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Lydia G. Ivie v. Dennis Waring Richardson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
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Clerk, Supreme Court, Utah

LYDIA G. IVIE,
Plaintiff and Respondent,

Vs.

DENNIS WARING RICHARDSON,
Defendant and Appellant.

Case No.
8856

APPELLANT'S BRIEF

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IN THE SUPREME COURT of the STATE OF UTAH

LYDIA G. IVIE,
Plaintiff and Respondent,

Vs.

DENNIS WARING RICHARDSON,
Defendant and Appellant.

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APPELLANT'S BRIEF

STATEMENT OF FACTS

This case is before this court on appeal from the District Court of Salt Lake County, Case No. 113055. The cause was tried, submitted to a jury and a verdict returned for the plaintiff in the sum of \$5,000.00. Defendant's motion to set aside the verdict and enter judgment in accordance with defendant's motion for directed verdict was denied.

On June 9, 1956, plaintiff, a woman, purchased groceries at a store located on the northwest corner of 3rd South and 3rd East in Salt Lake City and then proceeded to walk north on the sidewalk on the west side of 3rd East Street with a child, her niece. She continued to walk north until she reached a driveway area leading from the main traveled portion of 3rd East Street westward over the sidewalk and into a public garage. (R. 1) and (Ex. 1) She stopped in front of the garage and observed the double doors to the garage were open. She lived just across the street (R.2) and knew cars frequently used this driving area going into and out of the garage. She looked at the open doorway and saw no cars at the threshold of the doorway, but did not look westward through the doorway into the garage to see if any cars were approaching from inside the garage. (R. 12, 13) She then turned eastward, left the sidewalk and proceeded several steps forward on the driveway with her back to the garage, (R. 3, R. 8) intending to jaywalk across 3rd East Street on her way to her home. (R. 9, 10) As far as she recalls she did not at any time look backward to see if an automobile was approaching prior to the time she was bumped from the rear by defendant's automobile (R. 14) which defendant was slowly backing out of the garage. (R. 19).

Plaintiff testified there were available to her several routes which she could have taken with equal convenience. (R. 16, 17) Had she taken one of them she would not have been injured. If she had walked on the curbed area instead of the driveway area just a foot or two south of the path she took, she would not have been hit. (R. 17) She could have proceeded from the grocery store directly east on a pedestrian crosswalk across 3rd East to the east-

side of the street and then north on the sidewalk to her home and the route would have been no farther than the one she attempted to take and this accident would not have occurred. (R. 14)

The defendant, a young man, was outside the United States at the time of the trial and a brief statement as to what his testimony would be were he to testify was stipulated to at pretrial and read into the record and was as follows:

“That he was backing out of his uncle’s garage at a speed less than 1 or 2 miles per hour and was crossing the sidewalk. He checked to see if any people were coming from either direction and then proceeded to back out. Previous, he looked out the rear window and saw no one. Just as he crossed the sidewalk he heard a child start to cry and immediately stopped the car. When he got out he saw a woman sitting down next to the car. The lady was in the blind spot between the back window and side window and he did not see her.” (R. 53, R. 54)

Plaintiff was struck by the left rear bumper of the car, knocking her down with her knee twisted under her. She got up and proceeded to walk across the street to her home. (R. 4) She had undergone an operation on her knee in 1950 and had the kneecap removed (R. 5, R. 30) and she was suffering some trouble with her knee from the time of that operation up to the time of this accident. (R. 7) The plaintiff’s doctor diagnosed her injuries resulting from this accident as contusion of the sacrum, sprain of the left knee and contusion of the left calf. (R. 30) The doctor believes that “an attempt should be made

by an operative procedure to improve the function of her knee.” (R. 32) She lost three days work as a result of the accident. (R. 29, R. 30)

STATEMENT OF POINTS

POINT I

THE PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

A. Plaintiff was negligent per se because she violated a Utah statute applicable to pedestrians and her violation was a proximate cause of her injuries.

B. Plaintiff failed to maintain a proper lookout.

C. Plaintiff used a dangerous route when a safer route was available to her and equally convenient.

POINT II

TWO OF THE COURT’S INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL AND THE COURT’S FAILURE TO GIVE ONE OF THE DEFENDANT’S REQUESTED INSTRUCTIONS WAS ERRONEOUS AND PREJUDICIAL.

