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Maude Cox Peterson v. Joseph Nielson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

OCT 30 1957

Clerk, Supreme Court, Utah

MAUDE COX PETERSON,
Plaintiff and Appellant,

vs.

JOSEPH NIELSON,
Defendant and Respondent.

No. 8605

UNIVERSITY UTAH

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RESPONDENT'S BRIEF
BRIEF OF DEFENDANT AND RESPONDENT,
JOSEPH NIELSON

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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.

RESPONDENT'S
BRIEF

No. 8605

BRIEF OF DEFENDANT AND RESPONDENT,
JOSEPH NIELSON

ADDITIONAL FACTS

Defendant's Exhibit 2 is a map of U. S. Highway 89 at and near its intersection with the Shumway Road. It is on a scale of two inches to one hundred feet. Exhibit 3 is a map of the same intersection. It is on a scale of 1/8th inch to the foot. On Exhibits 2 and 3 are the measured distances between material physical objects. The measurements were made by the witness, A. Dale Bartholomew. He made said maps and placed the measurements thereon. Said maps also show the location of rose bushes, other natural objects, and markings.

Some of those were given by other witnesses. Shown on said maps in the middle of Highway 89 is a two laned, hard surfaced, 18 foot wide good grade asphalt strip.

Four white posts numbered 1, 2, 3, and 4, were on the West shoulder of Highway 89. They are shown on defendant's Exhibit 2. Number one is at the Shumway Intersection, number two 500 feet north thereof, number three 950 feet north thereof, and number four 1018 feet north thereof.

The location of a culvert, ditches, stop sign, and gouges made by an automobile tire in the ditch bank and on the shoulder, as well as location of the glass, etc. from the wreck, are given on Exhibit 3.

A few feet west of said culvert, the road drops off about the height of a man — 5 feet 10 inches. This drop or lowness of the Shumway Road west of the culvert deters visibility of things coming from the north (Tr. 174-5, 275-6). Highway 89 at or near white posts 3 and 4 rises a little or drops towards the northward more rapidly from 1,000 feet north of the intersection of Highway 89 and the Shumway Road (Tr. 176, 197-8, 209, 273-4).

These two white posts numbered 3 and 4, other objects, and the low place in the Shumway Road west of the culvert, prevents a clear vision of a car coming towards the south from Ephraim, for some distance north of said posts 3 and 4 (Tr. 272-5).

Defendant's Exhibit 6 is the publication of the Utah Highway Patrol which gives the feet travelled per second at various speeds, the approximate co-efficient of friction, stopping distances after depressing brake, and stopping distances of good brakes on good pavement. The introduction of said exhibit was first resisted, but later upon renewal of offer was received without objection (Tr. 315-16).

Just before the collision, defendant drove his truck eastward on the Shumway Road and into Highway 89. When he got to said highway, he looked north as far as the two white posts (nos. 3 and 4) approximately 1000 feet from the Shumway Road and saw no car on the road in that distance. He looked south and saw a car coming from the south. It was about 600 feet away (Holbrook car). He waited for that car to pass, and then proceeded to drive forward (Tr. 285-6).

Defendant's truck entered the junction or intersection of Highway 89 and the Shumway Road first. It entered Highway 89 from plaintiff's right. Defendant drove it "right up to the hard surface portion of said highway according to the plaintiff (Tr. 24). The court found defendant stopped his truck approximately 6 to 10 feet west of the asphalt strip (R. 35).

He stopped when the Holbrook car was within 150 to 200 feet of defendant's truck (Tr. 10-11). He yielded the right-of-way to said car. He then drove forward. By the time his car moved forward from between six to thirteen feet, the plaintiff's car struck it with great

force. Heavy black tire marks of the plaintiff's car showed on the asphalt strip 41 to 45 feet before the impact, and 57 to 64 feet after the impact. By said impact, defendant's truck was knocked entirely around and south along the highway for a distance of 30 to 50 feet (R. 35-7, Ex. 3). Defendant's truck was completely demolished. Plaintiff's car was seriously and substantially damaged (estimate \$1606.70). She was slightly injured. Defendant sustained permanent and serious injuries (R. 35-7, Ex. 3).

