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

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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, d/b/a CARBON
ANIMAL BY-PRODUCTS
COMPANY, and
LUEY HADDOCK,
Defendants and Respondents.

Case No.
11030

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
Fourth Judicial District Court for Utah County
Honorable Joseph E. Nelson, Esq., Judge

HANSON & GARRETT
by W. BRENT WILCOX
520 Continental Bank Bldg.
Salt Lake City, Utah
*Attorneys for
Respondents*

ROBERT W. HUGHES
425 Newhouse Building
Salt Lake City, Utah
Attorney for Appellant

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MARY HATHAWAY,
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COMPANY, and
LUEY HADDOCK,
Defendants and Respondents.

Case No.
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BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an action by the plaintiff-appellant against the defendants-respondents to recover for the personal injuries to said plaintiff-appellant resulting from an automobile collision.

DISPOSITION IN LOWER COURT

The case was tried before the Honorable Judge Joseph E. Nelson, sitting with a jury. The jury brought in a verdict of no cause of action. Subsequently, the plaintiff filed a motion for a new trial which, after argument by counsel for the parties and submission of Memorandums of Law, was denied.

intention of making a left turn across said highway onto the dirt portion of the Lake Boren Road, which intersected with Highway 40 and ran in an easterly and westerly direction. As respondents' truck approached the intersection, the turn signals were operating (TR 126), indicating a left-hand turn. As he began his left turn, the plaintiff's vehicle, which was attempting to pass him on the left, collided with the respondents' truck, resulting in the alleged injuries to the plaintiff. The plaintiff, along with her children, was also southbound on Highway 40. As she approached the respondents' truck, which was moving at a slow rate of speed, she attempted to pass on the left side in the northbound lane of travel, during which attempt the collision occurred. Had she stayed in the southbound lane, she would have avoided the respondents' truck (TR 128).

The point of impact was in the northbound lane of traffic and within the confines of the intersection of U.S. 40 with the Lake Boren Road. See plaintiff's Exhibits 1 and 2.

The Lake Boren Road is asphalt west of the intersection and dirt east of the intersection. U.S. Highway 40 is generally a two-lane highway, one northbound lane and one southbound lane; however, in the area of the intersection where the collision occurred, U.S. 40 is a four-lane highway inasmuch as two separate and distinctly marked acceleration and deceleration lanes have been placed on each side of the road for cars to enter onto U.S. 40 and exit

U.S. 40 from the Lake Boren Road either from the east or west (TR 14-15). The acceleration and deceleration lanes commence approximately one-tenth of a mile or 600 feet north of the Lake Boren intersection (TR 11, and also see plaintiff's Exhibit 4). The acceleration and deceleration lanes are marked with a broken white line. The lane marking stripes do not continue across the area encompassing the Lake Boren intersection but continue on the other side of the intersection (see plaintiff's Exhibit 4). Both the dirt and paved roads intersect Highway 40 at 90° angles, and stop signs are located at the intersection of both the dirt road and the paved road with U.S. Highway 40 (see plaintiff's Exhibits 5 and 3 and TR 16). North of the intersection, from which direction the plaintiff was traveling, there is a rise in the topography over which U.S. 40 passes. The Lake Boren Road intersection is visible from that rise, which is approximately a half mile away from the intersection (TR 34 and 67). As the plaintiff proceeded over the rise, she could see the intersection (TR 34) and the widened out portion of the highway (TR 67).

Both the paved portion and the dirt portion of the Lake Boren Road were traveled by the public; however, the paved portion was traveled more frequently, especially in the fishing season (TR 18-19).

During the voir dire of the jury, it was discovered that one of the prospective jurors, Reed Stansfield, was an eye witness to the accident and was

accordingly dismissed from jury duty. He was subsequently put on the stand by the defendants and testified that he was behind the plaintiff and defendant at the time the collision occurred, that he definitely saw the defendant's signal lights operating, that the defendant had commenced his turn and was in the northbound lane of traffic when the collision occurred, and that had the plaintiff stayed in her lane of traffic a collision would not have occurred.

ARGUMENT

POINT I

THE EVIDENCE PRESENTED CLEARLY PROVIDES SUFFICIENT BASIS TO SUPPORT A CONCLUSION BY THE JURY THAT THE INTERSECTION OF THE PAVED LAKE BORN ROAD AND THE DIRT ROAD WITH U.S. HIGHWAY 40 WAS AN INTERSECTION AS DEFINED BY THE STATUTES OF THE STATE OF UTAH.

