1967

Beth M. Wardell v. Harvey R. Jerman and David A. Jerman, a Minor : Respondent's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

BETH M. WARDELL,
Plaintiff-Appellant,

vs.

HARVEY R. JERMAN, and
DAVID A. JERMAN,
a minor,
Defendants-Respondents.

Case No.
10554

RESPONDENTS' BRIEF

Appeal from the Judgment of the Third District
Court for Salt Lake County,
Honorable Aldon J. Anderson, Judge

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STATEMENT OF KIND OF CASE

The appellant, a passenger in and owner of a motor vehicle involved in an intersection collision in which suit was brought for personal injuries, appeals from a jury verdict of the District Court of the Third Judicial District finding no cause of action.

DISPOSITION IN THE LOWER COURT

The appellant filed a complaint against Harvey R. Jerman and David A. Jerman, a minor, alleging that she sustained injuries as the result of an acci-

dent on March 20, 1964, in Salt Lake County, State of Utah. The accident occurred in the vicinity of 3190 South 7th East. At the Pre-Trial, it was admitted between the parties that the accident occurred when the vehicle driven by David A. Jerman and the vehicle in which the appellant was riding collided at 3190 South 7th East in Salt Lake County. Harvey R. Jerman, the father of David A. Jerman, was sued as a party defendant because he authorized the issuance of a license to his minor son. Trial was had on February 2nd and 3rd of 1965. A general jury verdict, in favor of defendants, of no cause of action was returned. A motion for new trial was filed and on January 10, 1966, it was denied. This appeal followed.

RELIEF SOUGHT ON APPEAL

The respondents assert that the judgment entered on the jury's verdict finding "no cause of action" on behalf of appellant should be sustained.

STATEMENT OF FACTS

The respondents submit the following statement of facts as being more in accord with the actual status of the record, and the principle consistently stated by this Court, that on appeal the facts are to be viewed in a light most favorable to the decision of the trial court.

The appellant's Exhibit 9, which was admitted into evidence, is a diagram map showing the inter-

section of Springview Drive and 7th East Street. Seventh East Street runs north and south and Springview Drive runs east and west. It does not perpendicularly traverse 7th East, but enters from the east further to the north than it leaves 7th East on the west. There are three lanes northbound on 7th East Street, in addition to a left-turn lane at Springview Drive. There are four southbound lanes on 7th East Street, in addition to a left-turn lane to allow a left surn easterly onto Springview Drive. The collection lane for the left-turn lane going south is approximately three-quarters of a block in length (R. 155), whereas the left-turn collection lane for a turn west onto Springview Drive is considerably shorter.

The appellant, Beth M. Wardell, operator of a small mink ranch (R. 136) had four children by a previous marriage, and at the time of the accident was married to Harold O. Wardell, who was driving the automobile (R. 118-120). The autmobile was owned by Mrs. Wardell and registered in her name (R. 118, 159), although Mr. Wardell testified that he was paying for it (R. 160-161). However, Mrs. Wardell obtained the loan herself with which to buy the vehicle, and signed the contract (R. 161, 162, 194). Additionally, she indicated in her deposition that the car was hers and that she bought it (Depo. P.26, R. 169-170), and Mr. Wardell stated in his deposition that he was driving a

car which belonged to his wife when the accident occurred (Depo. P.31, R. 170-171).

She signed the contract for the purchase of the vehicle, having made arrangements for the purchase of the automobile at a time when her husband was out of town (R. 193, 194). She drove to town, got out of the car to go into Western Union and then got back in the car and her husband drove her home (R. 195, 196). With reference to her husband taking over the driving, she stated (R. 136):

> "When I got out of the car at the corner of the Western Union to go in and send the wire he then slid over and drove and found a parking place."

At the time she started to drive into town, her husband was a passenger; she was already in the car (R. 200).

Mrs. Wardell drove her car from her home in Draper, Utah, to Salt Lake City, to send a birthday gift of money to her eldest son, who was in the Marine Corps (R. 118). Mr. Wardell at first declined to accompany his wife to Salt Lake City and then decided to go along (R. 158). Mr. Wardell drove on the return trip (R. 159), and was driving at the time of the accident. Mrs. Wardell was seated in the passenger seat and their small son was standing between them (. 119). There

was no evidence that Mr. Wardell was on business of his own.