ARGUMENT

POINT I

THE PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

A. Plaintiff was negligent per se because she violated a Utah statute applicable to pedestrians and her violation was a proximate cause of her injury.

Plaintiff’s conduct constituted negligence per se because in walking on the driveway at the place and in the

manner in which she was so walking she was violating *Sections 41-6-79 and 41-6-82, Utah Code Annotated, 1953.*

“41-6-79. Pedestrian Shall Yield Right of Way
(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.”

“41-6-82. Walking Along or Upon Roadways—Standing in Roadway for Prohibited Purposes:
(a) Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.”

The Court’s instruction to the jury revealed that the Court gave no credence to defendant’s contention that the driveway involved was *not a private* driveway, but *a part of the public street, a part of the roadway* concerning which the traffic rules and regulations of the Motor Vehicle Act of the State of Utah were applicable; that the plaintiff was not *about* to “jaywalk,” but that she was *already jaywalking at the time of the accident.*

The public street or highway includes sidewalks on each side of the roadway and all the area between the sidewalks. (*Sec. 41-6-8 (d). U. C. A. 1953*). The sidewalk is the part of the public street set aside for pedestrian travel and all areas between the sidewalk which are “designated or ordinarily used for vehicular travel” (*Section 41-6-8 (c). U. C. A. 1953*) are a part of the public “roadway.” Therefore, the place at which the plaintiff was struck was part of the public roadway, and while there, plaintiff was (1) committing a misdemeanor (*Section 41-*

6-82 (a)) ; (2) was obligated to yield the right of way to a vehicle traveling thereon (*Section 41-6-79 (a)*).

The following statutory definitions support the position of the defendant:

"41-6-7 (a) Street or Highway. The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

"(b) Private Road or Driveway. Every way or place *in private ownership* (emphasis supplied) and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons.

"(c) Roadway. That portion of highway improved, designed or ordinarily used for vehicular travel, exclusive of the berm or shoulder.

"(d) Sidewalk. That portion of *a street* (emphasis supplied) between the curb lines, or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians."

From the foregoing definitions, I think it is patent that the plaintiff at the time she was struck was (1) on part of the public roadway; (2) she was at that location illegally; and (3) in that location she was obligated to yield the right of way to vehicular traffic.

I do not think the clear language of the statutes requires judicial interpretation to achieve the above conclusion. There are no Utah cases exactly in point covering a perfectly analogous fact situation. The only case in the books I have been able to find, the facts of which render it directly in point on this proposition, is a recent

Wisconsin case, *Brunette v. Bierke*, 72 N. W. (2) 702, decided in November, 1955.

That case involves a fact situation which I think is almost identical with the situation in the case at bar, and as to the motor vehicle statutes involved, one is the same in substance as the Utah statute and the other is identical to the Utah statute.

The Wisconsin case is an action for injuries sustained by a pedestrian who was struck by an automobile backing out of a service station. The trial judge rendered judgment dismissing the complaint and the plaintiff appealed. The Supreme Court held that for right of way purposes, a concrete "apron" *extending from sidewalk line to curb line and constructed to provide convenient approach for motorists to the service station* constituted a part of the highway, and the pedestrian owed the duty to yield to the vehicle right of way over such apron. I have underlined certain words above to emphasize the similarity between the facts in that case and the facts in the case at bar.

On pages 704 and 705 of the opinion, the court stated as follows:

"On the other hand, sec. 85.10(21) provides that 'a highway is every way or place of whatever nature open to the use of the public as a matter of right for the purposes of vehicular travel', and sec. 85.44(4) provides that 'every pedestrian crossing a highway at any other point than a marked or unmarked crosswalk shall yield the right of way to vehicles upon the highway.' The apron was 'open to the use of the public as a matter of right for the purposes of vehicular travel'; its very purpose was to provide a convenient approach by motorists to

the service station. It was open to use by the public 'as a matter of right' because the right of the public to use a street for purposes of travel extends to the entire width of the street, to its whole surface, 25 Am. Jur. 461; Chase v. City of Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553. Peters was not on a crosswalk when he was struck. Thus by the provisions of secs. 85.10(21) and 85.44(4) the motorist, not the pedestrian, appears to be given the right of way.