The deposition of Yvonne Holbrook was introduced by plaintiff. Mrs. Holbrook testified the speed of her car as it approached and passed the Shumway Intersection was 50 to 55 miles per hour; and the court so found (R. 35). Mrs. Holbrook testified that she observed defendant's truck coming East on the Shumway Road; that she saw the fellow in the car lean forward as if to look if there were any cars; and at that time the truck came to a stop when her car was 150 to 200 feet South of defendant (Tr. 10-12).

Plaintiff testified that when she first saw defendant's car it was coming up the Shumway Road at what she figured was a pretty good rate of speed for that kind of a road; that she saw defendant's truck come up to the highway and come to a complete stop (Tr. 23-24).

On cross-examination plaintiff testified she was right along or approximately by the posts designated as "3" and "4" on defendant's Exhibit 2 when she first applied her brakes (approximately 1000 feet North of

defendant's truck); that then she applied her brake and continued to slow down until she took her foot off the brake and accelerated again at approximately post "2" (500 feet north of defendant's truck) (Tr. 62-3). She accelerated without sounding her horn or seeing whether or not defendant was looking one way or the other (R. 37).

The time at which she began said acceleration was when defendant stopped his truck. At that time, the Holbrook car was coming towards plaintiff and defendant from the south at 50 to 55 miles per hour (Tr. 12, 62). It was followed by a heavily loaded truck some 750 feet behind (R. 36).

Plaintiff applied her brakes immediately when defendant began to move forward (Tr. 27). The usual reaction time would put her car at 75 feet to 110 feet back of the tire skid marks, or when she observed danger she was 120 to 155 feet from defendant's truck, although she testified it was 50 to 75 feet (Tr. 27).

Plaintiff does not challenge the finding of the court that the plaintiff's car passed the Holbrook car 75 to 100 feet North of defendant's truck (R. 36).

Defendant filed his motion for assessment of costs in the lower court (R. 43) and argued the same.

ARGUMENT

ANSWER TO PLAINTIFF'S POINTS I. AND II. THERE IS SUBSTANTIAL COMPETENT EVIDENCE THAT THE SPEED OF THE PLAINTIFF'S CAR WAS IN EXCESS OF

60 MILES PER HOUR 75 TO 100 FEET NORTH OF THE POINT OF COLLISION; AND THAT SAID SPEED WAS THE PROXIMATE CAUSE OF, OR CONTRIBUTED TO THE CAUSE OF HER DAMAGES.

This case was tried by the court without a jury. It is a law case. There is conflict in the testimony of the plaintiff in itself as to the speed she was traveling. What she said about her speed in reference to the physical objects and that which she gave in figures, are two different things. The testimony of a witness taken on deposition, and introduced by plaintiff, challenges plaintiff's testimony. The testimony of witnesses Holbrook, Bartholomew, defendant, Dr. Christensen, and Etta Johnson, established plaintiff's speed was in excess of 60 miles an hour; and that said speed was the proximate cause of, or contributed to her damages.

The trial judge saw and heard all the witnesses and viewed the exhibits. He was personally familiar with the junction of the road, or the intersection where the collision occurred. In respect to the testimony of Dr. H. Reed Christensen, he conducted and did much of the examination, or directed its course.

A. Findings Are To Be Upheld.

Plaintiff refers four times to the case of *Alvarado vs. Tucker*, et al, 2 U. 2d 16, 260 P. 2d 986. The facts of that case are entirely different from this case. Twice referring to it on the question of speed, plaintiff states the findings * * * must be based on the preponderance of the evidence (app. B. pp. 7, 15).

Appellant challenges the findings of fact herein. On appeal the correct rule is not that the findings must be supported by the preponderance as to speed, or any other fact:

“Hence, if there is any competent evidence in the record to support the court’s findings the judgment should not be disturbed.”

Buckley v. Cox, 122 U. 151; 247 P. 2d 277.

