 feet north of defendant's stopped truck (Tr. 57, 58). After plaintiff observed defendant's truck stop, she assumed that defendant was going to yield to her right of way, and she then increased her speed to approximately 50 miles per hour (Tr. 69). When plaintiff was 75 to 100 feet north of the entrance of Shumway Road (R. 36, Tr. 27), defendant drove his truck into the highway directly into the path of plaintiff (Tr. 27). The speed of plaintiff's automobile prior to the collision, was 50 miles per hour (Tr. 69).

Plaintiff had the right to assume that defendant would not drive negligently. When defendant stopped his truck before entering upon the highway, plaintiff assumed and had the right to rely on the fact that defendant was going to, and would, yield to her right of way. Such is the holding of the case of *Keir vs. Trager, et al*, 134 Kansas 505, 7 P. 2d 49. In that case the Kansas Court held that plaintiff, who was the favored driver, relied on the fact that defendant, who was entering the intersection from a secondary road controlled by a stop sign, was going to stop. The defendant failed to stop, and a collision occurred. On page 50 of the Pacific Reporter, the Kansas Court stated:

“The law is well established that the operator of an automobile on a public highway may assume that others using the highway will observe the law of the road and is not guilty of contributory negligence in acting upon such assumption, unless and until he has knowledge to the contrary. (Citing cases).

“The appellee (plaintiff) was wholly within her rights in assuming that the appellant (defendant) would stop before entering the highway, and she cannot be charged with negligence in acting upon such assumption. She

can only be charged with negligence under such circumstances from the time that she had knowledge that the defendant intended to disobey stop sign and enter upon the highway. After she had such knowledge, she was bound to use the care of an ordinary, prudent person."

The foregoing rule has also been adopted in Utah, and is firmly established by expressions of this Court. The case of *Hess vs. Robinson*, 109 Utah 60, 163 P. 2d 510, involved a situation where the plaintiff, who was driving along a through street, collided with an ambulance which had entered an intersection against a stop sign. Plaintiff failed to look to the right to see the ambulance approaching. In the majority opinion, it was pointed out that the jury could well find it to be within plaintiff's duty of due care to assume that the driver of the ambulance would obey the stop sign, and that he was entitled to proceed through the intersection until it became apparent to him that the ambulance would not stop. In the case of *Lowder vs. Holley*, 120 Utah 231, 233 P. 2d 350, where plaintiff failed to see defendant approaching the intersection from the right, it was pointed out that even if the plaintiff had seen defendant, it could be found to be within his duty of care to assume that defendant would yield him the right of way. In *Martin vs. Stevens*, 121 Utah 484, 243 P. 2d 747, this Court stated, on page 751 of the Pacific Reporter, as follows:

"Although plaintiff had the right of way under both rules above referred to, yet there devolved upon him the duty of care in observing for other traffic, but in doing so he had the right to assume, and to rely and act on the assumption that others would do likewise; he was not obliged to anticipate either that other driv-

ers would drive negligently, nor fail to accord him his right of way, until in the exercise of due care, he observed, or should have observed, something to warn him that the other driver was driving negligently or would fail to accord him his right of way. If this principle is not clear in the earlier Utah cases, it is firmly established by the more recent expressions of this Court.”

To the same effect is the case of *Bates vs. Burns*, 3 Utah 2d 180, 281 P. 2d 209.

The duty of care imposed upon the driver of an arterial highway is very clearly set forth in the case of *Botts vs. Rushton*, 63 Nevada 426, 172 P. 2d 147. On page 153 of the Pacific Reporter it is stated:

