

1967

# Mary Hathaway v. Jay L. Marx, Floyd A. Marx, D/ B/A Carbon Animal By-Products Company, and Luey Haddock : Brief of Appellant

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# In The Supreme Court of the State of Utah

MARY HATHAWAY,

Plaintiff and Appellant,

vs.

JAY L. MARX, FLOYD A. MARX,  
CARBON-ANIMAL PRODUCTS  
COMPANY, and LUTY TRADING

Defendants and Respondents.

## BRIEF OF APPEAL

Appeal from the Judgment of the  
Court for Utah County.

Honorable Joseph E. Hanson, Judge.

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MARY HATHAWAY,

Plaintiff and Appellant,

vs.

JAY L. MARX, FLOYD A. MARX, d/b/a  
CARBON ANIMAL BY-PRODUCTS  
COMPANY, and LUEY HADDOCK,

Defendants and Respondents.

Case No.  
11030

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## BRIEF OF APPELLANT

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### STATEMENT OF THE NATURE OF THE CASE

This is an action by the owner-driver of an automobile for injuries arising out of an automobile accident which occurred June 27, 1961, at approximately 11:30 A.M. o'clock, on Highway 40. A collision occurred in a rural area at a dirt cross road as appellant attempted to pass respondent's truck.

### DISPOSITION IN LOWER COURT

The case was tried before the Honorable Joseph P. Nelson, sitting with a jury. The jury brought in a verdict of no cause of action. The Court instructed

the jury that the dirt road turnoff was an intersection. The jury apparently predicated its verdict upon appellant's contributory negligence in passing within 100 feet of an intersection.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the lower court as a matter of law upon the grounds that the Court erred in instructing the jury that the site of the accident was at an intersection within the meaning of the statutes of Utah; that passing within 100 feet of an intersection was unlawful. There was also irregularity on the part of a juror who stated to his fellows in the jury room material facts based on personal knowledge concerning material issues in the case which were not adduced in evidence.

## STATEMENT OF FACTS

Appellant was driving west on Highway 40, approximately 10 miles west of Roosevelt, Utah, on the 27th day of June, 1961, at approximately 11:30 o'clock A.M. The weather was clear and visibility was good. Highway 40, at the location of the accident, is relatively straight, and as the Highway approaches the dirt road turnoff from the east, there is a slight descent. About one-half mile to the east of the dirt road, Lake Boren turnoff, there is a crest of a hill so that a motorist traveling westerly is not able to observe the dirt road turnoff until driving over the crest of the hill and on the descent described. Once over the crest of the hill, Highway 40

can be observed for a considerable distance beyond the dirt road turnoff. The Lake Boren turnoff from Highway 40 for a motorist traveling west, as appellant was traveling in this case, is a paved roadway to the north, or to the right, and to the south, or left, there is a dirt road. Exhibit P.5 clearly shows the dirt road described, and Exhibit P. 4 shows the Lake Boren Road.

The testimony is uncontradicted that there were no highway signs, painted lines on the highway, or any marking of any kind to notify a motorist of an intersection at the dirt road turnoff (R. 16, 33). The dirt road, to the south, was sparsely traveled (R. 18-19). The Lake Boren Road was more frequently traveled than the dirt road, particularly during fishing season (R. 23).

Highway 40 on each side of the dirt road—Lake Boren Road is widened with marked lanes for acceleration as shown in Exhibits P. 2, P. 3, and P. 4.

Appellant testified that as she approached defendant's truck from the rear there was no other traffic on the highway, and that she proceeded to pass defendant's truck which was moving at a slow rate of speed. Defendant's truck made no visible signals to indicate a left hand turn as both vehicles approached the vicinity of the dirt road turnoff and appellant was not aware of an intersection. Officer Harrington, state trooper, who investigated the accident, testified that the turn signals on the truck did not work (R. 21), and further, that if they did, they would not be visible because they were covered with dirt

(R. 22). Appellant proceeded to pass defendant's truck, and simultaneously defendant Haddock turned the direction of the truck to make a turn onto the dirt road. The vehicles came to rest in the proximate position shown in Exhibits P. 1, 2, and 3.

Instruction 16 (R. 45) of the trial court stated the following:

**"No vehicle shall at any time be driven to the left side of the road when . . . approaching within 100 feet or on traversing any intersection".**

The trial court defined contributory negligence, then continued in Instruction No. 5, Proposition II 1(b) (R. 37);

**"Plaintiff attempted to pass to the left of a vehicle at an intersection when it was unlawful to do so" (R. 37).**

The appellant objected to the Court giving instructions No. 5 and 16 (R. 165).

