

1990

Harold Edwin (Hal) Rhodes v. John M. Fry and Judith L. Fry v. William c. Petersen : Brief in Opposition to Certiorari

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT

OF THE STATE OF UTAH

900478

HAROLD EDWIN (HAL) RHODES, :

Plaintiff/Appellee, :

vs. :

JOHN M. FRY and :
JUDITH L. FRY, :

Defendants/Third-party :
Plaintiffs/Appellants. :

vs. :

Case No. 900478

WILLIAM C. PETERSEN, :

Third-party Defendant. :

APPELLEE'S BRIEF IN OPPOSITION TO
APPELLANTS' PETITION FOR WRIT OF CERTIORARI

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL
DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH,
THE HONORABLE BOYD L. PARK

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FILED

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Clerk, Supreme Court, Utah

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APPELLEE'S BRIEF IN OPPOSITION TO
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QUESTIONS PRESENTED FOR REVIEW

1. Are there any special or important reasons for this Court to review the decision of the Court of Appeals, which affirmed, without opinion, the judgment of the trial court, where there is no apparent conflict with another decision of the Court of Appeals or this Court, nor any other reason justifying review by certiorari?

2. Did the trial court err in directing a verdict for the plaintiff passenger, where the defendant had stipulated that the plaintiff was not negligent, the trial court had previously directed a verdict in favor of plaintiff's driver based on the uncontroverted evidence, the accident was not one which would

happen in the absence of negligence, and the evidence established that defendant was negligent?

3. If this Court determines that the trial court did err, should this case be remanded for a new trial on negligence only, because defendant has not claimed any error in the juries assessment damages?

DECISION OF THE COURT OF APPEALS

There was no written opinion entered by the Court of Appeals. The case was decided on an expedited basis under Rule 31 of the Utah Rules of Appellate Procedure.

JURISDICTION

The Order of Affirmance of the Court of Appeals was filed September 18, 1990. Defendants' petition for Writ of Certiorari was filed October 13, 1990. Jurisdiction is conferred upon this Court by Utah Code Ann. § 78-2-2(3)(a) (Supp. 1990).

CONTROLLING PROVISIONS

The provisions of Rule 46 of the Utah Rules of Appellate Procedure are set forth below. Plaintiff-Appellee Rhodes is not aware of any other constitutional provisions, statutes, ordinances or regulations which are controlling in this case.

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of

the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

STATEMENT OF THE CASE¹

A. Nature of the Case. This is a civil action to recover for personal injuries suffered in an automobile accident.

B. Course of Proceedings and Disposition Below. The critical parties in this action are appellee Hal Rhodes ("Rhodes") who is a passenger in an automobile driven by third-party defendant William C. Petersen ("Petersen"). The Peterson vehicle collided with a vehicle driven by defendant-appellant John M. Fry ("Fry"). Fry's mother, Judith L. Fry was also named as a defendant based on her signing of Fry's driver's license application. The pleadings

¹ Citations to those portions of the record which were paginated by the trial court clerk in accordance with Rule 11(b) of the Utah Rules of Appellate Procedure will be to "R. [page number]." Only one portion of the transcript was so paginated, that of the testimony of Dr. Rudolph Limpert on the second day of trial, November 29, 1988. The balance of transcript will be cited by date and page number, e.g. "Tr. 11-29-88 p. ____".

at the time of trial included an amended complaint by plaintiff which stated claims for negligence against Fry and against Petersen. (R. 142-45.) Fry had filed a third-party complaint against Petersen. (R. 90-95.)

The case was tried before a jury commencing November 28, 1988. (R. 374-86.) Petersen made a timely motion for directed verdict as against both plaintiff and Fry. (Tr. 11-29-88 p. 102, 109; R. 500.) The trial court granted the motion and dismissed Petersen. (Tr. 11-29-88 p. 197.)

Rhodes made a timely motion for directed verdict that he was not negligent. All parties stipulated to the motion, and it was granted. (Id.)

Rhodes also made a timely motion for a directed verdict that Fry was negligent. (Id.) The court took the motion under advisement (Tr. 11-30-88 p. 9), and submitted the case to the jury.

Fry requested, and the court rejected, a jury instruction on "unavoidable accident." (R. 324; Tr. 11-30-88 p. 46.) The case was submitted to the jury on a special verdict, but the jury was instructed to answer questions relating to the amount of plaintiff's damages regardless of its verdict on negligence. (Tr. 11-30-88 p. 49.)