“A driver on a through or arterial highway who is driving at lawful speed and in a lawful manner has the right of way at an intersection with a secondary stop sign highway, and is entitled to assume that a driver on the latter will obey the law until the contrary appears, or should appear to a reasonable man in his position. If the favored driver, keeping a careful look out as he approaches or enters the intersection, sees or becomes aware of anything indicating that the driver on the secondary highway does not intend to yield the right of way, he is bound to use the care of an ordinarily prudent person in endeavoring to avoid an accident. If the driver on the favored highway is himself free from negligence in approaching the intersection, he has the right to presume that the driver on the disfavored highway will yield the right of way to him and not proceed into the intersections until he can do so without creating a traffic hazard. The purpose of arterial highways is to facilitate through traffic, afford rapid transit, and permit vehicles thereon to move freely, thus accelerating the flow of traffic over such

avored highways. As a general rule it is not necessary for such drivers on such highways to stop or slow up as they reach a stop sign intersection highway, in order to ascertain whether or not the driver on the latter is going to stop and yield the right of way. The right of way enjoyed by the driver on the favored highway does not relieve him of the duty to keep a careful lookout so that he may observe whether the driver on the disfavored highway is going to yield the right of way; but he is not obliged to have his car under such control at an intersection stop sign highway that he may stop at once and so avoid collision with persons who may illegally come into his path. If a driver on a trunk line is proceeding in a lawful manner, there is no rule which requires him to keep his car under such control as to be able to stop within a given number of feet."

In the instant case, after defendant stopped, he did not move again until after the Holbrook car had passed him (Tr. 123, 286). The evidence conclusively shows that defendant did nothing to put plaintiff on notice that he was not going to yield to plaintiff her right of way until plaintiff was approximately 75 to 100 feet from the Shumway Road, and in point of time approximately 1 second away. As soon as plaintiff observed that defendant started to drive onto the highway she immediately applied her brakes (Tr. 27). This is substantiated by the tire braking marks which began from 41 to 45 feet north of the point of impact (R. 36) coupled with her reaction time. It was impossible for plaintiff to turn into the north bound lane since the Holbrook car was abreast of plaintiff's car at that instant, and was followed by a heavily loaded truck driven by Elliott Johnson (R. 36).

A similar fact situation existed in the case of *Guegel vs. Bailey*, 199 Oklahoma 441, 186 P. 2d 827, wherein defendant was driving west on a through highway. Deceased was driving south on a secondary road upon which there existed a stop sign. After deceased had stopped, or slowed down, he drove onto the highway in front of defendant's car. Defendant applied her brakes as soon as she could, but collided with deceased's car. On page 828 of the *Pacific Reporter* the Supreme Court of Oklahoma stated that:

"In the instant case, the deceased drove from behind a bus onto Tenth Street in front of defendant's car. From that time on, defendant was required to act as a reasonably prudent person would have acted under such circumstances. The application of this rule would determine whether or not she was negligent, not the statute."

We are mindful of the fact that under the authorities cited above, the question of whether plaintiff's speed was reasonable is a question of fact to be determined by the trial court when sitting without a jury. We assume that the finding of the trial court that a speed at which plaintiff was driving was not prudent or reasonable under the existing circumstances, was based upon its erroneous finding that plaintiff was traveling at a speed in excess of 60 miles per hour. For the reason stated under point No. 1, there was no competent evidence to support a finding that plaintiff was traveling in excess of 50 to 52 miles per hour immediately prior to the collision. The issue involved herein then becomes whether or not reasonable minds could differ as to whether plaintiff's speed of between 50 to 52 miles per hour was not reasonable and prudent under existing circumstances. We emphasize the fact that the speed at

which plaintiff was driving was well under the statutory posted 60 mile per hour limit. We believe that under the test and standards set forth in the authorities cited above, that reasonable minds could reach only the conclusion that plaintiff's speed was reasonable and prudent under the existing circumstances. It would be an unwise rule of law to require a driver on an arterial highway to slow down at the junction of every county lane, sideroad and county road in anticipation that a driver thereon might not obey the law, and enter onto the highway at any time even when the favored driver was within a hazardous distance. The concurring opinion of Chief Justice Wolfe in the case of Poulson vs, Manness, 121 Utah 269, 241 P. 2d 152, supports this view. On page 155 of the Pacific Reporter Chief Justice Wolfe stated:

"The instant case falls within a category which should be denominated a highway case. Here maximum lawful speed is permitted on the oiled highway and it appears undisputed that there was a duty upon the plaintiff to stop before attempting to cross the highway. This situation we must expect the reasonable prudent person to look greater distances in order to ascertain that he can cross with safety. The speed of oncoming traffic being greater, the time for appraisalment and decision must necessarily be shorter. This, of course, every motorist realizes.

