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# Cherie Burkhalter, and Guardian Ad Litem of Robin Burkhalter, A Minor v. John Gunther : Appellant's Brief

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**IN THE SUPREME COURT OF THE  
STATE OF UTAH**

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**CHERIE BURKHALTER, and  
CHERIE BURKHALTER,**  
Guardian Ad Litem of  
**ROBIN BURKHALTER, a minor,**  
*Plaintiffs and Appellants*

Case No.  
**10309**

**GRANDEUR HOMES and  
JOHN GUNTHER,**  
*Defendants and Respondents*

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**APPELLANTS' BRIEF**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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CHERIE BURKHALTER, and  
CHERIE BURKHALTER,  
Guardian Ad Litem of  
ROBIN BURKHALTER, a minor,  
*Plaintiffs and Appellants*

Case No.  
**10369**

vs.

JOHN GUNTHER,  
*Defendants and Respondents*

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## APPELLANTS' BRIEF

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### PRELIMINARY STATEMENT

Leslie Terry Burkhalter was fatally injured in a collision with a pick-up truck owned by Grandeur Homes and being driven at that time by the Defendant John Gunther.

The collision occurred on State Street in Salt Lake County at the intersection of State Street and Gordon Lane. Terry Burkhalter was traveling north on State Street on a Triumph Motor Bike and the pick-up was proceeding south on State Street and then made a left turn into Gordon Lane.

The case was tried to a jury, which found the Defendant John Gunther negligent in failing to keep a proper lookout, on a special verdict, and found the decedent Terry Burkhalter negligent in that he failed to keep a proper lookout. The jury found Plaintiffs suffered general damages in the sum of \$50,000.00.

#### STATEMENT OF FACTS

Leslie Terry Burkhalter was riding a motorbike north on State Street at approximately 8:45 a.m. on his way to work. He was involved in a collision at State Street and Gordon Lane (approximately 414 1/2 South). John Gunther, driving a pick-up truck on company business for Grandeur Homes, made a left turn at the intersection of State Street and Gordon Lane and his vehicle and the motor bike driven by Terry Burkhalter collided. Terry Burkhalter expired almost instantly, after being thrown into the bed of the truck by the force of the impact.

The truck was carrying two by four lumber which extended beyond the rear of the truck some 6 feet 7 inches. (R.89)

The point of impact on State Street was 50 feet 4 inches from the island adjoining the left turn lane from which Mr. Gunther turned (Ex. D-17, R 87)

There were three lanes for north bound traffic on State Street at the place where the collision occurred. (Ex. D 17, R. 90). The two lanes west of the lane in which the collision occurred were 12 feet 2 inches and 11 feet 6 inches across. The lane in which the collision occurred was 12 feet 1 inch across, and the actual point of impact on the highway was 6 feet 8 inches from the east curb line. (Ex. D17, R. 87).

After the impact, the pick-up truck traveled 44 feet 6 inches. (R. 88)

The evidence is clear by his own admissions that John Gunther at no time saw the Burkhalter motor bike until immediately before the collision occurred although he testified that he looked before making his left turn. (R. 210, 211, 222, 226, 227).

There was conflicting evidence as to the speed of the Burkhalter motorbike as it approached the intersection. Mr. Thomas E. Allen, an eye witness to the collision, testified that in his opinion it was not going more than 40 miles per hour (R. 119). He was parked on the east side of State Street and standing by his automobile and the motor bike went past him just before impact and he saw the driver of it as the brakes were applied (R. 118). Mrs. Veva H. Riding, who was following the Burkhalter motorbike, as they

proceeded north, testified that it was keeping pace with her and that she was doing a little less than 40 miles per hour (R. 131).

Two witnesses called by the defense testified to a higher rate of speed. One, a Mr. John Reich made his observation as the vehicle was a block and a half away from the collision point and stated that in his opinion it was going over 50 miles per hour (R. 241). A Mr. C. E. Sandquist, stated that he was parked at the stop sign controlling Gordon Lane prior to turning north on State Street, and observed the motorbike after he heard it approach. In his opinion the motorbike was traveling 60 miles per hour (R. 249). However, Mr. Sandquist also saw at least one or two other motorcycles at that same time approaching from the south (R. 250, 251), although no one else saw the extra motorcycles.

Mr. Allen testified further, that as he heard the brakes of the motorbike applied he also saw the driver of the motorbike duck his head (R. 118, 119). Mrs. Riding testified that the motorbike appeared to veer to the right and slow down prior to the impact (R. 131, 132).