### POINT ONE

**THE DIRT ROAD TURNOFF AT THE ACCIDENT SCENE WAS NOT AN INTERSECTION WITHIN THE MEANING AND CONTEMPLATED CONSTRUCTION OF SECTION 41-6-58 UTAH CODE ANNOTATED, WHICH PROHIBITS DRIVING ON THE LEFT SIDE OF A ROAD WITHIN 100 FEET OR ON TRAVERSING AN INTERSECTION.**

An intersection is defined in our Motor Vehicle Code as follows:

**"Section 41-6-8. Intersection — Crosswalk — Safety zone, Business, Residence, and Urban Districts (a)**



"Intersection". (1) The area embraced within the prolongation or connection of the lateral curblines, or if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle come in conflict."

A Highway is defined as follows:

**"Section 41-6-7. Streets, highways, and roads and portions thereof** (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 . . ."

The State Road Commission has the authority and obligation to place highway traffic control devices and signs. Section 41-6-20 UCA vests that right with the State Road Commission and directs it to adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of the Motor Vehicle Act. Section 41-6-21 provides as follows:

**"Section 41-6-21. Placing and maintenance upon state highways.** (a) The State Road Commission shall place and maintain such traffic-control devices in conformance with its manual and specifications upon all state highways as it shall deem necessary to indicate and to carry out the provisions of this act or to regulate, warn or guide traffic." (Emphasis added.)

The evidence is uncontradicted that the State Highway Commission did not place any control to regulate, warn, or guide traffic traveling on Highway 40 as that Highway approached the dirt road-

Lake Boren turnoff that an intersection existed. In fact, a motorist passing as appellant did in this case, would only see the dirt road to the left of the highway which would appear as another farm lane.

A double painted line did not warn a motorist that he could not travel to the left hand side of the highway. In the instant case Exhibits P. 3 and P. 4 clearly show that a broken white stripe indicating the middle of the highway was the only marking on the highway. Such a marking did not prohibit passing or traveling to the left hand side of a highway. There were not regulatory signs indicating that the dirt road-Lake Boren turnoff existed or that an intersection even existed. Obviously, the State Road Commission did not classify the dirt road-Lake Boren turnoff as an intersection, for it did not use its authority to notify the public of its existence.

The Utah State Road Commission has adopted a Manual on Uniform Traffic Control Devices for Streets and Highways/<sup>1</sup> published by the United States Department of Commerce. This manual, so far as it pertains to no passing zones and intersections, provides as follows:

Section C (p. 53) of the Manual provides for the use of warning signs. Section K-10, Cross Road Sign

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<sup>1</sup>/Manual on Uniform Traffic Control Division for Streets and Highways, prepared by the National Joint Committee on Uniform Traffic Control Devices; American Association of Highway Officials, Institute of Traffic Engineers, National Committee on Uniform Traffic Laws and Ordinances, National Association of County Officials, and American Municipal Association, herein referred to as the "Manual".

(W 2-1) (P. 60) provides:

"The Cross Road sign, showing a vertical cross symbol, shall be erected on a through highway to indicate the presence of a cross road. Its use should be restricted to intersections with roads that are improved to such an extent that there is likely to be a fairly large volume of traffic entering or crossing the through route and where poor sight distance or obscured entrances make it advisable that the intersection be called to the motorists's attention. It should not ordinarily be used where Junction signs (sec. 1D-13) or Advance Turn Arrows (sec. 1D-15) are present. Cross Road signs should not be erected at unimproved intersecting roads. Too frequent use of the Cross Road sign should be avoided."

Part II, "Markings" in the Manual provides under 2A-4 "Types of Markings" (P. 114):

"Markings as defined for the purpose of this manual are of a number of types:

1. Pavement Markings:

- (c) No-passing zone markings (Sec. 2B 7 to 10)".

"2B-8 **No Passing Zones Markings** (P. 123) provides:

"A no-passing zone shall be marked by a solid barrier line placed as the right-hand element of a combination line along the center or lane line. This barrier line shall be yellow.

The barrier line shall be not less than 4 nor more than 6 inches wide, and shall be separated from the adjacent line by a space of not less than 3 nor more than 4 inches."

"2B-9 Application of No-Passing Zones Markings" (P. 123) states:

"On a two-lane highway the combination no-passing line shall follow the center line throughout the no-passing zone . . . In no case shall the marking be less than 500 feet in length. If the actual no-passing distance is less than 500 feet, the additional length of marking shall be added at the beginning of the zone . . . The no-passing barrier line is also used on two-way roadways at pavement-width transitions (sec. 2B-14) and on approaches to obstructions which must be passed on the right (sec. 2B-18). It may also be used on approaches to intersections."