"(2) The word 'sidewalk' is ordinarily used to designate a portion of a highway which has been set apart for pedestrians as distinguished from that which is used by vehicles, 2 Bouv. Law Dict., Rawle's Third Revision, p. 3068. Manifestly the apron was not intended for use by pedestrians; an adequate 5-foot strip of concrete was provided for them. The apron was constructed to provide a convenient approach for motorists to the service station, to replace or as a substitute for an elevated curb and boulevard which would constitute an obstacle to entry to the station. It was the obvious intent of the legislature to grant to the pedestrian the right of way at places at which they are usually found, upon sidewalks as that term is universally understood. We do not consider that it was intended by the legislature to extend the area in which the rights of pedestrians over the motorist are recognized. We can perceive no reason for so doing. On the contrary, it would be absurd to contend that the apron was constructed for any purpose other than to accommodate the motorist. It was constructed primarily, if not exclusively, for his easy passage to the station. We must assume that the legislature had these well-known facts in mind when enacting the statutes and that they did not intend that a pedestrian should be given more fa-

avorable consideration than is to be given a motorist when the pedestrian is found in a place where he should not be, or where foot-travelers are not ordinarily found. We think therefor that for the purpose of determining who has the right of way, sec. 85.44(5) must be construed as granting to the pedestrian the right of way over the motorist only when he is upon that portion of the sidewalk which is set apart for him, in this case the 5-foot strip immediately adjacent to the service station property, that the apron is to be considered as a part of the highway as defined in sec. 85.10(21), and that since the jury might properly have found that Peters was upon it when he was struck, it was his duty to yield the right of way and that it was proper for the trial court to instruct the jury as it did."

If a Utah Court interprets the motor vehicle statutory provisions involved as they were interpreted by the Wisconsin Court (and I think such interpretation is compelled by the clear wording of the statutes), then I do not see how a Utah Court could avoid reaching the same result in the case at bar as was reached by the Wisconsin Court in the case before it.

If we take the point of view of the Wisconsin Court and conclude that the motor vehicle law of Utah is applicable, in other words, that the plaintiff was at the time of the accident located on part of the public roadway, then certain declarations of the Utah Supreme Court become strikingly pertinent.

Mingus v. Olsen, 201 P. (2) 495 (Utah, 1949) is a case in point.

In that case a man and his wife started to cross Thirteenth East in Salt Lake City near its intersection with

Westminster Avenue. They were proceeding in an unmarked crosswalk that extended over Thirteenth East. The defendant's automobile struck the man and he was killed. The court granted defendant's motion for directed verdict "on the grounds that the evidence showed that, as a matter of law, plaintiff's decedent was guilty of contributory negligence."

The court said:

"As to whether or not decedent was within the crosswalk at the time of the collision, there is a conflict in the evidence. For purposes of this appeal, we must assume that deceased was in the crosswalk at the time he was struck. The crucial question is whether decedent failed to keep a proper lookout for approaching traffic."

(That is certainly one of the crucial questions involved in the case at bar).

On the subject of lookout, the Court said on page 498:

"More convincing than the direct testimony that deceased did not look, is the further evidence that deceased neither said nor did anything to indicate that he was at all aware of the danger presented by defendant's approaching automobile. He seems to have been wholly unaware of its approach. Certainly he did nothing either to warn his wife, nor to rescue either himself or her from their position of peril. On this evidence, it must be said as a matter of law that deceased either failed to look, or having looked, failed to see what he should have seen.

"(4, 5) There can be no doubt that a pedestrian who undertakes to cross a busy street of a large city, without first observing for vehicular

traffic is guilty of contributory negligence. And this is true, even though he may be crossing in a crosswalk, and have the right of way. In the recent case of *Hickok v. Skinner*, Utah, 190 P. 2d 514, this court held that a motorist who had the right of way across an intersection, nevertheless had a duty to observe for traffic as he proceeded across the intersection. *The rights of pedestrians to the use of the public streets are the same as those of motorists — neither greater nor less.* Hence, the same general duties devolve upon them. A pedestrian crossing a public street in a crosswalk or pedestrian crossing a public street in a crosswalk or peway over vehicular traffic, nonetheless has the duty to observe for such traffic. Clearly, decedent neglected that duty in this case. It follows that he was contributorily negligent as a matter of law. Of course we do not mean to imply that a mere glance in the direction of the approaching automobile would suffice. The duty to look has inherent in it the duty to see what is there to be seen, and to pay heed to it.” (Emphasis supplied)