Mrs. Riding stated that as soon as she saw the pick-up truck turn to the left she knew there would



be a collision because the motorbike was too near the intersection for a turn to be made. (R. 131, 132). The motorbike laid down 49 feet 6 inches of skid mark prior to the impact. (R. 92).

The evidence will be discussed further as it relates to the specific points relied upon by the Appellants.

#### **STATEMENT OF POINTS**

- 1. There was no evidence from which the jury could find that Leslie Terry Burkhalter failed to keep a proper lookout, or that his failure to keep a lookout was a proximate cause of the collision.**
- 2. It was error for the court to instruct the jury on "Failure to keep a proper lookout" in relation to Leslie Terry Burkhalter.**
- 3. The court erred in giving its instruction No. 13 relating to vehicles making a left turn, and in failing to give plaintiff's requested instructions No. 4 and 6.**
- 4. The court erred in giving instruction No. 19 in connection with the special verdict and in submitting the case to the jury on the special verdict in the form in which it was submitted.**
- 5. The court improperly interfered with the jury and allowed the jury to complete its verdict in the jury box under the direction of the court.**

## Point I

There was no evidence from which the jury could find that Leslie Terry Burkhalter failed to keep a proper lookout, or that his failure to keep a proper lookout was a proximate cause of the collision.

## Point II

It was error for the court to instruct the jury on "failure to keep a proper lookout" in relation to Leslie Terry Burkhalter.

The argument on both Point I and II involve analysis of the same evidence, and argument for convenience and brevity will be considered together.

Appellants assert that the court erred (1) regard to its instruction in submitting the question of contributory negligence of the deceased on the issue of failure to keep a proper lookout to the jury, (2) there was no evidence to justify a submission of this case on this theory, (3) that the jury erred in finding contributory negligence in "improper lookout," (4) there was no evidence of failure to keep a proper lookout, and (5) that in any event, failure of lookout on the part of Terry Burkhalter was not a proximate cause of the collision.

Appellants have heretofore set forth the evidence of four persons who saw this collision or the accident leading up to it.

Mr. Reich, for the Defendants, must be ruled out as an eye witness since his last view of the motorbike was a block and one half away (R. 239). In any case, his testimony related only to speed, and the court did not find speed of Terry Burkhalter a factor in the collision.

Mr. Sandquist's testimony for the Defendant also went to speed. He estimated the motorcycle as being 60 miles per hour (R. 249) and he acknowledged on cross examination that when he saw the truck start to cross the street that he knew nothing was going to happen (R. 252); that he had felt there was going to be an accident (R. 253).

Mr. Thomas E. Allen, testified that he heard the rax on the motorbike (R. 118); that he saw it and that he would say that it was going about 40 (R. 119); that after he applied his brakes, "I seen him lower his head and then he collided into the truck" (R. 119). That at the time he first observed Terry Burkhalter, he did not have his head lowered, but "he was just going down" (R. 119).

Mrs. Neva H. Riding, was following Terry's halter about one-half block back of him as he approached Gordon Lane. (R. 130, 131) She saw truck begin to make its turn and realized that it was too close to the motorbike. (R. 131) As stated in her own words, "Well, I saw the truck begin to make a left turn, and I realized that the motorcycle was too close, I knew immediately that was going to be a sort of impact, but the motorcycle tried to make a right hand turn to follow the truck as it was turning, but still didn't seem to make enough of a turn to get from making a right hand turn to making a left hand turn from causing this accident to happen." (R. 131, 132) She stated that the motorcycle was too close to the intersection when the turn was made to pick up. (R. 132) Similarly, she was aware that the motorcycle was slowing down. (R. 132)

On the basis of a conflict of evidence on the question of speed, appellants acknowledge that had the jury returned a verdict of contributory negligence based upon speed, there would be no room for argument as to sufficiency of evidence or proximate cause, and the court would be justified in sustaining the instruction of speed, the jury verdict on the question of speed, and that speed was a proximate cause of the collision.

However, take away the question of excessive speed, which is not the ground upon which the

and Appellants witness, Mrs. Riding, and appellants witness, Mr. Sandquist, agree that the accident was bound to happen the moment Mr. Gunther began his left turn.