The jury found that Fry was not negligent. (R. 303-04.) The trial court thereafter granted plaintiff's motion for a directed verdict, which had been taken under advisement during the trial. (R. 424-30.) The trial court subsequently entered formal Findings of Fact and Conclusions of Law (R. 448-54), and a Judgment (R. 455-56). Fry filed his appeal on May 15, 1989. (R. 457-58.) Follow-

ing the submission of the briefs, the Court of Appeals designated this case for expedited decision under Rule 31 of the Utah Rules of Appellate Procedure. Oral arguments were held and the Court of Appeals thereafter entered its order affirming without opinion the judgment of the trial court.

C. Statement of Facts. The accident giving rise to this action occurred shortly after 8:00 p.m. on December 11, 1982, at the intersection of 1300 South and Main Street in Orem, Utah. (Tr. 11-28-88 p. 47; Tr. 11-29-88 p. 8.) The road on which both vehicles were traveling, 1300 South, is the main arterial road leading from the I-15 freeway to the University Mall in Orem, Utah. (A diagram of the intersection appears in the Appendix.) Plaintiff was a passenger in a Volkswagen "bug" driven by William Petersen. Petersen and plaintiff were on a double date; plaintiff and his date were seated in the back seat, and Petersen and his date in the front seat. (Tr. 11-29-88 p. 6.) The Volkswagen was proceeding east along 1300 South at a speed less than the speed limit.² There was no evidence of any lane changes by the Volkswagen. (Tr. 11-29-88 pp. 125, 133. See also Tr. 11-28-88 p. 64, Tr. 11-29-88 p. 29.) The Volkswagen was travelling in the right-hand (South) lane of the road. (Tr. 11-28-88 p. 58; tr. 11-29-88 p. 122.) The road at that point had two east-bound lanes plus a left-turn lane.

²Rudolph Limpert, who testified for Fry, estimated the speed of the Volkswagen at 44 to 48 miles per hour prior to application of the brakes, and 30 to 35 miles per hour at the point of impact. (R. 487-88, 493.) Greg DuVal, who testified for plaintiff, estimated the speed of the Volkswagen at 38 miles per hour prior to braking, and 25 miles per hour on impact. (Tr. 11-30-88 p. 26.) Petersen did not recall what speed he was going. (Id. p. 36.) The speed limit was 55 mph. (Tr. 11-28-88 p. 55.)

(Exs. 1 & 10, diagrams of accident scene, copies in appendix; Tr. 11-30-88 pp. 16-17.) The roads were clear and dry, and although it was dark, the street lights were on and visibility was clear. (Tr. 11-29-88 pp. 7, 32-33; Tr. 11-28-88 pp. 48-49.) The headlights on the Volkswagen were on. (Tr. 11-29-88 pp. 24, 132, 140.)

John M. Fry, 16 years old at the time of the accident, was also on a date. (Tr. 11-29-88 pp. 31-32.) His vehicle was proceeding west on 1300 South. (Tr. 11-29-88 p. 123.) He thought he was on the road to the Orem Recreation Center, but was confused and traveling 17 blocks off course in the wrong direction. (Tr. 11-28-88 p. 56.) He turned his vehicle left through the intersection and into the path of the Volkswagen. (Tr. 11-29-88 p. 123.) The Volkswagen left 35' 11" of skid marks in the right-hand travel lane (Tr. 11-28-88 p. 55; Ex. 2), but still collided with sufficient force to cause the Volkswagen to spin around and to knock all four occupants of the Volkswagen unconscious. (Tr. 11-29-88 pp. 9, 56, 132.) The four occupants in the Volkswagen therefore had little memory of the accident itself; however, Becky Jones, Petersen's date, recalled that she was turned around talking to plaintiff and his date when she felt Petersen slam on his brakes. She turned forward and saw the pick-up in front of the Volkswagen just as the collision occurred. (Tr. 11-29-88 pp. 131-32.)

Fry and his date similarly had little memory of the accident. Fry testified (plaintiff disputed this testimony) that he had been stopped at a red light prior to entering the intersection, and when the light turned green, he looked for on-coming traffic, saw none, and proceeded to make his turn. (Tr. 11-29-88 p. 105.) He further

testified that his vision was obstructed by a brown station wagon which was in the eastbound left turn lane and proceeding to turn left. (Id.) He also testified, however, that after making his initial visual check for on-coming vehicles and starting to make his turn, he did not again look for traffic in the eastbound lanes. Fry further acknowledged that his pickup sat "considerably higher off the road" than the station wagon. (Tr. 11-29-88 P. 44.)

The impact occurred in the southern most lane when Fry was nearly through the intersection (Tr. 11-29-88 p. 111), a distance of over 50 feet from where he began his turn (Tr. 11-30-88 p. 26.)³ It would have taken Fry at least six seconds to travel through the intersection. (Tr. 11-29-88 p. 169.) Fry nonetheless unequivocally testified that he only looked for on-coming traffic prior to starting his turn and did not look again at any point during the turn. (Tr. 11-29-88 pp. 41, 46, 105.)