Mrs. Wardell testified at trial that she saw the vehicle driven by the defendant David A. Jerman in the left-hand turn lane approximately 15 to 20 feet in front of the Wardell vehicle before the accident (R. 120). However, at the time of her deposition, she stated that she had seen the adverse vehicle turning into the left-hand turn lane prior to its making the turn, and had seen it when it started to turn left to go onto Springview Drive (Depo. P. 7, R. 137-139), and that she thereafter did not see the defendant's vehicle until just before the accident.

Officer Elwood Sheppard, a Salt Lake County Deputy Sheriff, investigated the accident (R. 149). He testified that the accident occurred at about 6:44 p.m. on March 20, 1964, at approximately dusk (R. 156-157). He found extensive front-end damage to the Wardell vehicle and that the right side near the right door and fender of the pickup truck driven by defendant Jerman was damaged (R. 151). He had a conversation with the defendant Jerman at the scene of the accident (R. 151), who said that he had looked down the road, saw the Wardell vehicle with its left turn signal on and thought that it was going to turn left onto Springview Drive (R. 153). He then made a left turn and was struck broadside (R. 153). The space between the raised islands and collection lanes was 129 feet (R. 154,

Pls. Exhibit 9). The point of impact was substantially to the south side of the intersection between 7th East and Springview Drive and approximately in the center on the west side of 7th East (See Exhibit P.9). Officer Sheppard observed the only skid marks were three feet in length left by the right front tire of the Wardell vehicle (R. 151). The Jerman vehicle had its lights on (R. 157).

Mr. Wardell testified that he turned on his left turn signal device before approaching the intersection of Springview Drive and 7th East (R. 164, 177, 178). He first observed the Jerman vehicle in the left turn lane traveling north (R. 163, 177), but did not observe it further until just before impact (R. 177). He estimated his speed at approximately 35 miles per hour (R. 166). Mr. Wardell activated his turn signal before the intersection of Springview Drive and 7th East, not because he intended to go east on Springview Drive, but because he intended to turn east on 33rd South Street (R. 166). 33rd South Street was a full three-quarter to a block away from Springview Drive (R. 155, 166). Mr. Wardell saw the defendants' vehicle approaching before he turned on his left-turn signal and before reaching the intersection of Springview Drive (R. 17, 178). He estimated the speed of the Wardell vehicle at between 5 and 6 miles per hour at the time of impact. With specific reference to keeping a lookout for defendants' truck,

he testified on direct examination in response to a question from his own counsel (R. 182):

> "Q. And did you see this defendant's truck at any time between the time where it had arrived near the end of the island for the left turn that he was in and the time that he put himself in front of you on the highway?
>
> A. No. I did not.
>
> Q. Now, as you were proceeding at that rate of speed, why didn't you keep your eyes constantly on the wdefendant's truck?
>
> A. I was watching for my left-hand turn lane up on 33rd South, and the traffic."

The defendant David A. Jerman testified that he was driving a 1964 Ford pickup truck on the way to the library to obtain a book (R. 202, 204). As he was traveling north on Seventh East, he entered the left-turn lane to turn west onto Springview Drive (R. 203). He shifted gears from third to second, and slowed to about 15 miles per hour as he entered the left-turn lane (R. 204) He first saw the appellant's vehicle before it entered the intersection of Springview Drive and 7th East, at a point where the southbound left-turn lane begins (for eastbound traffic), north of the intersection (R. 205). From where he first saw the appellant's vehicle, there was sufficient evidence to conclude that it could have made a left-hand turn easterly onto Springview Drive. Thereafter, he did not see the vehicle until the accident (R. 206).

After the Court instructed the jury, appellant took exceptions to the Court's failure to give certain requested instructions, but assigned no grounds as a basis for the exception, nor did he indicate in the record the need for any such instructions (R. 221, 222). No exception was taken to the Court's instructions on any general basis that they were confusing, excessive, or weighted in favor of the respondents, now assigned as error on appeal.

Based upon the above evidence, the jury returned a general verdict of no cause of action.

ARGUMENT

POINT I.

THE ISSUE OF APPELLANTS' NEGLIGENCE WAS PROPERLY SUBMITTED TO THE JURY.