And to this the testimony that Terry applied his brakes, that he laid down 49 feet 6 inches of skid marks, and tried to turn to the right to avoid the collision, and it becomes clear that Terry Burkhalter observed the danger as soon as the danger developed, and he took all of the action he could to seek to avoid the danger thrust upon him. Note also, that the vehicle operated by Mr. Gunther had an overall length of 25 feet 3 inches. That is, 18 feet 3 inches of truck and 6 feet 7 inches of obstruction on the rear of the rear of the truck. (R. 88, Ex. D-17)

At this point the across road measurements have significance. The impact point was 6 feet 8 inches from the curb, and the impact point on the truck was 2 feet 2 inches from the front of the truck. (R. 87, Ex. D-17) This leaves a protrusion to the west of the impact point of 16 feet 9 feet 5 inches of truck (R. 89, Ex. D-17) and 6 feet 7 inches protrusion of amber. (R. 89, Ex. D-17) Add this to the point of impact 6 feet 8 inches from the east curb, and at the time of impact Mr. Gunther had effectively blockaded

22 feet 8 inches of the highway without ever having observed the decedent approaching.

It may be that the jury, in a proper case might be entitled to infer "improper lookout." However, on the face of affirmative evidence to the contrary, there is no room for such an inference, and in this case there is affirmative evidence of proper lookout and no evidence whatsoever of improper lookout.

Under the circumstances, it was error for the court to instruct on failure to keep a proper lookout on the part of the decedent, and there was no evidence from which a jury could properly make a finding which it did on the special verdict. R 95.

Finally, appellants assert that there was no need for the determination that "improper lookout" on the part of Terry Burkhalter was the proximate cause of the collision in view of the testimony of the other eye witnesses who watched both vehicles, i.e. Mr. Riding and Mr. Sandquist, each of whom testify that as soon as the truck began to turn each knew the collision was going to occur. R 131, 132 and R 253.

## Point III

The court erred in giving its instruction No. 13 relating to vehicles making a left turn, and in failing to give plaintiffs requested instructions No. 4 and 6.

The court in instruction No. 13 quoted the application of the Statutes, Section 41-6-73, as found in the Laws of Utah 1961, as follows:

"The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, during the time when such driver is moving within the intersection."

However, Appellants feel that the court erred in the phrasing of the instruction given which was as follows:

"If you find from the evidence that when John Gunther commenced his left turn the decedent's motorcycle was not so close to the intersection as to constitute an immediate hazard, then you are instructed that it was the duty of decedent Leshe Terry Burkhalter to yield the right of way to defendant's truck, and failure to do so would be negligence."

It is doubtful that the instruction as given is a correct statement of the law as it existed prior to the

1961 amendment, but it is clear that it is not a *per se* statement of the law following the 1961 amendment.

The only burden visited upon Gunther under instruction as given was to conclude that Jerry Burkhalter was not so close as to constitute an immediate hazard at the time he, John Gunther, began to turn, and then a duty sprang up on the part of Jerry Burkhalter to yield the right of way.

Jury Instruction Forms For Utah 4111 sets out a model instruction which indicates that under prior law the instruction given was not a correct instruction even as to the pre 1961 law of letting.

In the model instruction is contained the following language — 21-20

It means that *before* starting to turn *and while making* the turn the driver of the car must use such precaution as would satisfy a reasonably prudent person, acting under similar circumstances, that the turn could be made in safety. *Italics added.*

Nowhere in the court's instruction is there reference to continuing to observe and use caution on the part of Mr. Gunther.

The 1961 amendment eliminated any question of the right of the left turn driver to proceed without continued observation when it omitted the language



to the disfavored left turn driver having a right of way and all other traffic to yield, and imposing therefore a positive duty of the left turn driver to yield to any vehicle in or approaching the intersection so close as to constitute an immediate hazard, such driver — the left turn driver — is moving within the intersection.

The court submitted that under the cases French v. O'Brien Refining Co., 117 Utah 406, 216 P. 2d 323; *Wages vs. Budge*, 122 Utah 517, 252 P. 2d 669; *Gayden vs. Cedarlund*, 1 Utah 2d 171, 263 P. 2d 100; and *Cedarloff vs. Whited*, 110 Utah 45, 169 P. 2d 100, the court was in error in the instruction as given even prior to the 1961 amendment and that the amendment has placed an increased duty upon the left turn driver.

This court had occasion to pass on the amended section 41-6-73, in the case of *Smith vs. Gallegos*, 1966 2nd 344, 400 P. 2d 570, although not under the exact factual situation.

In that case this court said:

Under the new statute, the left turner is obliged to yield to vehicles so close as to constitute an immediate hazard "during the time when such driver is moving within the inter-

section." The addition of the language quoted clearly places a greater duty on left turner in that he must yield not only to approaching vehicles close enough to constitute a hazard prior to his beginning his turn, but also to vehicles which will constitute a hazard "during the time he is moving across the intersection," which includes the time which will be necessary for him to complete his turn."