This court also said:

“As this is a law action, the question is not whether the evidence would have supported the decision in favor of the appellants, but whether the decision made by the trial court finds support in the evidence. If there is competent credible evidence to support the findings made by the trial court, then those findings should stand.”

Jensen v. Gerrard et al, 85 U. 481; 39 P. 2d 1070.

In a case which was tried by the court, this court said:

“This is a case at law. It therefore follows that this appeal is upon questions of law alone. That being true the function of this court is not to pass upon the weight of the evidence, nor to determine conflicts therein, but to examine it solely for the purposes of determining whether or not the judgment finds substantial support in the evidence. In so examining the evidence all reasonable presumptions are in favor of the trial court’s findings and judgment, and the evidence must be considered in the light most favorable to them. If the findings and judgment are substan-

tially supported by the evidence, then the court may not disturb them.”

Sine v. Salt Lake Transp. Co. et al, 106 U. 289 at p. 294; 147 P. 2d 875.

B. Record To Be Viewed Favorably To Respondent.

How shall the record on appeal be read or considered by this court? Our supreme court has said that the record on appeal must be read in a light most favorable to the respondent. Since the trier of the facts found in respondent's favor, the evidence should so be viewed. *Lowder vs. Holley*, et al 120 U. 231; 233 P. 2d 360.

Our court has stated the rule thus:

“Thus we must view the evidence in its most favorable aspect to support the verdict which the jury has rendered and if from the evidence the jury could reasonably find facts necessary to sustain their verdict, it must be sustained. This is true, even though had we been the triers of the facts we would have found them differently, or even though we may not believe that the jury did in fact so find, or, even though we believe that such a finding would be against the great preponderance of the evidence.”

Horsley v. Robinson, et al., 112 U. 227; 186 P. 2d 592.

C. Competent Creditable Evidence Shows Speed Over 60 miles per hour; and such speed was the proximate cause of plaintiff's damages.

It is then a simple mathematical computation to calculate the speed of plaintiff's car which traveled 400 to 425 feet while one traveling 50 to 55 miles per hour

traveled approximately 225 to 300 feet. It only had to travel 1/10th to 1/5th farther than did the Holbrook car to have traveled in excess of 60 miles per hour. Using the mid figure between 225 and 300 feet or 262.5 feet of travel for the Holbrook car, and 400 feet for the plaintiff's car, plaintiff's car traveled 128.5 feet farther in the same time, or approximately half again as fast; or it was traveling an average of approximately 74 miles per hour during the last 400 feet before the crash.

There is another test of the evidence which reaches the same result. The defendant testified that he looked north and could see as far north as the two white posts (Nos. 3 and 4, Ex. 2), which was approximately 1000 feet; that he then looked south and saw a car approaching at about 600 feet; that he waited for that one to pass and then he proceeded to drive forward (Tr. 286). When the plaintiff testified that at approximately the two white posts "3" and "4" she saw Mr. Nielson (his truck) and applied her brakes (Tr. 62), she in substance told the court that at approximately 1000 feet she saw the defendant's truck entering the intersection. It is a reasonable deduction that was just after the defendant looked north and then looked south and saw a car approximately at 600 feet away. Then while the Holbrook car at 50 to 55 miles per hour traveled between 675 to 700 feet, plaintiff's car traveled 900 to 925 feet. Again taking the average figures of 687.5 feet and 912.5 feet, the plaintiff's car traveled 225 feet farther in the same time during the first half of which it was slowing down and the last half accelerating. Here we reach the result of

approximately one-fourth faster than the Holbrook car—62.5 to 68 miles per hour.

Is it strange that the computation of Dr. Christensen figured the speed of plaintiff's car to be approximately 70-71 miles per hour (Tr. 250, 259). By three different tests from the evidence approximately the same speed of the plaintiff's car is reached.

Plaintiff had a right to rely that no car would approach from the northward at any speed appreciably faster or a distance appreciably farther than the car coming from the south; and that if so approaching, plaintiff would still have been four to five hundred feet north of defendant when the car from the south passed, and when he began to move forward. At a speed of 60 miles or less, the plaintiff would have been able to stop her car within 251 feet at the time the danger appeared. In that event, she would have had between 150 and 250 additional feet in which to stop, if she had been traveling within the lawful rate of speed.