The appellant contends that the decision of the trial court must be reversed because (1) there is no evidence that any action on the part of the appellant or her husband was a contributing cause to the accident, and (2) that the evidence discloses that the actions of the respondent David A. Jerman were the sole and proximate cause of the accident. The respondents submit that the appellant's contention is without merit. The only question that need be convassed on this appeal is whether there was *any* negligence on the part of the appellant or her husband that could have contributed to cause the accident. Thus, the appellant is asking this Court to reverse the jury's verdict and to rule as a matter

of law that the respondent's negligence, if any, was the sole and proximate cause of the accident.

In *Coombs v. Perry*, 2 Utah 2d 381, 383; 285 P.2d 680 (1954), this Court observed, with reference to the rule regarding its review of a trial court's decision to submit a matter of fact to the jury's determination, and the subsequent jury verdict:

> "The basis of defendant's appeal is that the evidence so conclusively supports his views as to these two points that the court was required to so rule as a matter of law and should not have submitted the matter to the jury. The plaintiff having won a judgment below, the verdict is protected by a bulwark of rules firmly established in our law. First, by the general proposition that the judgment and proceedings in the lower court are presumptively correct with the burden upon defendant to show error. Second, where a trial judge has passed upon a question and a jury, presumably fair and impartial, has made a finding, while such is not controlling, it is at least entitled to some consideration and should not be wholly ignored in reviewing the situation. "and attempting to see, as objectively as possible, whether reasonably minds might so conclude. Third, that the court must review the evidence, together with every inference fairly arising therefrom, in the light most favorable to the plaintiff, and similarly, must consider any lack or failure of evidence in the same light, which we do in reviewing the facts here."

It has long been the rule in this State that a decision of a trial court in refusing to rule that a party was negligent as a matter of law will not be distributed on appeal, unless, under the facts taken in a light most favorable to the trial court's determination, it appears no reasonable man could but conclude otherwise. *Jensen v. Dolen*, 12 Utah 2d 404, 367 P.2d 191 (1962); *Mulbach v. Hertig*, 15 Utah 2d 121, 388 P.2d 414 (1964); *Toomer's Estate v. Union Pacific R.R. Co.*, 121 Utah 37, 239 P.2d 163.

With specific reference to the question of whether or not the conduct of the appellant and her husband was of such a nature as to render them contributorily negligent, this Court has indicated several times under similar circumstances that the question is one for the jury. *Spackman v. Carson*, 117 Utah 380, 216 P.2d 640 (1950); *Jensen v. Taylor*, 2 Utah 2d 196, 271 P.2d 838 (1954). Consequently, this Court would be justified in reversing the verdict only where if it could be determined as a matter of law that no reasonable juror could have concluded that the appellant or her husband was contributorily negligent. In reaching such a determination, the appellant would have to rley upon the evidence when taken in a light most favorable to the jury's verdict. The appellant simply has been unwilling to apply that standard in her brief. Further, the facts that appear of record in this case support a finding that Mr. Wardell was negligent, and indeed, that Beth Wardell

was, herself, negligent. Further, even if Mrs. Wardell was not negligent, it is submitted that under the facts of the case, the negligence of her husband should be imputed to her. The latter issue will be canvassed in a subsequent point in this Brief.

The evidence showed that Mrs. Wardell saw David Jerman when he started to turn into the left-hand lane (R. 139). In her deposition, she testified that she had seen the defendant Jerman as he turned into the left-hand collection lane to turn west onto Springview Drive (R. 138). Prior to approaching the intersection between 7th East and Springview Drive, Mr. Wardell had turned his left-turn signal on. The left-turn collection lane on 7th East to turn east onto Springview Drive was three-quarters of a block in length, substantially longer than the shorter lane to turn west onto Springview Drive. The longer collection lane gave rise to the belief by Mr. Jerman that Mr. Wardell intended to pull over into the left-hand collection lane to turn east onto Springview Drive because he was in position and had time to do so (R. 210, 211, 214). Additionally, it should be remembered that the accident was at approximately 6:44 p.m. (R. 156), and that the lights on most vehicles, including that of the defendant David Jerman, were on. Under these circumstances, the jury could reasonably have found that the clear vision of the defendant might have been impaired and that Mr. Jerman was misled into believing it was the intention of Mr. Wardell, who

had activated his left-turn signal, to pull over into the left-hand collection lane and turn in front of him. Indeed, that is substantially the testimony of Mr. Jerman (R. 208-209, 210-211). The jury was also entitled to believe that Mrs. Wardell's deposition impeached her credibility, that she saw the defendant Jerman enter the left-hand turn lane, and also that her husband had turned on his left-turn signal prior to reaching the intersection of Springview Drive and 7th East, almost a block before a left turn was necessary. Still she said nothing, and really didn't watch the defendant's vehicle. The jury could have concluded that a reasonable person would have advised her husband of the approaching vehicle, especially in view of the fact that he had his left-turn signal on which could certainly have misled the aproaching vehicle.