If it is true, as Justice Wolfe said in the *Mingus* case, that the “rights of pedestrians to the use of the public streets are the same as those of motorists—neither greater nor less,” then the plaintiff in the case at bar was certainly contributorily negligent. If it was negligence for the defendant Richardson to fail to keep a proper lookout for the plaintiff (and the jury obviously decided it was), then it was negligence on the part of the plaintiff to fail to keep a proper lookout for the defendant’s automobile. If we assume the defendant was negligent, even though his testimony was that he did examine the area behind him through the rear vision mirror, then certainly the plaintiff was negligent when, according to her testimony, she does not

recall maintaining any lookout whatsoever to her rear for an approaching vehicle as she proceeded down the driveway.

I submit that even if the driveway involved were a private driveway, under the fact circumstances appearing from the plaintiff's own testimony in this case, the plaintiff was at least as negligent as the defendant, and therefore was contributorily negligent as a matter of law. When a pedestrian is walking in an area which she knows is primarily designed and used for vehicular traffic, she certainly owes some duty to maintain a reasonable lookout, and there can be no question but that her failure to maintain a lookout was a proximate cause of her injuries in this case.

Smith v. Bennett, 265 P. (2) 401 (Utah, 1953) also is a case in point. There also a pedestrian was struck while crossing a public roadway. In this case, unlike the Mingus case, and I submit similar to the case at bar, the plaintiff was not in a marked or unmarked crosswalk. This is another case in which the defendant was awarded a directed verdict on the grounds that the plaintiff was contributorily negligent as a matter of law. A particularly significant statement of the court was this:

"By attempting to cross the street in disregard of safety rules, she (plaintiff) was charged with a *high standard of care*, (emphasis supplied) the duty being commensurate with the perilous circumstances."

In the case of *Sant v. Miller*, 206 Pac. 2d 719 (Utah 1949) the court was concerned with a pedestrian who had been injured while crossing a street at a place contrary to

law. While doing so he failed to keep a proper lookout and the court said:

“Having omitted to continue to watch, he failed to exercise the degree of care required of a pedestrian who leaves a place of safety and places himself in a position of peril. A greater degree of care is necessary upon the part of a pedestrian who undertakes to cross a city street at a prohibited place than is placed on one who uses a marked crosswalk.”

I submit that in the case before the court the plaintiff left a place of safety, to-wit, a sidewalk and placed herself in a position of peril, to-wit, in an area which was designed for the use of vehicular traffic. She omitted to continue to watch and, therefore, failed to exercise the degree of care required of such a pedestrian. Furthermore, she undertook to cross a city street at a prohibited place and “A greater degree of care is necessary upon the part of a pedestrian who undertakes to cross a city street at a prohibited place than is placed on one who uses a marked crosswalk.”

Later the court said:

“Because of the violation of the quoted ordinance and statute, appellant was on the street at a prohibited place, and under these circumstances, he was required to constantly observe the movement of traffic from the direction it should legally travel.”

B. Plaintiff failed to maintain a proper lookout.

Even if we do not rely on the statute discussed under A, we can rely wholly on common law negligence. It is the defendant's contention that the plaintiff in walking

along an area designed for vehicular traffic without ever glancing back to see if an automobile was approaching was negligent in that she failed to keep a proper lookout, indeed any lookout whatsoever, for cars which she should reasonably have anticipated might have been approaching from the rear.

Even if the plaintiff had been walking on a private driveway, which was not part of a public road, she should have, in the exercise of ordinary care, maintained a more vigilant lookout than she did in this instance. She would be expected to foresee the possibility of approaching automobiles even on a private driveway, which driveway primarily existed for the purpose of accommodating vehicular traffic.

C. Plaintiff used a dangerous route when a safer route was available to her and equally convenient.

Plaintiff's testimony clearly reveals that to be a fact. The negligence of such conduct is recognized in *Anderson vs. Mammoth Mining Co.* 93 P. 190 (Utah 1907).