Plaintiff suffered severe and permanent injuries in the accident, and has a 15% permanent partial disability as a result of the injuries. (Tr. 11-28-88 p. 161.) He has suffered and continues to experience considerable low back pain, with the result that he cannot participate in sporting and other activities as he used to, and is limited in his abilities to work and lift objects.

³This is not different from the testimony of Rudolph Limpert. Dr. Limpert testified that the pick-up traveled approximately 28.5 feet from the moment that Petersen would have perceived the pick-up. (R. 495.) Limpert gave no testimony concerning the total distance that Fry traveled across the intersection.

SUMMARY OF ARGUMENT

Review by a writ of certiorari is appropriate only when there is some special or important reason for such review. Fry asserts that the decision of the Court of Appeals conflicts with other decisions of this Court and the Court of Appeals, and that it constitutes a vast departure from the accepted and usual course of judicial proceedings. Neither assertion, however, is supported by the arguments in Fry's brief.

The Court of Appeals did not issue an opinion setting forth any legal holdings; it is therefore impossible for the decision to conflict with other decisions of the Court of Appeals or this Court. A review of Fry's arguments reveals that the "conflict" is really a claim that the Court of Appeals failed to correctly apply existing judicial precedent.

Neither the Court of Appeals nor the trial court departed from established judicial precedent. The trial court did not, contrary to Fry's argument, rely on any "negligence per se" concept. The trial court determined, in accordance with prior decisions of this Court, that the accident was caused by the negligence by some person, and was not unavoidable. The trial court further determined, based on all of the evidence, that reasonable minds could reach no conclusion other than that Fry was negligent. Further, even if the decision of the Court of Appeals was a departure from the accepted and usual course of judicial proceedings, it was not so great a departure as to warrant intervention by this Court.

In addition, Fry's assertion that the trial court held that a statutory violation is negligence per se was not raised before the trial court or the Court of Appeals. The argument should not be considered for the first time on a petition for writ of certiorari.

ARGUMENT

POINT I

NO SPECIAL OR IMPORTANT REASON EXISTS FOR REVIEW BY WRIT OF CERTIORARI.

Review by writ of certiorari is to be granted "only for special and important reasons." Utah R. App. P. 46. The types of cases appropriate for review by certiorari are those where the Court of Appeals has made a ruling on an issue of law which conflicts with another decision of the Court of Appeals, Utah R. App. P. 46(a), or of this Court, Utah R. App. P. 46(b), or where the decision is "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Supreme Court's power of supervision" Utah R. App. P. 46(c). This case does not meet any of these criteria.

One of the obvious purposes of allowing review where a Court of Appeals' decision conflicts with other decisions is to prevent conflicting precedents. No such risk exists in this case, because the Court of Appeals did not issue an opinion. There is no opinion

which can conflict with another decision of the Court of Appeals or of this Court.⁴

The holding of the Court of Appeals likewise does not conflict with other decisions of this Court or of the Court of Appeals. Fry's claim is really a claim that the Court of Appeals misapplied the law to the facts, not that the trial court or the Court of Appeals had decided a question of law in a manner which conflicts with other decisions. This point is demonstrated more fully below in Point II of this brief.

The discussion below also reveals that if any error was made, it did not lead to an unjust result nor constitute so far a departure from the usual course as to call for an exercise of this Court's power of supervision. The trial court determined, and Fry did not appeal the determination, that the accident was not one which would happen in the absence of negligent, and that the other persons who were in a position to have caused the accident were not negligent as a matter of law. The overwhelming weight of the evidence confirmed the trial court's legal conclusion, and es-

⁴Rhodes does not assert that review by writ of certiorari is never appropriate from a Rule 31 decision of the Court of Appeals. Such review was granted, for example, in Yearsley v. Jensen, 144 Utah Adv. Rep. 9 (Oct. 3, 1990). Rhodes only suggests that the lack of a published opinion is a factor which this Court should consider in deciding whether review by certiorari is warranted.

The Court of Appeals, on its own motion, scheduled this case for disposition under Rule 31. The apparent reason for proceeding under Rule 31 is that the case involves a narrow issue, the evidence of Fry's negligence was overwhelming, the supposed "expert testimony" of Rudolph Limpert did not really address the critical issue, and justice clearly demanded a speedy resolution to avoid further delay in giving the awarded damages to Rhodes. These same factors should persuade this Court to deny the Petition for Writ of Certiorari.

tablished that Fry was negligent; indeed, there was no substantial evidence which would support a finding that Fry was not negligent.