The testimony of Mr. Wardell demonstrates that he was contributorily negligent. He did not see the defendant's truck at any time between the time it arrived near the end of the island, even though he had previously observed it, and the moment of impact (R. 163, 177, 182). Instead of observing traffic near him, he was watching for traffic on 33rd South, although 33rd South was some distance away (R. 182). This becomes important, because Mr. Wardell had previously indicated that he saw the defendant's vehicle as it entered the left-turn lane and observed that it had its left-turn signal on. Under these circumstances, a reasonable person should have

known that in view of the long left turn collection lane on Mr. Wardell's side of the road, that an approaching vehicle could be misled as to his intentions. Still, Wardell was looking far to the south towards an intersection from which he was still nearly a block away. Under these circumstances, the jury could have reasonably concluded that Mr. Wardell had failed to keep a reasonable lookout and had failed to keep a view of the traffic near him in order to prevent the very collision that occurred. Further, the jury could have reasonably found that Mr. Wardell, had he kept a lookout, would have realized the danger involved in sufficient time to have avoided the collision. Under these circumstances, the jury's finding that Mr. Wardell's conduct was a contributing cause to the accident is fully supported by the record.

The appellant contends that, since Mr. Wardell gave a signal prior to the time that he was intending to turn and prior to the 100 foot limitation set out in Section 41-6-69(b), Utah Code Annotated (1953), that he did everything that the law required. This, of course, begs the question. Mr. Wardell was a substantial distance away from the intersection where he intended to turn. He turned on his left-turn signal prior to the time he reached the intersection of 7th East and Springview Drive, and at such a time that the defendant felt Mr. Wardell had ample time to pull over into the left-turn collection lane and make a turn east onto Springview

Drive (R. 210, 211). Further, the actions of Mr. Wardell hardly constitute compliance with the spirit of the statute. Sectio n41-6-69(b), Utah Code Annotated, (1953), is undoubtedly intended to give an ample warning to a driver approaching the vehicle giving the signal, or a driver behind the vehicle giving the signal, that a turn in intended. If the signal to turn is made at a distance unrelated to the place of the intended turn, it could indeed be confusing. Under the interpretation that the appellant proposes, had Mr. Wardell turned his signal on at 4th South and 7th East preparatory to turning on 33rd South and 7th East in Salt Lake City, he would not be negligent because he would have complied with the letter of the statute requiring a signal at a distance of at least 100 feet prior to the turn. Such an interpretation is unwarranted.

In *Prosser, Torts*, 3rd Edition, P.205, dealing with compliance with a statute, it is stated:

> "Where the violation of a criminal statute is negligence it does not follow that compliance with it is always due care."

Further, with reference to Mr. Wardell's failure to keep an appropriate lookout, Prosser notes:

> "Thus the requirement of a hand signal on a left turn does not mean that the Legislature has conferred immunity on the driver who is otherwise negligent in making the turn and that he is absolved from all obligation to slow down, keep a proper lookout and proceed with reasonable care."

By the same token, the fact that Mr. Wardell had turned on his signal 100 feet before the intersection at which he was intending to turn, or 100 feet prior to the time he intended to change lanes, does not mean that he exercised due care in every other respect. His failure to keep a proper lookout for approaching vehicles and his failure to continue to observe the defendant's vehicle after he first observed it moving into the left-hand turn lane was a sufficient basis for a finding of contributory negligence by the jury. Also, the nature of the statute and its intended purpose must be considered in determining whether or not compliance with it should be deemed to absolve Mr. Wardell from any further responsibility. Obviously, the statute was intended to give warning to other drivers that a turn was imminent, so as to allow them to keep a safe distance and to be on guard for hazards involved in the impending turn. When Mr. Wardell gave his signal far beyond the time that he intended to turn, a reasonable man could have concluded that he intended to turn at the intersection nearest to the one he was then approaching. His failure to use circumspection at the time he gave a signal to turn was negligence, and the defendant was lulled into a reasonable belief that a left turn was imminent on the part of the Wardell vehicle. Thus, Mr. Wardell's conduct contributed to the cause of the accident. In addition, Mrs. Wardell had ample opportunity to

advise her husband of the danger that was being spawned by a premature left turn signal.