This court has upheld a lower court's judgment that the driver of a vehicle who looked 40 rods northwest of the intersection (660 feet) and saw no car within that distance was not negligent in failing to look again where the way was clear that far; and where the other driver was approaching at an excessive rate of speed.

“Had Ruth Holley exercised such reasonable and ordinary care the collision would not have occurred. Under such a state of facts Amasa Lowder's failure to see the truck could have in

no way contributed to the accident.”

Lowder v. Holley, et al, 120 U. 231; 233 P. 2d 350.

It was said by Justice Wolfe in his concurring opinion in *Poulsen vs. Manness*, et al 121 U. 269 at p. 275; 241 P. 2d 152:

“The plaintiff need only appraise the situation with regard to what the lawful rate of speed is upon the intersecting road.”

The same rule was again announced by Justice Crockett in *Martin vs. Stevens*, 121 U. 484 at p. 496; 243 P. 2d 747:

“He then looked to the east and saw no car within the extent of his vision, 150 to 200 feet. At that instant he was entitled to assume, absent anything to warn him to the contrary, that any car approaching from that direction would do so at a lawful rate of speed * * *.”

Plaintiff claims that the testimony of Wallace Tatton corroborated plaintiff’s testimony as to speed. Defendant denies this. Among other things said witness testified that the plaintiff passed him “approximately a half of a mile or a mile this side of Ephraim (south); that at the time of the collision he would say plaintiff was “about 8 blocks ahead of the witness.” Manti’s blocks are 429 feet without streets. Whether it was blocks or what is was, we couldn’t tell from the testimony. But he definitely testified that he could not tell at what speed plaintiff’s car proceeded ahead of him (Tr. 82).

Plaintiff claims it was the duty of the trial court to completely disregard the evidence of the witness,

Etta Johnson. Said witness went back to the scene of the collision. She pointed out the distances on the highway and helped Mr. Jensen measure them (Tr. 206, 210). There is no doubt her testimony was to the effect that the plaintiff's car was going a great deal faster than the Holbrook car, and she wanted her testimony to so show.

Said witness also misjudged the distance from the witness stand to a distant house, which she was asked to look at through the window. Judge Larsen also misjudged the distance. He judged it to be 250 feet (Tr. 208). Both said it was hard to judge from the Court Room (light in the courtroom, and venetian blinds at the windows through which both looked, made it difficult).

Dr. H. Reed Christensen testified: That he was graduated from the Brigham Young University with a major in Physics in 1926; that he received his master's degree in Physics in 1929 from the University of Chicago; that in 1940 he received his PhD. from Ohio State College in Philosophy and Physics; that he taught at Massachusetts Institute of Technology; that he did special work for the U. S. Government during the war in Physics from 1942 to 1946; that he presently was teaching Physics at Snow College and had been teaching Physics between 28 and 30 years (Tr. 240-41, 243).

He also testified that he was familiar with the junction of Highway 89 with the Shumway Road and the particular surface. He made an experiment as to the

abrasive character of the road or the co-efficient of friction on that type of road, and got the approximate value of 80 per cent when he dragged a rubber automobile tire thereon (Tr. 254, 257). This is what Exhibit 6 shows for same type of road.

Further he testified he considered the weight of the plaintiff's DeSoto and the weight of defendant's truck, with occupants (Tr. 250).

He computed how much energy would be used up by the co-efficient of friction at eight-tenths; and took the distance which the plaintiff's car slid before the impact, and after the impact, and what energy was used by the truck as it skidded; added them, and put it into the standard formula that gives the kinetic energy, and he came out with 63 miles per hour which the plaintiff's car was traveling at the point where the brake or tire skid marks started to show. This did not include the energy used in stopping the wheels until the skid marks showed (Tr. 249).