It should first be noted that appellant's Points I and II will be treated jointly under respondents' Point I herein.

The issues as framed by appellant's Points I and II are not a full and complete statement of the issue. The only possible question arising out of the trial in connection with the negligence of the plaintiff for passing within an intersection or within 100 feet thereof as provided in Utah Code Annotated, 41-6-58, is whether or not there is sufficient evidence to support a verdict by the jury that said in-

tersection was in fact an "intersection," as defined in the Utah statutes and as contemplated in the above-cited provision. Of course, there is no way of knowing that the jury even considered this as an element in finding against the plaintiff; however, for the purposes of argument we shall assume that the basis of the jury verdict was the negligence of the plaintiff for passing within an intersection or within 100 feet thereof. The appellant in her Point II merely reiterates her point in Point I, that the meeting of the U.S. Highway 40 and the dirt and paved roads was not an intersection. Obviously, the court was justified in giving an instruction concerning the possible negligence of the plaintiff passing at an intersection if there was any evidence to substantiate the fact that it was an intersection and that she had passed within 100 feet of the intersection. See *Adamson vs. United Mine Workers*, 3 Utah 2nd 37, 177 Pac. 2nd 972 (1954) in regards to the "any evidence" rule. However, before we take up the factual question it should also be pointed out that appellant's Point II is misleading in that it attempts to give the impression that the court instructed as a matter of law that an intersection did exist at that point. The instructions read as a whole and not out of context as the appellant places them shows what the court obviously meant to do was to present to the jury the question of whether or not there was an intersection, and if so, whether or not the plaintiff had attempted to pass within the confines of the

intersection or within 100 feet thereof. The instructions as fully given are as follows:

INSTRUCTION NO. 5

“Even though you find the proposition set forth in the next proceeding instruction in favor of the plaintiff, nevertheless, the claim of the plaintiff may be barred by contributory negligence on her part.

“Before contributory negligence would preclude plaintiff’s recovery, the defendant has the burden of proving by a preponderance of the evidence that the two propositions are true:

PROPOSITION NO. 1

“That the plaintiff was negligent in the operation of her automobile immediately prior to the collision in one or more of the following particulars:

(a) Plaintiff drove at a speed which was greater than was reasonable and prudent under the circumstances;

(b) Plaintiff attempted to pass to the left of a vehicle at an intersection when it was unlawful to do so;

(c) Plaintiff failed to yield the right of way to defendant’s vehicle;

(d) Plaintiff failed to maintain a reasonable lookout for other vehicles on the highway.

PROPOSITION NO. 2

“That the negligence of the plaintiff, if

any, proximately contributed in producing her own injuries and damage.

“If you find the foregoing propositions against the plaintiff, she cannot recover.”

INSTRUCTION NO. 16

“The laws of this state provide that the driver of any vehicle overtaking another vehicle proceeding in the same direction shall pass at a safe distance to the left thereof and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

“The driver shall, when reasonably necessary to insure safe operation, give an audible warning with his horn, but shall not otherwise use such horn.

“No vehicle shall at any time be driven to the left side of the roadway when approaching the crest of a grade or upon a curve in a highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction or when approaching within 100 feet of or traversing any intersection.

“The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent having due regard to the speed of such vehicle, the traffic upon and the condition of the highway.

“The driver of any vehicle upon a highway, before turning from a direct course or moving right or left upon a roadway, shall first see that the movement can be made with reason-

able safety and whenever the operation of another vehicle may be affected by such movement shall give a signal as required plainly visible to the driver of such other vehicle of the intention to make such movement. The signal herein required shall be given either by means of the hand and arm in the manner herein specified or by approved mechanical electrical signal device, and whenever the signal is given by means of the hand and arm the driver shall indicate his intention by extending the hand and arm horizontally from and beyond the left side of the vehicle.

“A failure to comply with the foregoing requirements would constitute negligence.”

In light of the instructions as given, it is obvious that the instructions merely stated the possible alternatives of negligence which the jury could find, and did not instruct the jury, as the appellant asserts, that there was as a matter of law an intersection at the point of the accident.

However, the evidence and the pleadings on file herein obviously constituted sufficient evidence upon which a jury could find that the meeting of U.S. Highway 40 with the Lake Boren paved and dirt road was an intersection, and that that evidence was also sufficient to justify the court in finding as a matter of law that it was an intersection, had the court been so inclined to do so.