The decision of the trial court and the Court of Appeals was correct. Even if there were some technical error in the manner in which the decision was reached, however, no injustice was done. This is not a case which calls for an exercise of this Court's power of supervision by writ of certiorari. The petition should be denied.

POINT II

THERE WAS NO SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT A FINDING THAT FRY WAS NOT NEGLIGENT.

Point I of Fry's Petition asserts that there was competent evidence to support the jury finding that Fry was not negligent, relying mainly on testimony that Fry's view of oncoming traffic was obscured, and that his actions were not unreasonable. A closer look at all the evidence refutes the assertion.

The standard to be applied by this court in reviewing the trial court's directed verdict is whether there was "substantial competent evidence" which would have supported a jury verdict that Fry was not negligent. Canyon Country Store v. Bracey, 781 P.2d 414, 418 (Utah 1989) (quoting In re Estate of Kesler, 701 P.2d 86, 95 (Utah 1985)). See also First Security Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253, 1255 (Utah 1989). "Substantial evidence" has been defined as follows:

Substantial evidence is more than a mere scintilla of evidence though something less than the weight of the evidence. Substantial evidence is such relevant evidence as a reason-

able mind might accept as adequate to support a conclusion.

Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989) (citations and quotation marks omitted).

No "substantial competent evidence" was presented in the instant case which would support a jury finding that Fry was not negligent. Although the evidence was conflicting in many particulars, certain facts were not disputed. The night was clear, the roads were dry, and, although it was night, the street lights were on and visibility was clear. The Volkswagen in which plaintiff was a passenger was in good operating condition, and its headlights were on. The Volkswagen had the right of way and was traveling at a speed well below the posted speed limit. The Volkswagen was traveling in the center lane of the three eastbound lanes and did not make any sudden lane changes immediately prior to the collision. In summary, there was absolutely no evidence, and the trial court properly so held, of any negligence or improper driving by Petersen, the driver of the car in which plaintiff was a passenger. Petersen had a right to be where he was and driving in the manner he was at the time of the accident.

The evidence further established, without dispute, that Fry did not have the right of way. Fry intended to turn left across three lanes of traffic in an area where the posted speed limit was 55 miles per hour. According to Fry's testimony, he looked for on-coming traffic while his own pickup was stopped for a red light, but his view of on-coming traffic was at least partially obstructed by a station wagon in the eastbound left-turn lane. When the light

turned green, Fry looked once, did not see any on-coming traffic, and proceeded to turn. He traveled approximately 56 feet, taking approximately six seconds, before reaching the point of impact. After his initial visual check prior to starting his turn, he did not again even glance to see if there was any oncoming traffic from the eastbound lanes. In contrast, Petersen saw Fry and slammed on his brakes to avoid the accident. Petersen's vehicle left nearly 36 feet of skid marks in a straight line in the right-hand lane of travel on Petersen's side of the road.

If Petersen could see Fry, Fry obviously could have seen Petersen had he been looking. Fry had a duty to look and see what there was to see. The accident was totally avoidable had Fry done so and yielded to Petersen as required.

Utah Code Ann. § 41-6-73 (1981), amended by Utah Code Ann. § 41-6-73 (1988), as in effect at the time of the accident, provided as follows:

The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close to the turning vehicle as to constitute an immediate hazard.

Fry violated this section, and his violation was a factor that the jury could consider in determining whether he was negligent.⁵

⁵Fry asserts that the trial court improperly held that the violation of the statute constituted negligence per se. As an initial matter, this argument is raised for the first time in the Petition for Writ of Certiorari, and should not be considered. Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 657 (Utah 1988). The trial court did not, however, make an implicit holding of negligence per se. A review of the trial court's rulings shows that statute was cited only to show the

(continued...)

Rhodes acknowledges that there are prior Utah decisions where a plaintiff has lost at trial against a left-turning driver, and has attempted on appeal to establish that the left-turning driver was negligent as a matter of law, and that the jury decisions have been affirmed. In each of these cases, however, there was evidence that the plaintiff was also negligent. For example, in Smith v. Gallegos, 16 Utah 2d 344, 400 P.2d 570 (1965), Smith was a passenger in a vehicle driven by Jones which turned left at an intersection into the path of Gallegos, who was traveling straight through the intersection. Smith prevailed at trial, and Gallegos appealed, claiming that Jones was contributorily negligent as a matter of law because he had failed to yield the right of way. This Court affirmed, holding that Jones was entitled to assume, in determining whether an on-coming vehicle constituted an immediate hazard, that other drivers were not negligent. The evidence showed that Gallegos was exceeding the speed limit, had accelerated just before or while going through the intersection, and may have suddenly switched lanes just before the intersection. This Court held that there was some evidence to support the jury's verdict that Jones was not negligent in failing to yield to Gallegos.