In *Mulbach v. Hertig*, 15 Utah 2d 121, 388 P.2d 414 (1964), the Supreme Court acknowledged that an individual driving on an arterial highway approaching an intersection was also "obliged to be alert to other possible dangers on the street, and particularly at the intersection." See also *Martin v. Stevens*, 121 Utah 484, 243 P.2d 747. The Court also observed that the question of negligence, proximate cause and contributory negligence were for the jury.

In *Anderson v. Strack*, 236 Iowa 1, 17 N.W.2d 719 (1945), the Iowa Supreme Court indicated that where an individual gave a signal to make a left hand turn and then turned right that his negligence could be assumed as a contributing cause of the accident. In the present case, Mr. Wardell gave a signal of an impending left turn at an approaching intersection and then continued on through the intersection. Under these circumstances, the jury could reasonably conclude that Mr. Wardell's actions were negligent, and that his wife had sufficient time to apprise him of the possible dangers and therefore failed to take reasonable precautions for her own safety. See also *Hickok v. Skinner*, 113 Utah 1, 190 P.2d 514 (1948).

In *Beck v. Jeppesen*, 1 Utah 2d 127, 262 P.2d 760 (1953), the Utah Supreme Court ruled that a

vehicular collision occurring at an intersection presented a jury question of whether the motorist was contributorily negligent. The Court noted that the duty imposed upon a motorist approaching an intersection is one of due care under the circumstances. Consequently, it is apparent that under the facts of the instant case, the question of proximate cause and of the contributory negligence of the appellant, or her husband, was one of fact for the jury. *Hess v. Robinson*, 109 Utah 60, 163 P.2d 510; *Bullock v. Luke*, 98 Utah 501, 98 P.2d 350.

Under the facts of this case, Mr. Wardell's conduct could be imputed to his wife thus precluding Mrs. Wardell's claim for relief. Further, the conduct of Mrs. Wardell all the circumstances, including th fact that she was the owner of the vehicle, and presumptively had control of the vehicle, *Fox v. Lavender*, 89 Utah 115, 56 P2d 1049 (1936), was such that the jury could have properly concluded that she had failed to keep an appropriate lookout for her own safety and exercise the control over the operation of the vehicle that she was entitled to. Therefore, it cannot be said as a matter of law that the verdict of the jury was improper.

The appellant's contention that the defendants' actions were the sole and proximate cause of the accident cannot be sustained. An individual making a left turn has a duty to keep a proper lookout, and not to make the intended turn under circumstances

which will endanger approaching vehicles. Also, an individual approaching an intersection has a duty to keep a proper lookout and to exercise due caution under circumstances indicating an impending left turn. *Smith v. Gallegos*, 16 Utah 2d 344, 400 P.2d 570 (1963); *Burkhalter v. Grandeur Homes*, 17 Utah 2d 278, 409 P.2d 614 (1966). Under these circumstances, there is no basis for reversal on the contention that the sole cause of the accident were the actions of the defendant David A. Jerman, or that the conduct of the appellant or her husband was not a contributing cause to the accident.

POINT II.

THE EVIDENCE WAS SUFFICIENT TO ALLOW THE JURY TO CONCLUDE (A) THAT BETH M. WARDELL WAS THE OWNER OF THE VEHICLE DRIVEN BY HER HUSBAND AND PRESUMPTIVELY HAD CONTROL OVER IT AND (B) THAT THE APPELLANT'S HUSBAND WAS OPERATING THE APPELLANT'S VEHICLE AS HER AGENT AT THE TIME OF THE ACCIDENT AND THAT HIS CONTRIBUTORY NEGLIGENCE WAS IMPUTABLE TO HER.