The verdict need only be supported by some competent evidence. The requirement of some competent evidence for that point was clearly satisfied

by the testimony which established the existence of the acceleration and deceleration lanes which extended approximately one-tenth of a mile in both directions from the intersection of U.S. Highway 40 and the Lake Boren paved and dirt roads. The appellant would have the court believe that there were no indications of an intersection and no markings prohibiting passing in that area. The basis of that erroneous assumption appears to be derived from the appellant's reading of the case of *Douglas vs. Gigandet*, 8 Utah 2nd 245, 332 Pac. 2nd 932 (1958). A close examination of that case will show that it does not say what appellant would have it say. In that case the defendant, who was the passing vehicle, had filed a counterclaim against the plaintiff. The trial court entered a no cause of action against all parties. The defendant appealed on the grounds that it was error to instruct that the defendant had a duty to use due care to observe that the vehicle of the plaintiff was approaching at a point at which a side road departed from the highway and also in instructing that the defendant had no right to attempt to pass the plaintiff's vehicle at an intersection. The court held there that the Peters Point Road was not a highway or road, and therefore could not meet the statutory definition of an intersection. That was the extent of the holding of the case. In the court's discussion leading up to its conclusion, the court indicated that there was nothing to indicate a turnoff road from the highway and no markers showing that a road left the highway anywhere in the area.

From this statement of fact the plaintiff appears to evolve a specific test in determining the existence of an intersection. It appears to respondent that the supreme court did not intend such statement as the test, and certainly not as an exclusive test. But even if such statement were the test, the present situation would still fall within that definition since the acceleration and deceleration lanes were an obvious marking on the road from which every observant motorist could conclude that there was a special situation in that area of U.S. Highway 40 allowing for the entrance and exit of vehicles from either side of the Lake Boren Road (TR 34). The appellant herself testified that when she was at the crest of the hill to the north she could see from that point the widened portion of the road in front of her.

The testimony of the police officer shows that the Lake Boren Road to the west of Highway 40 was a paved county road which was publicly traveled and a maintained highway and that stop signs were placed on the east and west sides of the intersection of U.S. Highway 40 and the Lake Boren Roads. He also testified that the dirt portion of the Lake Boren Road, which proceeded east from Highway 40 also was publicly traveled, although not as much as Highway 40 or the paved portion of the Lake Boren Road. Of course, the fact that the dirt and paved portions of the Lake Boren Road were not used to the extent of Highway 40 is not in any way determinative of their status. In the present case the

evidence shows that the two intersecting roads, U.S. Highway 40 and the paved and dirt portion of the Lake Boren Road, both came within the definition of a road or highway as set forth in the Utah Code Annotated 1953, 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.”

An examination of the cases set forth in 53 ALR 2nd 861 show that such a road as the Lake Boren Road, where it is partially paved, publicly maintained, and publicly used, is within the classification of a highway or street for the purposes of this lawsuit. Once it is determined that the Lake Boren Road is a highway or road within the statutory contemplation, the problem faced in *Douglas vs. Gigandet* has been resolved.

The statutes of the State of Utah define an intersection as being:

“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.” Utah Code Annotated 1953, 41-6-8

U.S. Highway 40 and the Lake Boren Road, being roads or highways under the statutory definition, their connection is by definition an intersection

without further proof. However, even if we were to accept the proposition of the plaintiff that an intersection must also have signs and markings so indicating the intersection of roads, the evidence in this case establishes such signs and markings: the widened highway extended on both sides of the intersection with clearly defined acceleration and deceleration lanes proceeding from the intersecting Lake Boren Road, and the existence of stop signs on both sides of U.S. Highway 40 where the dirt and paved portions of the road intersect. It is obvious that any driver attentive to the conditions in front of him as he came over the rise north of the intersection would observe these markings and signs delineating the existence of the two intersecting roads.