Of similar effect is Gibbons v. Orem City Corp., 27 Utah 2d 184, 493 P.2d 1280 (1972), which also involved the question of whether a left-turning plaintiff was contributorily negligence as a matter of law. The defendant in Gibbons was exceeding the speed

⁵(...continued)
existence of a duty on the part of Fry, and was considered only as evidence of negligence in accordance with Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162, 1164-65 (Utah 1978).

limit, and this Court accordingly affirmed the jury verdict of no contributory negligence.

Another example is McCloud v. Baum, 569 P.2d 1125 (Utah 1977). The plaintiff was traveling straight through the intersection and was struck by a car turning left. The jury found the plaintiff 100% at fault. The evidence showed, however, that the plaintiff was exceeding the speed limit and had swerved around a camper and into the opposing traffic lane just before entering the intersection.

In each of the foregoing cases, the court allowed the jury to excuse the left-turning driver's failure to yield where the driver with the right of way was guilty of some negligent or improper conduct. No such circumstance existed in the instant case. Petersen was not negligent. The trial court so held based on the overwhelming evidence, and Fry has not appealed that determination. Reasonable minds could not differ in finding that Fry negligently failed to yield the right of way. To find otherwise would be to say that a left-turning driver whose view of on-coming traffic is obscured may nonetheless forge boldly ahead without regard to what perils may await.

The law forbids such indifference. In French v. Utah Oil Refining Co., 117 Utah 406, 216 P.2d 1002 (1950), for example, the plaintiff turned left in an intersection in front of the defendant's truck. The trial court directed a verdict that the plaintiff was contributorily negligent for having failed to yield the right of way. This Court affirmed and stated as follows:

Regardless of his exact position, plaintiff saw the truck some 120 feet away from him prior to

the time he entered the west lane of traffic and never again noticed it until just prior to the crash or until it was 6 feet from the point of impact.

216 P.2d at 1003.

Several other decision have also considered and rejected the contention that a driver may ignore hazards obscured by other vehicles. E.g., Richards v. Anderson, 9 Utah 2d 17, 337 P.2d 59 (1959); Hughes v. Hooper, 19 Utah 2d 389, 431 P.2d 983 (1967).

When faced with a non-negligent victim and a defendant who has violated the statute, the courts have not hesitated to direct a verdict of negligence. Henderson v. Meyer, 533 P.2d 290 (Utah 1975); Solt v. Godfrey, 25 Utah 2d 210, 479 P.2d 474 (1971).

All the evidence compelled the holding that Petersen was not negligent, and that he was doing what he had a right to do and was where he had a right to be. See Onyeabor v. Pro Roofing, Inc., 787 P.2d 525, 529 (Utah Ct. App. 1990). Fry had a duty to yield to him and was negligent, as a matter of law, for failing to do so. There was no substantial competent evidence to the contrary.⁶ The Court of Appeals properly affirmed the directed verdict.

⁶Fry points to the testimony of his expert witness, Rudolph Limpert, who despite extensive testimony of calculations and theories could only muster a conclusion that the accident was "unfortunate" and that Fry's conduct was not unreasonable if Fry's vision of oncoming traffic was blocked. (Fry claimed that a station wagon in the left-hand turning lane opposite Fry blocked his view.) Mr. Limpert's testimony, however, ignored the undisputed fact that Petersen's vehicle was in the right-hand lane of travel, did not change lanes prior to the accident, and was in a position where Petersen could see Fry.

The trial court ordered a transcript of Limpert's testimony, and granted Rhodes' motion for directed verdict only after carefully reviewing the transcript and concluding that Limpert's testimony did not support the jury's verdict.

POINT III

THE TRIAL COURT'S RULING WAS COMPELLED BY OTHER PROPER RULINGS WHICH FRY HAS NOT CHALLENGED.

Fry requested a jury instruction on "unavoidable accidents." The trial court denied the request because the accident did not fit in the class of accidents which happen in the absence of negligence. The trial court also held that neither Rhodes nor the driver of the vehicle he occupied was negligent. The net effect of these rulings, none of which have been challenged by Fry, is that the accident was caused by the negligence of some person, and the only possible person was Fry. This logic is corroborated by the evidence, set forth above in Point II, that Fry was in fact negligent.

Utah decisions have recognized a class of accidents which are "unavoidable":

It is obvious that there are some accidents, i.e., unusual and unexpected occurrences, which result in injury and which happen without any one failing to exercise reasonable care; and when this is so the accident is properly classified as unavoidable insofar as legal causation or the imposition of liability is concerned.