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

It would be even a more harsh rule of law to require a driver on an arterial highway when he observed that a

driver on a secondary road has stopped before entering the highway, to slow down to such a speed that will enable the favored driver to stop and avoid a collision in the event the disfavored driver decided to drive onto the highway at any instant he desires. Either of the rules would defeat the very purpose of the arterial highway, and would impede and obstruct traffic thereon, rather than facilitate the movement of such traffic. The only conclusion which would be reached from an application of either rule is well stated by Mr. Justice Crockett in the majority opinion in the case of *Martin vs. Stevens*, cited above. On page 750 of the *Pacific Reporter* he states:

“If a driver has to drive his car under the assumption that everyone else is apt to be negligent, the next step would be for him to conclude that he better get off the streets entirely or someone is likely to hit him, and abandon the streets to those who were just willing to take chances. If, under circumstances such as present in this case, where the plaintiff’s right of way is so clear that no reasonable person could have any doubt about it, he could not assume that he would be afforded his right of way, the only way drivers could safely proceed at an intersection would be to resort to: ‘you first, my dear Gaston, — No, after you, my dear Alphonse,’ procedure, or get out and hold a conference before either could safely proceed.”

We submit that the plaintiff’s speed under the existing circumstances was reasonable and prudent and under the record of this case reasonable minds could not differ. We further submit that there was no competent evidence to support a finding that the speed at which plaintiff was driving was not reasonable and prudent under the existing conditions.

POINT IV

THERE IS NO COMPETENT EVIDENCE TO SUPPORT A FINDING THAT PLAINTIFF FAILED TO KEEP A PROPER LOOKOUT, OR THAT PLAINTIFF WAS NEGLIGENT IN ANY MANNER.

The trial court made findings that plaintiff did not observe that defendant was not looking to the north, or that his attention was focused on the Holbrook car approaching from the south, and plaintiff did not sound her horn (R. 37). Plaintiff first observed defendant's truck traveling east on Shumway Road when plaintiff was between 1000 and 900 feet north of Shumway Road (R. 36). Plaintiff kept defendant's truck in view at all times from the time she first observed it until it stopped, at which time plaintiff was 400 feet to 500 feet north of Shumway Road (Tr. 57, 48 R. 36). After defendant stopped he did nothing that plaintiff observed, except remain stopped, until he drove his truck onto the highway directly into the path of plaintiff (Tr. 27). Plaintiff observed someone, (defendant), in defendant's truck when it stopped, but she was unable to tell in which direction he was looking (Tr. 39, 40). Plaintiff saw defendant's truck move the instant it began to move forward onto the highway (Tr. 39). During all times mentioned above neither the view of the plaintiff, nor the view of the defendant was obstructed of each other (R. 36).

We are at a loss to understand how the trial court could find that plaintiff had a duty to observe that defendant did not look to the north before driving onto the highway, when plaintiff, in seeing the defendant in his truck, couldn't tell in which direction defendant was looking.

Surely the defendant could have glanced to the north with a quick movement of his head, or even just with his eyes with no movement of his head, and it would have been virtually impossible for plaintiff to see such movement. It must be remembered that plaintiff had to keep her attention focused on the road ahead, the Holbrook car which was then approaching from the south, and the defendant's truck. Yet, the trial court found it plaintiff's duty to look into the cab of defendant's truck and observe that defendant did not look to the north. Defendant had the duty to look to the north and observe plaintiff's car approaching. Plaintiff had the right to assume that defendant did look, and she could not be held contributorily negligent for relying on that assumption. This is true particularly in view of the fact that defendant had stopped and plaintiff assumed that defendant was going to yield to her right of way. We believe the foregoing comes within the spirit and very purpose of the principles set forth in *Martin vs. Stevens*, 121 Utah 484, 243 P. 2d 747, as discussed above.

We have been unable to find any case where the duty was imposed upon the favored driver on the arterial highway to observe that the disfavored driver entering the highway from a secondary road had not looked in the direction of the favored driver. Such a duty is so contrary to common sense and reason, and it would place such a hopeless burden on any driver, that it doesn't warrant any further argument.