Likewise he computed the energy used according to a generally accepted standard of loss of energy where there isn't an elastic impact — such as where the cars stay together (using the actual weights of the cars with occupants). By that computation, the plaintiff's car would have been traveling 85 miles per hour. But when he used 60 per cent of the energy conserved (consumed) when the truck was struck and the cars were smashed up, he came out with a speed of plaintiff's car at 70 to 71 miles per hour (Tr. 249-50, 259).

He testified that he saw the plaintiff's car after the impact and before it was repaired; but he did not see the defendant's truck.

His computations were made on the basis of 41 feet of skid marks of the plaintiff's car before the impact and 56 feet after impact (Tr. 252); and using the defendant's witnesses figures of 45 feet before instead of 41 feet, and 63 feet instead of 56, he judged the speed of plaintiff's car was greater than 73 miles per hour (Tr. 258).

Much of the testimony given by Dr. Christensen was in answer to direct questions by the court. Objections to Dr. Christensen's testimony was primarily on the grounds that the questions did not include some of the facts which the appellant claims should be included. It has been written by some authorities that all the pertinent facts to an ultimate issue need not be included upon questions to an expert witness. (58 Am. Jur., Sec. 854, p. 483).

Our court has in the cases of *Martin v. Stevens*, 121 U. 484, 243 P. 2d 747; and in *Alvarado vs. Tucker, et al*, supra, approved the testimony of police officers as to the speed of an automobile from measured skid marks together with the use of charts showing the relationship between the speed and stopping distances. Other states which have similar situations have accepted the testimony of an expert on speed from the length of skid marks, *Linde et al v. Emmick*, 61 P. 2d 338 and cases cited therein. A situation not unlike the one at bar was considered by our court:

“Appellant’s objection to the so-called expert testimony of Dr. Castleton is not well taken. The opinions expressed by him were largely from his own observations and come more nearly being the answers of a skilled witness based upon what he observed than that of an expert based upon an assumed state of facts or facts in evidence adduced from other witnesses.”

Spackman v. Benefit Association of Railway Employees, 97 U. 91 at p. 96; 89 P. 2d 490.

The record shows the defendants had an engineer (Tr. 254) and they were able to make their own computations and to confound Dr. Christensen, if they could so do. Failing to so do on either cross examination or rebuttal, the court was entitled to take the evidence as reliable, substantial and competent.

No reference was made at any time in this case, prior to the appellant’s brief, to Andrew J. White’s “Tire Dynamics, First Edition.” It appears to be further refinement by experimentation of factors affecting tire marks on road surfaces in relation to the speed of the vehicle which laid them down. In a number of respects, it challenges accepted standards of this court as to the weight of the evidence of such marks. It is also hearsay. Since no opportunity was given the trial court or counsel to meet the same, defendant contends it should be disregarded as heresay; is a publication which may not properly be judicially noticed; and which is not properly before the court.

There has been much controversy about the effect of

Hickok vs. Skinner, 113 U. 1; 190 P. 2d 514. That controversy appears to arise from the fact that one who saw a car at a distance of 400 to 500 feet was held to be contributorily negligent for a collision which followed when he proceeded through the intersection without again looking. In this case, the appellant apparently contends that the plaintiff was close enough to constitute an immediate hazard within the meaning of our statute. A similar situation existed in said *Hickok vs. Skinner*. There the court said:

“Plaintiff’s evidence was that defendant was 400 to 500 feet back from the intersection traveling at a speed of 45 mph. If the distance was 400 feet, the defendant would have required approximately six seconds to reach the point of collision; if 500 feet away, approximately seven and one-half seconds. Under such facts defendant’s car could not be said to have been approaching so closely as to constitute an immediate hazard.”

Hickok v. Skinner, supra.

It is interesting to note that where the defendant was making a left hand turn across a through highway, and saw the plaintiff approaching in excess of 375 feet, that the plaintiff’s excessive speed was held to be a contributing cause of the accident; and said case was dismissed. *Walker vs. Peterson*, 3 U. 2d 54; 278 P. 2d 291.