POINT II

TWO OF THE COURT'S INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL AND THE COURT'S FAILURE TO GIVE ONE OF THE DEFENDANT'S REQUESTED INSTRUCTIONS WAS ERRONEOUS AND PREJUDICIAL.

The Court's Instruction No. 4 was as follows:

"If you find from a preponderance of the evidence that the defendant failed to keep and maintain a proper lookout for the plaintiff in the drive-

way where the accident occurred and that such failure proximately resulted in the accident, then your verdict must be in favor of the plaintiff and against the defendant.”

This instruction is obviously erroneous due to the fact that it is a formula instruction directing the jury to find a verdict for the plaintiff if the circumstances exist as set forth in the instruction yet in the instruction there is no provision made for the affect of contributory negligence. In other words, if the jury finds that the defendant was negligent then the jury is bound by that instruction to render a verdict in favor of the plaintiff and is not required, or indeed permitted, to give any consideration to contributory negligence of the plaintiff.

The same type of error is committed in Instruction No. 10, which reads as follows:

“You are instructed that the law in force in the State of Utah on the 9th day of June, 1956, which relates to the operators of motor vehicles was as follows:

“1. That the driver of a vehicle within a business or residential district emerging from any alley, driveway or building shall stop such vehicle immediately prior to driving on to a sidewalk or into the sidewalk area extending across any alleyway or private driveway and shall yield the right of way to any pedestrian, as may be necessary, to avoid collision, and upon entering the roadway shall yield the right of way to all vehicles approaching on said roadway.

“2. The driver of a vehicle shall not back the same unless such movement can be made with reasonable safety and without interfering with other traffic.

“You are instructed that if you find by a preponderance of the evidence that the defendant violated either one or both of the above provisions then you are instructed that such violation would amount to negligence upon his part and you are further instructed that if you find that such violation was made and that the same was the proximate cause of the happening of the incident in question and the resulting injuries to the plaintiff then and in that event you would find the issues of negligence and proximate cause in her favor and proceed to assess such damages as you find by a preponderance of the evidence she would be entitled to.”

The part of Instruction No. 10 which defendant contends is erroneous is the last paragraph of the same. Again the court has given a formula instruction in which he directs the jury to find that the defendant was negligent if it believes that the defendant violated either one or both of the statutes, and then directs the jury in that event to proceed to assess damages against the defendant. The court in that instruction makes no reference to or provision for the affect of contributory negligence.

Instructions Nos. 4 and 10 are inconsistent with Instructions Nos. 4a and 5 and could result only in confusion in the minds of the jurors and I submit that Instruction No. 4a and Instruction No. 5 do not correct the errors contained in 4 and 10 and do not alleviate the prejudice resulting from those erroneous instructions.

The errors in the court's instructions are analogous to those made by the court as discussed in the case of *Mazzotta v. Los Angeles County and Sam Finkelstein*, 153 Pac 2d 338 (California 1944). In that case the offensive instructions read as follows:

“If you find from the evidence that the defendant, Sam Finkelstein could have avoided this accident by exercising ordinary care in using his senses of sight and hearing to discover the presence of the Los Angeles Railway bus and in preventing his automobile from colliding with the bus, then you must find for the plaintiff, Jane Mazzotta, and against the defendant, Sam Finkelstein.”

Finding that instruction to be erroneous and prejudicial the court said:

“The instruction upon which Finkelstein substantially relies as justifying the action of the trial court (in granting a new trial) required the jury, under certain stated circumstances, to return a verdict for Jane Mazzotta. *It, therefore, includes a formula and may be justified only if it contains all of the elements essential to a recovery (citing cases) and the absence of any one of the necessary elements may not be compensated for or cured by the fact that other instructions state the omitted factors required to sustain the verdict directed.*” (citing cases) (emphasis added).

The error made by the court in the case at bar is also analogous to the situation in *Spear vs. Leuenberger*, 112 Pac 2d 43 (Cal. 1941).