There is no dispute about the finding that plaintiff did not sound the horn of her automobile as she approached Shumway Road (R. 37, Tr. 87). In view of what we have said above, we do not believe that there devolved upon the plaintiff any duty to so do. If it were so determined, as

the trial court found, that plaintiff had a duty to observe that defendant did not look to the north, we can see reason for imposing the duty to sound her horn. In such event, since plaintiff would be on notice that defendant did not see her and might proceed onto the highway, the trier of the fact could well find that plaintiff should have sounded her horn. Such a duty could well be imposed under Section 41-6-146, Utah Code Annotated, 1953, which provides in part that the driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn, but shall not otherwise use such horn upon the highway. If, however, plaintiff did not have the duty to observe that defendant had not looked in her direction, plaintiff did not have the duty to sound her horn under the foregoing statute. Since we are convinced that plaintiff had no such duty to observe, we contend she had no duty to sound her horn.

The duty of care required in the instant case is the duty imposed upon the driver on an arterial highway, who is confronted with secondary roads controlled by stop signs. Since this is an arterial highway case, the facts are somewhat similar to Poulsen vs. Manness, 121 Utah 269, 241 P. 2d 152, which involved a collision at the intersection at an arterial highway with a county road. In the instant case we have the additional fact that the county road was controlled by a stop sign, whereas in the Poulsen case the county road therein was uncontrolled. In the Poulsen case Chief Justice Wolfe in his concurring opinion, on page 155 of the Pacific Reporter, pointed out:

“The city intersection collision is usually under circumstances quite different from those of this case. This case is unlike Bullock vs. Luke, 98 Utah 501, 98 P. 2d

350; *Hickok vs. Skinner* 113 Utah 1, 190 P. 2d, 514; *Conklin vs. Walsh* 113 Utah 276, 193 P. 2d 437; *Gren vs. Norton*, Utah 213 P. 2d 356. It is different from *Mingus vs. Olsson*, Utah, 201 P. 2d 495, although there may be some broad principles of law stated in those cases applicable to intersection or for that matter any automobile collision case. It is the factual differences which arise out of human conduct that give birth to refinements in cases which differentiate them.

“This case differs materially from *Hess vs. Robinson*, 109 Utah 60, 163 P. 2d, 510. True, it is assimilable to *Lowder vs. Holley*, Utah, 1951, 233 P. 2d, 350, 353, except in that case two county roads intersected; not a country road with a speed inviting highway. This situation may come up more often in the future as cars emerge from country lanes or secondary roads onto through and cross-continental highways where great disparity of speed may be the usual thing which on the roads intersecting in the case of *Lowder vs. Holley*, *supra*, was not expectable”.

This case is also distinguishable from the cases of *Sine vs. Salt Lake Transportation Company*, 106 Utah 289, 147 P. 2d 875; *Hickok vs. Skinner*, 113 Utah 1, 190 P. 2d 514; *Conklin vs. Walsh*, 113 Utah 276, 193 P. 2d, 437, and *Gren vs. Norton*, 117 Utah 121, 213 P. 2d 356, where the driver was held guilty of contributory negligence as a matter of law. Each of those cases was decided upon the proposition that the circumstances were such that the driver held to be negligent as a matter of law either observed, or in the exercise of due care should have observed the manner in which the other driver was approaching the intersection, and clearly could by ordinary reasonable care have avoided the collision. In each of those cases, the negligence of the driver was so clear that a reasonable mind could not find

to the contrary.

In referring to the foregoing cases in the case of Martin vs. Stevens cited above, on page 751, this Court stated as follows:

“There has been, and still is much discussion and disagreement as to whether the various fact situations in those cases come under the foregoing rule. But there is no disagreement about the rule. If as stated by Chief Justice Wolfe in his concurring opinion the facts of Hickok vs. Skinner, supra, do not bring it within the principle above stated, it was wrongly decided, and is hereby overruled. Those cases do not purport to lay down any other standard than that of ordinary reasonable care. No matter how far afield one may go in reviewing, analyzing and rationalizing the decisions in these intersection cases, he must always come back to the one basic concept that underlies and controls the Law of Torts: the conduct of the mythical but extremely useful ‘ordinary, reasonable, prudent man under the circumstances,’ all of which is encompassed in the shorter phrase, ‘due care’.”