We do not agree that the other authorities cited by the appellant in his brief are in point. In each and all of them, they involve facts materially different from those involved in the instant case. None of them involve

facts where the plaintiff saw the defendant enter the intersection 1,000 feet away, saw him slow down and stop for a car which was within 150 to 200 feet, or an immediate hazard; and then uphold plaintiff's attempt to bolt through the right of way which defendant had; and where he had pre-empted the intersection. We submit that is what plaintiff tried to do here; and that her speed proximately caused, or contributed to her damages.

ANSWER TO PLAINTIFF'S POINTS III AND IV. THERE IS SUBSTANTIAL COMPETENT EVIDENCE THAT THE SPEED OF THE PLAINTIFF WAS NOT REASONABLE OR PRUDENT UNDER THE EXISTING CONDITIONS; THAT SHE DID NOT KEEP A PROPER LOOK-OUT; AND WAS IN OTHER RESPECTS, NEGLIGENT, WHICH PROXIMATELY CAUSED, OR CONTRIBUTED TO HER DAMAGE.

As part of this point defendant adopts the foregoing argument.

Was the fact that after defendant had entered said junction of the roads or intersection more than 40 feet, and was within three to six feet of the path of the plaintiff's car such a fact situation that a reasonable prudent person would again speed up in an effort to "barrel through" as the trial court put it, or whizz by the defendant's truck at 52 to 55 miles per hour according to plaintiff's view, and between 65 to 75 miles per hour according to defendant's view, the act of an ordinary, reasonable prudent person? The mere statement of the facts to the trial court's mind, and to ours, answers itself that no ordinary reasonable prudent person would so do; and especially without a careful look and sounding

her horn. He had pre-empted the intersection. The facts gave her notice thereof.

On top of those facts plaintiff admitted she did not see defendant driver looking toward the nearest approaching car, and she did not sound her horn. She should have known he would not be expecting her, and that he might reasonably be expected to move forward as he did. In view of her fast arrival at the scene, she was wholly unexpected. Plaintiff knew defendant intended to enter the path she would take (Tr. 61). He could well be expected to move forward on the passing of the nearest vehicle. In view of this situation, surely she owed the duty to slow down, have her car under control, and to honk to ensure safe operation of the other vehicle and her own, as provided by Section 41-6-14 U.C.A. '53.

Persons who look towards an approaching car at a crossing or intersection, are not bound to figure cars are approaching at an unlawful rate of speed; but need only regard those only approaching within a distance which at a lawful speed constitute an immediate hazard.

“Automobile driver, entering Highway from private driveway after looking in direction from which another auto approached at greater distance than his vision carried, had a right to presume that driver thereof would not exceed statutory speed limit.”

Fontanille v. Ducote, 155 S. 46 (La. 1934).

The above case held that where a driver looked for a distance of 85 yards and saw no automobile approach-

ing, that the excessive speed of the automobile striking the rear end of the car making the left turn into the highway was the sole proximate cause of the accident. The above reasoning and holding was later approved.

“As the defendant Taylor stopped and looked in each direction before beginning her L. hand turn and seeing no car either direction, she was not guilty of negligence and therefore did not contribute to the collision. But the excessive speed at which E. H. was driving his car approaching an intersection of Church and Kentucky streets was the proximate and immediate cause of the collision.

Gartman v. Taylor, 164 S. 660.

Suppose the defendant had looked North again after he saw the Holbrook car at 600 feet south of his truck. He would then have seen the plaintiff's car somewhere near 1000 feet from his truck slowing down, indicating she was going to await his forward movement after the passing of the Holbrook car, which at the time of defendant's stopping was 150 to 200 feet from him and plaintiff was approximately 500 feet north from him.

It might be said of her as Justice Pratt said in *Bullock vs. Luke*, et al, 98 U. 501, 98 P. 2d 350, “Any presumption that Luke was going to afford him the right-of-way was not in the picture.”

Defendant maintains of himself as was said by Justice Wolfe in said *Bullock vs. Luke*, “Another illustration would be where one enters the intersection definitely with the right-of-way, and with due care in relation

to any other also exercising due care and assumes his right-of-way to his injury, he should be allowed to recover."

DEFENDANT'S POINT I.