The appellant in her Point I attempts to assert that there is no intersection within the statutory contemplation unless the Utah Highway Department has marked the intersection according to the *Manual on Uniform Traffic Control Devices for Streets and Highways* published by the United States Department of Commerce. First of all, the *Manual*, which appellant freely quotes from in her Brief, was never presented as evidence in this case, and is now being asserted on appeal by the appellant. The *Manual* merely suggests procedures which the Highway Department should adopt. However, it is not in any way connected with the statutory definition of an intersection, and furthermore it is incompetent evidence before the Court at this time. The Court on

many occasions has held that evidence not presented in the case prior to appeal was incompetent and should not be considered on appeal. *Cooper vs. Foresters Underwriters, Inc.*, 257 Pac. 2nd 540, 123 Utah 215, where the court held that it could not look dehors the record on appeal and consider facts stated in briefs but absent from the official record. And also in the case of *Watkins vs. Simonds*, 385 Pac. 2nd 154, 14 Utah 2nd 406, the court held that the appellate court could not consider facts stated in briefs which may be true but which are not present in the official record. The same was held also in the case of *Reliable Furniture Company vs. Fidelity & Guaranty Insurance Underwriters, Inc.*, 380 Pac. 2nd 135, 14 Utah 2nd 169. Respondents concede that the applicable Utah statutes, which the appellant cites, are properly presented to the Court; however, the *Manual* carries no such status and therefore is improper in the appellant's Brief and should be disregarded. The appellant argues in her Point I that the intersection was not marked as the Highway Department may have marked other intersections. The obvious answer to this is that the actions of the State Road Commission do not control the question of whether an intersection exists as defined in the previously cited statute. The State Road Commission has been delegated authority over the control of traffic throughout the state, and how they carry out their obligation is not determinative of the issue before the Court.

The respondents contention, therefore, is that the Lake Boren Road was obviously a public highway, that it created an intersection where it intersected with Highway 40, and that the existence of stop signs and the acceleration and deceleration lanes is additional evidence of such intersection.

It is also interesting to note that the appellant apparently sees this intersection question as a last-minute device to overturn the verdict of the jury, for it appears that prior to the trial the appellant had no doubts as to it being an intersection. In the plaintiff's Complaint in Paragraph Three, the appellant stated:

"That at all times herein alleged, the intersection of Lake Boren Road and U.S. Highway 40 is an intersection approximately ten miles west of Roosevelt, Utah in Duchesne County, Utah. (Emphasis ours)

And in Paragraph Four of said Complaint, the plaintiff stated:

"That on or about the 27th day of June, 1961 at approximately 11:30 A.M. plaintiff was traveling west on U.S. Highway 40 approaching the Lake Boren Road or intersection and the defendant Luey Haddock was traveling west ahead of plaintiff; . . ." (Emphasis ours)

In the trial of the action the appellant's counsel frequently referred to the "intersection," and now the appellant is in the precarious position of questioning on appeal whether the jury was entitled to consider

the intersection as an intersection. And as to Point II previously discussed, the appellant is also in the peculiar position of complaining of the court's instructions wherein reference was made to an intersection, when in fact the appellant had herself submitted a proposed Instruction No. 1, which stated in part:

"That on the 27th day of June, 1961, at approximately 11:30 o'clock A.M. plaintiff was driving west on U.S. Highway 40 and approaching the intersection of Lake Boren Road, Duchesne County."

Had plaintiff's instruction been given, would the plaintiff now be alleging that it was error to give that instruction? And also note plaintiff's Instruction No. 2, which was given in substance by the court in Instruction No. 6, which stated in part:

". . . It is likewise negligence for the driver of a motor vehicle on a public highway to make a left-hand turn when it is unsafe to do so by reason of a vehicle passing to the left or to commence to make a left turn from a public highway to an intersection to fail to see a vehicle on the highway there to be seen."

It appears obvious to the respondents that the junction of the Lake Boren Road and U.S. Highway 40 was an intersection within the contemplation of the law, that it was properly so considered by the jury and even the plaintiff until the jury had returned with its verdict.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING THE PLAINTIFF'S MOTION FOR NEW TRIAL BASED ON JURY MISCONDUCT, THERE BEING NEITHER COMPETENT EVIDENCE BEFORE THE COURT OF SUCH MISCONDUCT NOR A SHOWING OF PREJUDICE TO THE PLAINTIFF'S CASE.