There the offensive instruction appearing on P. 50 was as follows:

“I further instruct you that if you find the defendant neglected any duty, or duties imposed upon him by law, or the duties imposed upon him to be generally careful and prudent in the operation of his automobile and that the accident could not have been avoided by plaintiff even though plaintiff had observed all demands of law and good judgment

because of the recklessness and carelessness of defendant, then you will find for the plaintiff.” Referring to the instructions the court said:

“It is contended that this instruction purported to state all of the conditions upon which liability could be imposed upon the defendants; that it did not contain the necessary element that the defendants’ negligence must have been the proximate cause of the accident, *and that contributory negligence on the part of the plaintiff proximately contributing to the accident would bar recovery.* Also, that the phrase ‘all demands of law and good judgment’ does not mean contributory negligence and could not be taken by the jury to have that meaning. We are of the opinion that this instruction is subject to the criticism stated. It has frequently been held that *instructions of this kind must correctly set forth all of the conditions necessary, that the exclusion of any one necessary element constitutes reversible error, and that even a correct instruction in another part of the charge of a matter omitted from the formula instruction does not rectify the error.*” (Emphasis added)

Later in the opinion the court further stated at P. 52:

“We are of the opinion that the rule to be followed herein is that set forth in the quite recent case of *Ferguson v. Nakahara*, Cal. App., 110 P. 2d 1091, decided March 12, 1941, and wherein at page 1096 it is said: ‘All instructions of the court are to be considered and construed as a whole to determine whether they contain reversible error. If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordi-

narily be cured thereby. *If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction.* The giving of instructions which are contradictory in essential elements may warrant a reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury.’ *Soda v. Marriott*, 118 Cal. App. 635, 5 P. 2d 675; see, also, *Akers v. Cowan*, 26 Cal. App. 2d 694, 80 P. 2d 143.” (Emphasis added)

The facts in the case of *Williams v. Portland General Electric Co.* 247 Pac (2d) 494, (Oregon 1952) are not analogous, but the pertinent principle with regard to instructions is set forth in that case in the following language at P. 499:

“Misleading and inconsistent instructions are frequently deemed ground for new trials or reversals.” (citing cases).

Later the court said:

“The parties to any jury case are entitled to have the jury instructed in the law which governs the case in plain, clear, simple language. The objective of the mold, framework and language of the instructions should be to enlighten and to acquaint the jury with the applicable law. Everything which is reasonably capable of confusing or misleading the jury should be avoided. Instructions which mislead or confuse are ground for a reversal or a new trial.”

The Pennsylvania court in the cases of *Sears v. Birbeck*, 321 Pa. 375, 383, 184 A. 6, 10, and in *Randolph v. Campbell*, 62 A. 2d 60, uses this language in both cases:

“It is a primary duty of the trial judge—a duty that must never be ignored—in charging a jury to clarify the issues so that the jury may comprehend the questions they are to decide. * * * A trial judge’s charges which are inadequate or not clear, or which tend to mislead, are well recognized grounds for reversal.” (citing cases).

Defendant also contends that the court committed prejudicial error in failing to give defendant’s requested instruction which reads as follows:

“When a pedestrian is located on a roadway which is open to the use of the public for purposes of vehicular travel the pedestrian has the duty to yield the right of way to automobiles traveling on such roadway.”

As indicated earlier in this brief, it is defendant’s contention that plaintiff was walking or standing on a portion of the public roadway, rather than on a private driveway, at the time she was struck and that, therefore, the motor vehicle statutes quoted earlier in the brief were applicable to her conduct. Reading the court’s instructions as a whole reveal that the theory upon which defendant relied in this respect was never submitted to the jury. The jury had no opportunity under the instructions of determining whether or not the plaintiff was located on a public roadway or a private driveway at the time she was struck and accordingly had no opportunity to determine whether or not she was negligent per se for violating the state statute.

It should be noted that in the original pretrial order the driveway involved was referred to as a private driveway. However, immediately before trial on motion of the defendant the word private was stricken from the pretrial order.

The court's action in refusing to submit that issue to the jury was erroneous and prejudicial.

CONCLUSION

Based on defendant's contention that plaintiff was contributorily negligent as a matter of law the defendant asks the court to reverse the trial court and order judgment for the defendant. In the alternative, defendant, relying on the erroneous and prejudicial instructions of the court and the court's failure to give the requested instruction described, requests the court to set aside the verdict and order a new trial.

Respectfully submitted,

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