Woodhouse v. Johnson, 20 Utah 2d 210, 436 P.2d 442, 445 (1968) (footnotes omitted). A later case expressed the same concept:

If either party can avoid an accident by the exercise of proper care, it cannot be said to be unavoidable. The issue of unavoidable accident arises only where the evidence shows that the accident happened from an unknown or unforeseen cause or in an unexplainable manner which circumstances rebut the defendant's alleged negligence.

Stringham v. Broderick, 529 P.2d 425, 426 (Utah 1974).

The converse of this concept is that other accidents (those which are not unavoidable) are the result of the negligence of some person.⁷ Application of this concept was illustrated in the Florida case of Davis v. Sobik's Sandwich Shops, Inc., 351 So. 2d 17 (Fla. 1977). The plaintiff in that case, as in the instant one, "was an innocent passenger, free of any contributory negligence." 351 So. 2d at 18. The court held that where there was no evidence to indicate that the injury was the result of an unavoidable accident, and where there was no evidence that the accident was caused by anyone not joined in the action, the only possible conclusion was that one or more of the defendants was at fault. The court held that "the state of the evidence would require a new trial if petitioner failed to recover against at least one of the defendants. A verdict for all the defendants was legally precluded by the evidence." 351 So. 2d at 18-19.

⁷This assertion is not contrary to King v. Fereday, 739 P.2d 618 (Utah 1987), cited on page 19 of Fry's brief for the proposition that a collision alone does not create an inference of negligence, nor to McCloud v. Baum, 569 P.2d 1125 (Utah 1977), which is cited in Fry's quotation from King. The plaintiff in King was injured when her car was rear-ended by the defendant in heavy traffic. The plaintiff in McCloud was injured as he was traveling straight through an intersection on his motorcycle and was struck by the defendant's car, which came from the opposite direction and was turning left. In each case, the plaintiff was found to be 100% at fault. The cases stand only for the proposition that an inference of negligence may not be based solely upon the position or role of the drivers in the accident (i.e., the following car in a rear-end collision is not always at fault, nor is the left-turning car in an intersection collision always at fault). The plaintiff in each case was clearly negligent, so the cases did not address nor decide the question of whether the mere occurrence of a collision creates an inference that some person was negligent, in absence of evidence that the collision was "unavoidable."

Each of these factors is present in the instant case. The accident was not unavoidable. Fry's expert, Rudolph Limpert, ultimately characterized the accident as "unfortunate" (R. 497), and did opine that Fry had not done anything unreasonable, but that hardly establishes the accident as "unavoidable." The "unfortunate" circumstance identified by Dr. Limpert was that of an alleged station wagon in the left hand turn lane opposite from Fry, and which Fry claimed blocked his view of the Volkswagen. Even if the station wagon was there,⁸ having one's view blocked by another vehicle when wanting to make a left hand turn is certainly not a rare or uncommon occurrence. Limpert's blocked view theory ignored the undisputed fact that whereas the claimed station wagon was in the left-turn lane, Petersen was two lanes over in the right-hand lane of travel, and had been in that lane for some distance. Petersen's view of Fry was not blocked. The accident could have been avoided by Fry waiting until the station wagon completed its turn before starting his turn, or by Fry continuing to look for oncoming vehicles during the course of his turn. The accident was not unavoidable as that term has been defined by this Court.

The instant case, therefore, presents a set of circumstances different from the cases relied upon by Fry. The accident was not unavoidable. Fry stipulated that plaintiff was not negligent.

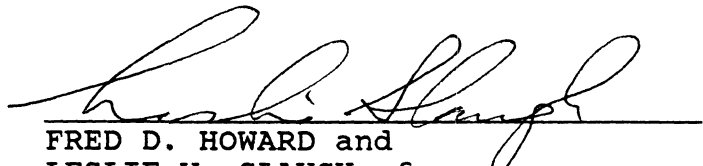
⁸None of the other witnesses recalled any vehicle in the left turn lane. Kirk V. Vest, who was traveling behind the Petersen vehicle and who was the only independent witness of the accident, also testified that he did not recall any other vehicle in the intersection. (Tr. 11-19-88 p. 124.) He further testified that the Petersen vehicle made no lane changes or sudden movements prior to the accident. (Id. at p. 125.)

The trial court held, and Fry has not appealed that determination, that Petersen was not negligent. There was no claim that the accident was caused by any other person. The only possible remaining conclusion is that the accident was caused by Fry, and this conclusion was supported by the overwhelming weight of the evidence. The trial court properly directed a verdict against Fry, and the Court of Appeals properly affirmed the judgment.

CONCLUSION

The trial court correctly granted a judgment notwithstanding the verdict. The decision is in accordance with other decisions of this Court and of the Court of Appeals. The result reached is just. No special or important reason exists to review the decision of the Court of Appeals. The petition for writ of certiorari should be denied.