Appellant in her Point III makes a contention which is clearly contrary to the well-established law in the State of Utah in connection with jury misconduct. She appears to allege that the misconduct was on the part of the foreman of the jury in stating to the jurors while deliberating in the jury room that he had driven by the scene of the accident shortly after the accident and had seen there Mr. Stansfield, who was one of the defendants' witnesses. Plaintiff at the time of the motion for new trial did not in any way support her contention of jury misconduct but based her motion merely upon her own assertion of such fact as she does in this appeal. The fact alone that no affidavits or any other type of evidence is before the trial court or this Court is sufficient to defeat appellant's contentions in her Point III. Respondents have previously in their Point I cited the Utah authorities for the proposition that evidence not before the trial court is not properly before the Supreme Court. In this situation there is not any evidence other than the hearsay and self-serving assertions of the appellant.

Respondents note, however, that even had the appellant submitted affidavits to the trial court supporting the allegations of jury misconduct it is clear under the Utah law that such affidavits also would be incompetent evidence of such misconduct. In Rule 59 (A) 2 of the Utah Rules of Civil Procedure, the policy of the State of Utah as to impeaching jury verdicts is set down; and there it is provided that jury misconduct is provable, and then only by affidavit, in two situations: where there has been a quotient or chance verdict, and where the verdict is a result of bribery. It was early established in the Utah jurisprudence that it was contrary to the public policy and the statutes of the State of Utah to allow the verdict of a jury to be impeached for jury misconduct after it was entered unless it came within the two above-prescribed exceptions. *People vs. Flynn*, 75 Utah 378, 26 Pac. 1114 (1891); *Homer vs. Intermountain Abstract Company*, 9 Utah 193, 33 Pac. 700; *Hepworth vs. Covey Bros. Amusement Company*, 97 Utah 205, 91 Pac. 2nd 507 (1939); *Morrison vs. Perry*, 104 Utah 151, 140 Pac. 2nd 772 (1943); *Wheat vs. Denver & R. G. W. R. Company*, 122 Utah 418, 250 Pac. 2nd 932 (1952); and the latest affirmance of this rule is in the case of *Smith vs. Barnett*, 17 Utah 2nd 240, 408 Pac. 2nd 709 (1965).

The appellant has failed to show that the alleged misconduct prejudiced the verdict against her. In the case of *Redd vs. Airway Motor Coach Lines, Inc.*,

104 Utah 9, 137 Pac. 2nd 374 (1943), this Court stated on page 22 of the Utah Reports:

“In denying the motion for new trial on the ground of misconduct on the part of the jury, the trial court did not abuse its discretion, even assuming that on the showing made a contrary ruling could be sustained.”

Respondents feel further argument is not necessary along these lines inasmuch as it is clear that in the first place there being no competent evidence before the trial court or before this Court of misconduct, such issue is therefore non-existent. However, it is obvious that even assuming that such misconduct did occur and also assuming that the plaintiff had proof of such misconduct, it would nevertheless be incompetent evidence; and under the undisputed law of the State of Utah, the verdict would stand, and the trial court would, under the rule in the *Redd* case, be sustained in its denial of the appellant's motion for a new trial.

CONCLUSION

There is clearly no basis for a new trial upon the grounds raised by the appellant. The issue of misconduct is obviously improperly before the Court and is asserted without any basis. The issue concerning the appellant's allegations concerning the intersection merely resolves itself down to whether there was any evidence upon which the jury could find

that it was an intersection, assuming they did. The bulk of the appellant's argument under Point I is also improperly before the Court inasmuch as it was not evidence before the trial court at any stage of the proceedings and therefore should not be considered on appeal. The evidence as set forth shows that there was an intersection at the junction of U.S. 40 and the Lake Boren Roads, that this intersection was obvious to any reasonable driver from at least one-tenth of a mile away, and that it was indicated by the clearly marked acceleration and deceleration lanes and stop signs on both sides of the Lake Boren Road. The fact that the Lake Boren Road obviously met the test of being a public road or highway by definition makes its junction with Highway 40 an intersection within the contemplation of the Utah Law, and the above-mentioned markings and signs supplement the basis for finding that the intersection was an "intersection." Respondents also contend that the appellant cannot claim error in regard to the instructions for the reason that in her pleadings she has pleaded that the intersection was an intersection at all times and in fact asked for instructions from the court which referred to the junction as an intersection.

Respondents respectfully submit that the appellant's contentions for a new trial and now for relief

on appeal are groundless and that the verdict of the jury and the trial court's denial of the motion for a new trial should be affirmed.

Respectfully submitted,

HANSON & GARRETT

by W. BRENT WILCOX
520 Continental Bank Bldg.
Salt Lake City, Utah

*Attorneys for
Respondents*