We submit that the conduct of plaintiff from the time she first observed defendant’s truck until the collision occurred was all that could be expected of the ordinary reasonable, prudent man. The record overwhelmingly shows that she maintained a proper lookout. Plaintiff kept the defendant’s truck in her view until it stopped. She observed the truck the instant it began moving forward onto the highway. She immediately applied her brakes, but it was too late to avoid the collision. Under the standards and principles set forth in the authorities cited herein, and based upon the record in this case, reasonable minds could not differ in reaching the conclusion that plaintiff was free

from negligence. There is no evidence to support a finding otherwise.

CONCLUSION

The record is devoid of any competent evidence to support the finding of the trial court that plaintiff was traveling at a speed in excess of 50 to 52 miles per hour immediately prior to the collision. Plaintiff unequivocally testified that her speed was 50 to 52 miles per hour. This was corroborated by the testimony of Wallace Tatton. The testimony of the witness Etta Johnson of the distances involved was so exaggerated and misjudged that any inference of the speed of plaintiff's automobile based thereon was mere speculation and conjecture. Any finding based upon such evidence cannot stand. The opinion testimony of Dr. Christensen, relating to the speed of plaintiff's automobile, if it were admitted, is wholly incompetent. Dr. Christensen was not qualified to testify as an expert on the application of impact and momentum theories to automobiles. The hypothetical question posed to him lacked numerous material factors, and included material factors not in evidence. In addition thereto, the evidence shows the existence of material factors for which no scientific formula could be applied. Any opinion based thereon would not be entitled to any weight whatsoever. The record is void of any other evidence which would support a finding that the speed of plaintiff's automobile was greater than 50 to 52 miles per hour.

Under the facts of this case the speed of plaintiff's automobile was not a proximate cause of the collision. It is immaterial whether the plaintiff was traveling in excess of 60 miles per hour or 30 miles per hour, since the collision

would have occurred anyway. The difference would have been only a matter of degree and not the difference of whether the collision would have occurred. It was incumbent upon the defendant to show that even if plaintiff's speed was excessive that such excessive speed was a proximate cause of the collision. There simply is no evidence to support such a finding. Approximately one second of time elapsed between the time defendant started to drive forward, into plaintiff's path and the collision. The collision would have occurred even if plaintiff were traveling 30 to 35 miles per hour.

Plaintiff was the favored driver on an arterial highway. The evidence shows that her speed was between 50 and 52 miles per hour, which was well under the statutory posted speed limit of 60 miles per hour. She slowed her automobile down until she observed that defendant's truck had stopped. When she saw the defendant stop, she assumed that defendant was going to yield to her right of way. She cannot be held negligent for relying on such assumption. She then resumed her normal speed of approximately 50 miles per hour. To impose a duty upon the favored driver on an arterial highway to anticipate that a driver who is stopped at a controlled secondary road may pull onto the highway at any instant and require the said favored driver to so manage his automobile to avoid a collision in such event would impose a hopeless burden on any driver, and would obstruct and impede the flow of traffic on our highways rather than facilitate it.

The record shows that the conduct of plaintiff as a favored driver on an arterial highway was reasonable and prudent under the existing conditions. Plaintiff had no duty to observe that defendant did not look in her direc-

tion, and likewise no duty to sound her horn. Plaintiff maintained a sharp lookout, and her conduct was all that could be expected of a reasonable prudent person. Under the tests and standards laid down by this Court in the arterial highway-secondary road cases, reasonable minds could reach only the conclusion that plaintiff was free from negligence.

We have no doubt that defendant was negligent and that there is substantial competent evidence to support the findings of the trial court that defendant was negligent, and that his negligence was the proximate cause of the collision. Since appellant appeals only from the judgment of the trial court denying appellant's right of recovery, we have refrained from discussing the negligence of the defendant in this brief. We do not anticipate that respondent will raise any question in his brief with respect thereto. In the event he does, we may desire to file a reply brief herein.

We respectfully submit that the judgment of the trial court denying appellant's right of recovery should be reversed, and that the case should be remanded to the trial court with instructions to assess appellant's damages and enter judgment thereon. . .

Respectfully submitted,

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