The physical facts are that Highway 40 is wider on each side of the Lake Boren turnoff, but this would not alert a motorist of its being an intersection, for Highway 40 between Soldiers Summit and the Colorado border is widened and narrowed repeatedly with and without markings.

This court has had occasion to consider a similar physical fact situation as the dirt road-Lake Boren turnoff in **Douglas v. Giganden** (1958) 332 Pac. 2d 932, 8 Utah 2d 245. That case involved a motorist who commenced passing a pickup truck who's driver, without warning, commenced to make a left hand turn onto Peters Point Road. There were no highway markings to prohibit passing or were there any regulatory signs indicating the intersection of Peters Point Road with the main highway. This Court rightly held that Peters Point Road was not an intersection within the meaning of our statutes. The same test applies here. The State Road Com-

mission in both situations did not prohibit passing by establishing no-passing zones either through the use of painted markings on the highway or regulatory signs pursuant to its Manual. A traveler using Highway 40 in the vicinity of the dirt road-Lake Boren turnoff would not know the purported intersection by reason of its physical location, i.e. a dirt road cross secting the main highway in a farming community. The State Road Commission would have marked the intersection if in fact it was one. As a matter of law, an intersection did not exist and the trial court erred in instructing the jury as to the law concerning intersections.

## POINT TWO

**THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT WAS UNLAWFUL FOR APPELLANT TO PASS TO THE LEFT OF A VEHICLE AT AN INTERSECTION.**

The Trial Court charged that appellant would be guilty of contributory negligence in Instruction No. 5, Proposition 1 B, to-wit:

“Plaintiff attempted to pass to the left of a vehicle at an intersection when it was not lawful to do so” (R. 37).

This error was further developed in Instruction No. 16 when the Trial Court instructed as follows:

“The laws of the state provide . . . no vehicle at any time should drive to the left side of the road way when approaching . . . within 100 feet or on traversing any intersection . . .”

The dirt road turnoff that defendant's truck was turning into simply was not an intersection within the contemplation of Section 41-6-8 UCA 1953 and was not recognized as such by the State Road Commission for the reasons set forth in Point I, as a matter of law, the above instructions were erroneous.

### POINT THREE

**APPELLANT WAS PRECLUDED FROM HAVING A FAIR TRIAL WHEN A JUROR WITHHELD FROM THE COURT HIS PERSONAL KNOWLEDGE OF THE ACCIDENT BY REASON OF HAPPENING UPON THE SCENE IMMEDIATELY AFTER ITS OCCURRENCE AND SO TESTIFIED TO HIS FELLOW JURORS ON MATERIAL FACTS NOT IN EVIDENCE IN THE JURY ROOM.**

The jury foreman advised counsel for respondent that he happened upon the scene of the accident shortly after its occurrence, and observed Stansfield there and so advised the jury in the jury room. The jury foreman did not advise the Court of his presence at the scene of the accident shortly after it occurred.

Mr. Stansfield, a prospective juror was challenged for cause during the impanelling of the jury and was excused by the Court. Though the court reporter did not record the testimony, counsel for respondent will agree that Mr. Stansfield knew defendants, was their business associate, and a long time personal friend of defendant Haddock; for these relationships, the trial judge granted appellant's counsel challenge for cause.

Mr. Stansfield remained in the courtroom and took the stand on respondents behalf, testifying that he observed the accident by reason of his position as he traveled west on Highway 40 behind appellant. Further, his testimony was contradictory to Trooper Harrington, for he said the signal lights of defendant's vehicle were working and in fact were blinking, indicating a left hand turn just prior to the accident. Upon cross examination it was brought out not only did Mr. Stansfield have a business acquaintance with respondents, but he had a firm opinion that appellant was responsible for the accident originating, supposedly, from his first hand observation of the accident which he withheld from the Court while he was under consideration as a juror (R. 127).

The jury foreman failed to acknowledge upon inquiry by the trial court that he had been at the scene of the accident. The jury foreman told his fellow jurors that he happened upon the scene of the accident shortly after it happened and Mr. Stansfield was present. He knew that Stansfield was telling the truth concerning the left hand turn signals of defendant's truck and that they were properly working. It was material for the jury foreman to acknowledge that he had been at the scene of the accident shortly after its occurrence, for questions could have been put to him as to whether or not he had a preformed opinion concerning the accident and its cause as did Mr. Stansfield (R. 127). The jury foreman stating to his fellows in the jury room that he had been present at the accident and seen Mr. Stansfield was a material fact based upon personal