DATED this 19th day of November, 1990.


FRED D. HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 19th day of November, 1990.

Scott W. Christensen, Esq.
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
Salt Lake City, Utah 84180

A handwritten signature in cursive script, appearing to read "Scott W. Christensen", is written over a horizontal line.

APPENDIX

Diagram of Accident Scene

MAIN

1300 S.

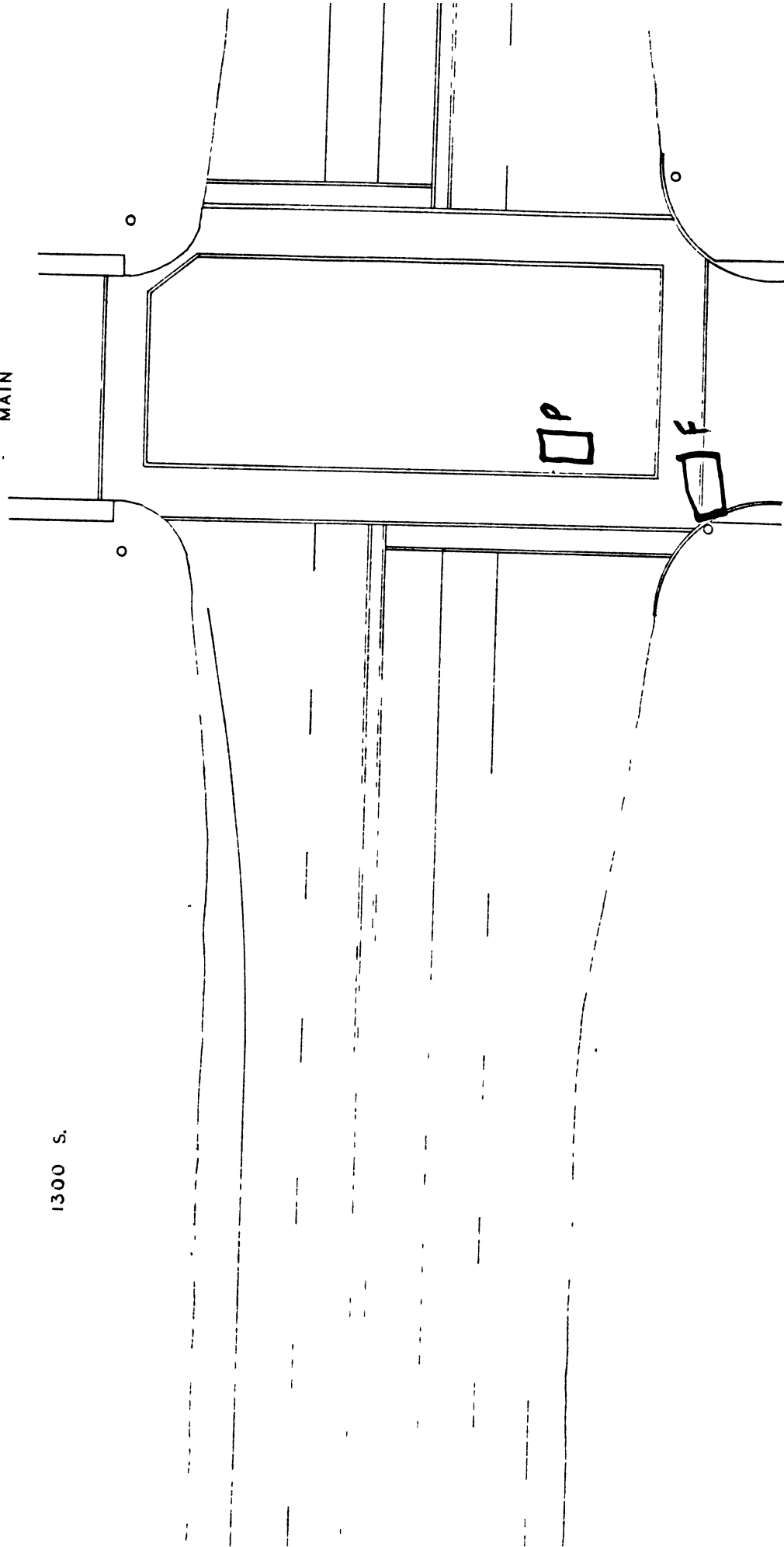
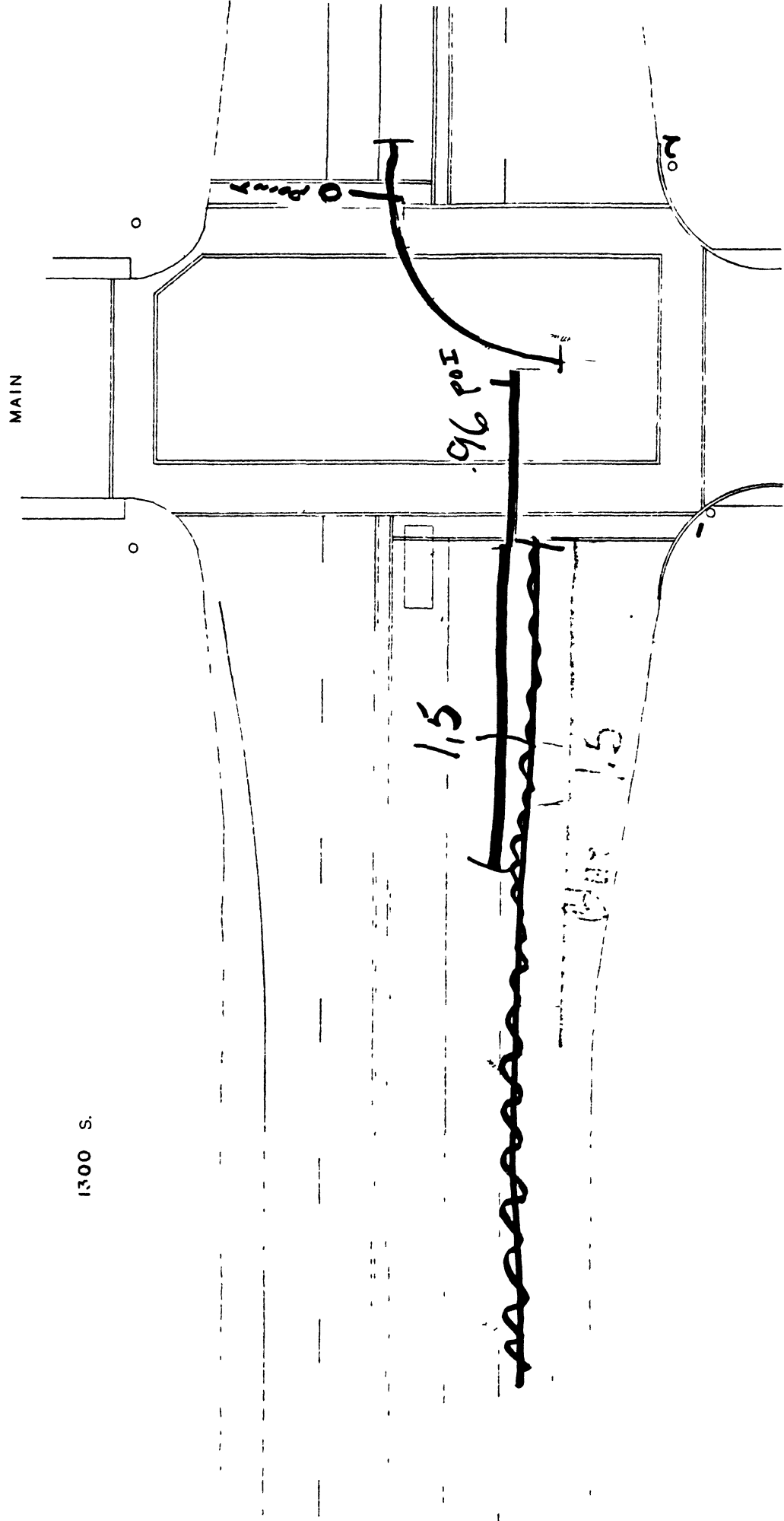


Exhibit I

6 DUVAL
SCALE 1" = 10'
ORDEM 10 88



G DUVAL
SCALE 1"=10'
DATE 10-14



EXPLANATION OF ACCIDENT SCENE DIAGRAMS

The scale on the initial drawings was 1" = 10'. The scale on these reductions is approximately 1" = 33'.

Exhibit 1 shows the resting place of the vehicles after the accident. "F" indicates Fry's pickup and "P" indicates the Petersen Volkswagen. (Tr. 11-28-88 p. 50.)

Exhibit 10 shows the probable path of travel of the vehicles leading to the collision. "POI" indicates the point of impact. (Tr. 11-29-88 p. 165.) The heavy black line from the cross-walk to the point of impact indicates the approximate length of the skid marks. (Id. p. 165.) The ".96" reflects the testimony of Newell Knight of the travel time of the Volkswagen while laying down the skid marks. (Id.) The remainder of the heavy black line (next to "1.5") reflects Mr. Knight's testimony of the distance the Volkswagen traveled from the point of perception of the Fry vehicle to the application of the brakes (i.e., the reaction time). (Id. at 177.)

The wavy line is an error. (Id. at 177-78.)