A

The respondents submit that the facts of this case demonstrate circumstances sufficient to warrant the jury to find that Mrs. Wardell had control over the vehicle in which she was riding and that Mr. Wardell was her agent. By Mrs. Wardell's own testimony the vehicle was registered in her name,

(R. 118, 159 and she made the arrangements for the loan to purchase the vehicle (R. 161, 162). At the time of her deposition, she testified that the vehicle was hers and her husband indicated that the vehicle was hers. (Depo. Mrs. Wardell, p. 26, R. 169-170; Depo. Mrs. Wardell, p. 31, R. 170-171). Further, Mrs. Wardell and her husband both indicated that normally her husband drove a pickup truck and she drove the automobile in which she was riding at the time of the accident. Mrs. Wardell was a woman of some independence, owning and operating a mink ranch (R. 136). It is submitted under the facts of this case and the circumstances surrounding the ownership of the vehicle that the jury could have properly concluded that Mrs. Wardell had control of or had the right to control of the vehicle.

In the case of *Fox v. Lavender*, 89 Utah 115, 56 P.2d 1049 (1936), this Court rulesd:

> "We believe that the better rule is that where an owner is an occupant of his own care there arises rebuttable presumption that he has control and direction of it. It is not as if he were absent as in the case of *McFarlane v. Winters*, supra, where this court refused to indulge in presumption. A person being conveyed by his own vehicle is presmued to control his own property in his own transportation. Moreover, as a practical matter the rule is a salutary one. A person injured by the negligence of the driver ordinarily cannot know the real relationship between the driver and the pas-

> senger owner. They may not know it themselves. If the presumption of agency is indulged, it throws upon the proper parties the burden of producing evidence to negative the relationship rather than upon the plaintiff to produce evidence to prove it."

The Court further stated:

> "* * * when the sole owner is present in the car and another is driving, it is presumed, without more being shown, that the sole owner has the right of control, and that the driver is driving for him, that is, as his agent. If two or more joint owners are in the car, they will be presumed, without more shown, to have joint right of control and therefore the driver will be presumed to be driving for himself and as the agent of the other present joint owners.'

Consequently, under the decision of *Fox v. Lavender*, it was presumed that Mrs. Wardell had control of the vehicle and that her husband was acting as her agent. No testimony was introduced which rebutted this presumption. The facts of this case justify a determination of her right to control the vehicle; first, on the grounds that she was the sole owner of the vehicle, and second, even if the evidence is taken in a light most favorable to the appellant, she was at least a co-owner.

In *Donaghue v. Hayden*, 58 Cal. App. 457, 208 P. 1007 (1922), the California Supreme Court, in a fact situation very comparable to the instant one, ruled that where a husband was operating the ve-

hicle owned by the wife at the time the accident occurred, the wife being present in the vehicle, the parties having been to town to obtain tobacco for the husband and pigeon feed for the wife's pigeons on a farm owned by her, that a jury verdict denying her recovery for her injuries would be sustained, and the husband's negligence would be imputed to the wife.

In *Nielsen v. Watanabe*, 90 Utah 401, 62 P.2d 117 (1936), this Court affirmed the decision in *Fox v. Lavender*. In that case, an action was brought by the wife of a motorist against a truck driver alleging that she sustained injuries while riding in an automobile driven by her husband, jointly owned by both of them, when it was involved in a collision with the truck driver. This Court stated:

> "The case of Fox v. Lavender, 89 Utah 115, 56 P. (2d) 1049, 1060, is authority for the doctrine that:
>
> > 'If two or more joint owners are in the care, they will be presumed, without more shown, to have joint right of control and therefore the driver will be presumed to be driving for himself and as the agent of the other present joint owners.'
>
> "The allegations of plaintiff's complaint brings her within the foregoing rule. She alleged that at the time complained of she was riding in an automobile jointly owned by her and her husband. The automobile was being

> driven by her husband. Nothing is alleged in the complaint which takes her out of the general rule. Under the facts alleged by her she was responsible for the negligence, if any, of her husband."

A similar result was reached by the Supreme Court of Minnesota in *Martin v. Schiska*, 183 Minnesota 256, 236 N.W. 312 (1931).

Consequently, it is submitted that under the facts of this case the jury was warranted in finding, on the basis of the presumption alone, that Mrs. Wardell had right to control the vehicle and that her husband was driving the vehicle as her agent. Neither presumption was rebutted. Further, it is submitted that since the right to control was presumed, that since Mrs. Wardell saw the respondent's vehicle as it approached the left turn lane and knew, or should have known, that her husband had his turn signal on before Springview Drive, she could have taken measures to have prevented the accident. Therefore, it is submitted that her husband's negligence is imputable to Mrs. Wardell, and further, that her own independent negligence would deny her recovery.