The court compounded its error at the trial, and at the outset of the case, the court misstated the law of left turns in telling the jury what to look for in the case. (R 83)

Appellants' requested an instruction (R 82) No. 6 in substantially the language of JJI instruction No. 21-20, requesting that the court instruct the driver making a left turn "before starting to turn a vehicle and while making the turn," had a continuing duty, and setting forth the statute as set forth above.

The court indicated that this instruction was "given in substance," but to the contrary, a completely different and erroneous instruction on the law of left turns was given.

Coupled with the court's failure to give Plaintiffs' requested instruction No. 4, the result was to

and because the plaintiffs theory of the case and the instruction gave the jury a distorted basis for its delibera-

In *Young*, Points I and II heretofore, the Appellants argued that the state of the evidence concerning the decedent's occupancy of the road and blockade was such under the theory of the instruction as to be not improper. The instruction however, specifically precluded the Plaintiffs from arguing to the jury the continuing and increased duty on the part of Mr. Gunther.

It is to be assumed that there was evidence from which the jury could make out failure to keep a proper lookout on the part of the decedent, then it at once became obvious that Plaintiffs case was jeopardized.

The instruction, No. 13, as given, in effect misled the jury that Gunther did not have to look out before starting his turn, and that from that point on the burden was on the decedent and all risk of collision was on him.

The Trial Court was mistaken in its view of the law of left turns and by his statement to the jury in *Young*, his erroneous instruction to the jury and his refusal to give the requested instructions of the

Plaintiffs, weighted the case heavily in favor of Defendants and against the Plaintiffs.

Coupled with the fact that the written instruction submitted to the jury (No. 13) was the original instruction of the Defendants, and was never reviewed but submitted on the form prepared by the Defendants, and was corrected in the final line in italics "would be," rather than "was" negligence, the whole effect of this instruction was to impede the jury that decedent did something wrong which should preclude a recovery.

As a practical matter, Appellants assert that the facts developed in this case are such that the jury could rule as a matter of law, that the sole proximate cause of this collision was the inattention of the Gunther.

## Point IV

The court erred in giving instruction No. 19 in connection with the Special Verdict and in submitting the case to the jury on the special verdict in the form in which it was submitted.

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the court interrupted the cross examination of the witness of the day to impart to the jury that he refused to submit a Special Verdict and that he had recently been reversed by the Supreme Court for interfering with the processes of the jury in such a manner. R. 103, 104. Apparently the court had referred to the case *Cornia vs. Albertsons, Utah* 64-347 P. 2d 66.

It is submitted that such a statement as made in R. 103, 104, whether intentional or not, is calculated to thoroughly confuse the jury which at that point had little information concerning the case and no information concerning the dispute which the trial court has with the Supreme Court in another case.

The court could, I am sure, find a more direct and accurate way of submitting the Special Verdict than is done in this case.

Had the court in its Special Verdict supposed Question No. 1 (a) and (b) as it did, and then the introduction to Question No. 2 used some language such as this:

If by your answer to 1 (a) you find that Gunther was not negligent, you need not answer 1 (b) or Question No. 2.

If by your answer to 1 (a), you find that Gunther was negligent and by your answer to 1 (b) find that Mr. Burkhalter was negligent, you need answer Question No. 2.

If, however, by your answer to 1 (a), you find that Mr. Gunther was negligent and you find by your answer to 1 (b) that Mr. Burkhalter was negligent, then you should answer Question No. 2.

Language of this nature would seem to more accurately handle the situation, and to give the jury the benefit of an explanation of what it is to do rather than adding to their confusion.

As a result of the Special Verdict as given, the court left ample room for the jury to be thoroughly confused.

Appellant started Instruction No. 19 by saying "you should think Plaintiffs are entitled to recover if you should determine a sum of money which they can adequately represent the amount of plaintiffs sustained by reason of the death of Leslie Terry Burkhalter."

Appellant with the court's earlier statement of his legal problem with the Supreme Court, and the fact Special Verdict is drafted, the jury could well conclude that there was no great reason to even consider the question of negligence on the part of Leslie Terry Burkhalter, since a recovery was forthcoming in any event.

Appellant also, that the jury was in fact confused by Special Verdict — R-264 — and brought in only a partially completed verdict which was completed by the court's direction after the jury was back to the jury box.

Appellants are mindful of the rule which is oft stated that the instructions are to be read together in determining their validity. However, in view of the fact that the jury seized upon "improper lookout" as the basis for contributory negligence, the ground there evidence to sustain it, when they completed Special Verdict in the jury box, appellants assert that the jury was thoroughly confused by the special verdict and the attention drawn to it by the trial court.