THE UTAH RULE IS THAT DEFENDANT HAD THE RIGHT OF WAY; AND ACCORDINGLY PLAINTIFF IS NOT ENTITLED TO RECOVER.

Plaintiff's testimony and testimony of witnesses above named precludes plaintiff's recovery. Our statute, 41-6-46 U.C.A. 1953, in part provides:

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

(c) The driver of every vehicle shall, consistent with the requirements of subdivision (a) of this section, drive at an appropriate reduced speed when approaching and crossing an intersection * * * and when special hazard exists with respect to * * * other traffic * * *.

Our Supreme Court held the driver entering a thru highway first had the right-of-way where he had stopped before the other car had entered the intersection:

"Motorist stopping before entering through street, as required by ordinance, complied with all its requirements, and was free to move without restriction, relying on C. L. '17 Sec. 3978, as amended by L. U. 1923, c 47, providing that oper-

ator of vehicle shall have right-of-way at intersection over one approaching from left.”

Smith v. Lenzi, 74 U. 362; 279 P. 893, Syl 3.

“Instruction should have been given that, if plaintiff’s failure to yield right of way to defendant approaching from right proximately contributed to accident, he could not recover.”

Smith v. Lenzi, Supra, Syl 6.

Said Utah case has been referred to in 81 A.L.R. 192, and 164 A.L.R. 22-24. Summarizing A.L.R.’s view of that case, we quote:

“The view is taken by some courts, however, if the motorist on the disfavored thoroughfare makes a proper stop at the stop sign, he is entitled to the right-of-way if he is on the right of the driver occupying the protected thoroughfare, or if he pre-empted the intersection before the latter reached it.”

It may be argued that the place of stop of the defendant was not the proper place. It has been held “generally speaking, it is the duty of one approaching an arterial highway to stop at a point somewhere between the stop sign and the arterial highway where he may effectively observe traffic approaching on the arterial highway.” 5 Am. Jur., Sec. 303, p. 669. This he did.

In the instant case the defendant moved to dismiss the complaint at the conclusions of the plaintiff’s case. The court reserved the ruling and denied it when all of the evidence was in. We maintain now as then the evidence of the plaintiff was insufficient to show the negligence, if any, of the defendant was the proximate cause

of the plaintiff's damages. It affirmatively showed her own negligence was the proximate cause of her damages, and the damages of the defendant.

DEFENDANT'S POINT II.

COSTS SHOULD HAVE BEEN AWARDED TO THE DEFENDANT.

Under U.R.C.P. 54 (d) (1) costs shall be awarded to the prevailing party as of course unless the court otherwise directs. Interpreting this rule Justice Henroid in his dissenting opinion in *Hull vs. Goodman*, 4 U. 2d 163, 290 P. 2d 245 stated that former practice would be followed in so far as applicable. In *Checketts vs. Collins*, 78 U. 93; 1 P. 2d 950 our court held that the costs went to the defendant as of course where neither plaintiff or defendant prevailed. If such is still the rule, defendant is entitled to his costs.

CONCLUSION

Defendant believed the evidence herein entitled him to recover against plaintiff. But in view of the burden of the appellant in a law case, believed, and now believes, neither party hereto can change the findings and judgment of the lower court. Hence no assignment on the main case.

The rule on appeal is that the findings of the lower court are to be upheld when there is competent creditable evidence to support same; and the evidence is to be

viewed favorably to the respondent. There is abundant substantial creditable evidence that the plaintiff was traveling in excess of 60 miles per hour at the time her tires began to skid 41 to 45 feet before her car struck the defendant's truck; and we submit it is a preponderance of the evidence that sustains that view.

The speed the plaintiff was traveling under the existing conditions, with the defendant almost directly in front of her; her failure to slow down, to keep her car under control, to sound her horn of her intention to try to pass ahead of the defendant, and her failure to see that defendant was interested in another approaching car, were each and all acts of negligence which were the proximate cause of her damages, and contributed to the same.

Accordingly we submit that the findings of fact, conclusions of law, and judgment of the trial court dismissing the plaintiff's complaint should be sustained; and the defendant should have his costs.

Respectfully submitted,

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