B

Under the facts of this case there is a sufficient showing of actual agency upon which to sustain the jury's apparent determination that Mr. Wardell was acting as an agent on behalf of his wife. In addition to the legal presumption of con-

trol, the facts of this case clearly disclose that Mr. Wardell was in fact acting as his wife's agent in operating the vehicle. First, the trip into Salt Lake was solely for Mrs. Wardell's purposes. She went to the Western Union office in order to send her son by a prior marriage a gift of money for his birthday. Second, Mr. Wardell was not going in the first instance but thereafter changed his mind and went. Consequently, there was no evidence at all that there was any other purpose to be served by his going and driving the vehicle other than for Mrs. Wardell's benefit. Third, Mrs. Wardell drove the vehicle into town, got out of the vehicle to go into the Western Union ofice and Mr. Wardell found the parking place. Thereafter, she returned to the vehicle and got in the passenger side. There were no stops made on the way home and the route taken was directly back to the Wardell house. Mr. Wardell's operation of the vehicle was purely for the benefit of his wife. This when coupled with evidence of the fact that the vehicle was the one normally Mrs. Wardell would drive, and one which she purchased and which was registered in her name, points to the conclusion that the operation of the vehicle by Mr. Wardell was as the agent of Mrs. Wardell.

At the outset, the respondents agree with the cases submitted in the brief of the appellant to the effect that agency does not arise solely from a husband and wife relationship. These cases and the other cases cited in appellant's brief bear no rela-

tionship to the facts of the instant case. It seems evident, however, from the facts that appear of record would support a finding of actual agency sufficient to sustain the jury's verdict. In *Fox v. Lavender*, supra, this Court indicated that the liability of a wife riding in an automobile driven by the husband, and jointly owned by both, on an errand for the wife was a question for the jury. It is recognized that the creation of a agency relation depends upon a manifestation of consent by the principal. *Restatement of Agency* 2d § 15. However, it is well settled that the manifestation of the agency may be implied. Thus the *Restatement of Agency* 2d, § 26, states:

> "Except for the execution of instruments under seal or the performance of transactions required by statute to be authorized in a particular way, authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him to act on the principal's account."

Section 27 of the *Restatement of Agency* 2d states:

> "Except for the execution of instruments under seal or the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or by any conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal

consents to having the act done on his behalf by the person purporting to act for him."

Under these circumstances where the husband was operating the vehicle on behalf of the wife's interests, the whole trip was for the purpose of accommodating the wife's interests, and where the wife had presumed control over the vehicle, an agency relationship was established which would allow imputation of the husband's negligence to the wife. *Prosser, Torts*, 3rd Edition, P. 479-480.

Based upon the above facts showing the principal-agent relationship, this case is controlled by the doctrine of *Fox v. Lavender*, and the jury verdict should be sustained on the grounds that Mr. Wardell's negligence was imputable to his wife on the theory of agency.

POINT III.

THE TRIAL COURT DID NOT ERR TO THE PREJUDICE OF THE APPELLANT IN FAILING TO GIVE INSTRUCTIONS REQUESTED BY THE APPELLANT SINCE THEY WERE EITHER INAPPLICABLE OR OTHERWISE COVERED BY INSTRUCTIONS GIVEN BY THE COURT.

The appellant contends that the trial court committed error in failing to give her requested instructions. Appellant's requested instruction No. 4 asked the Court to instruct the jury that there was no evidence that the appellant was guilty of contributory negligence and therefore this should not be deemed an issue in the case. Of course, from the

facts of the case and what has been heretofore been set forth in this brief, it is apparent that the trial court acted properly in giving the instruction on contributory negligence and in rejecting the appellant's request for an instruction that the matter was not in issue. The appellant contends that the failure of the Court to give an instruction that the negligence of the appellant's husband could not be imputed to her was error. As has been heretofore noted, it was proper for the jury to find imputation of the driver's negligence to the appellant, and consequently, the Court did not commit error in failing to give such an instruction.

The appellant contends that Instruction No. 8 (R-93), should have been given by the court. It should be noted that the Court indicated that the instruction framed by the appellant was "covered in part". An examination of the record (R-93) reveals that Instruction No. 24 as given by the Court adequately covered the theory of the appellant. Indeed the instruction posed by the appellant was not completely correct. An individual cannot be charged with negligence in complying with a statute if there is a mandatory duty to do so unless it is reasonably foreseeable that harm would arise from the compliance and a reasonable prudent man would disregard the statute in an effort to avoid harm to others or to himself. However, in this case, the application of the statute was not involved. Here was a situation where the facts indicated that Mr. Wardell turned

his blinker on long before it was necessary in order to make an appropriate change of lanes or to turn up 33rd South. His blinker was on under circumstances which could have mislead a reasonable prudent man. The instruction of the court adequately appraised the jury of the law on giving a signal before making a turn or changing lanes. There is no requirement that instruction be given by the court in the precise language posed by either party. If the instruction given by the court accurately deals with the law of the case, the mere fact that one party would have preferred different language is no basis to contend error on appeal. The instruction given by the court satisfied the law of the case, and therefore, there was no error in the court giving the instruction it gave and refusing to give instruction No. 8 requested by the appellant in the exact language requested.

Instruction No. 9, as proffered by the appellant, was an instruction to the effect that Mr. Jerman was not justified in assuming that the vehicle in which Mrs. Wardell was riding might make a left turn at the intersection of 3190 South 7th East. This instruction would in effect have ruled as a matter of law that the conduct of the driver of the Wardell vehicle was not negligence which could have contributed to the cause of the accident. On the contrary, at the time Mr. Jerman saw the Wardell vehicle, he testified there was still sufficient time for it to pull into the left hand lane and make a

left hand turn. Since the turn signal was on, it was reasonable for Mr. Jerman to conclude that the Wardell vehicle intended to make a turn at the nearest intersection. Under these circumstances, the instruction requested by the appellant was contrary to the law necessary for appropriate decision in the case and would have withdrawn from the jury a part of defendant's theory of the case. There is nothing in Section 41-6-66, Utah Code Annotated 1953, (left turn statute) which directs the court to otherwise advise the jury than the way it did in this case. The statute is inapplicable to the proposition for which the appellant urges. Further instruction 24 given by the Court covered the statutory language in Section 41-6-66.

Appellant also assigns as error the failure to give requested instruction No. 10 (R-95). It should be noted again that the trial judge indicated that he had covered that instruction in part in his instructions to the jury. The instruction is argumentatively framed and not in accordance with the decision of this Court in *Fox v. Lavender*, supra. Instruction No. 26 as given by the court (R-42, 44) appraised the jury of the law applicable to the case regarding the possible agency of Mr. Wardell and the necessity of finding the right to control in the appellant. Under these circumstances, there could have been no error from the failure to give the instruction requested by the appellant. The instruction as given complies adequately with the rec-

ommended instruction in Jury Instruction Forms Utah 10.7 and the decision of this Court in *Fox v. Lavender*, supra.

Finally, the appellant contends that the court should have given requested instruction No. 11 which deals with the duty of proper look out (R-96). It should also be noted that Judge Anderson indicated concerning that instruction that it was covered in part. Instruction No. 19, as given by the court, when read in conjunction with Instruction No. 18, clearly satisfies the obligation of the Court to advise the jury on the respondent Jerman's duty to keep a proper lookout. The instructions given by the Court complied with the decision of this Court in *Smith v. Gallegos*, 16 Utah 2d 344, 400 P.2d 570 (1965), and *Burkhalter v. Grandeur Homes*, 17 Utah 2d 278, 409 P.2d 614 (1966).

When the instructions given by the court are appraised as a whole, they adequately advised the jury as to the applicable law of the case and appellant's assignments of error are without merit.

POINT IV.

THE INSTRUCTIONS GIVEN BY THE COURT WERE NOT UNNECESSARY, CONFUSING, OR INAPPROPRIATE.

The appellant, in the final Point of her Brief, contends that the instructions given by the Court were voluminous, inconsistent and confusing, and that consequently reversal is in order.

At the outset, it should be noted that immediately after the instructions were given, the trial court asked the parties to take any exceptions to the instructions they may have. No exceptions were taken by the appellant on the grounds that the instructions were inconsistent or confusing, or unduly voluminous or repititious. Indeed, the exceptions to the instructions taken by the appellant concerned the refusal of the court to give particular instructions and at no time did the appellant except on the broad basis she now assigns as error before this Court.

In *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962), this Court noted that the purpose of taking exceptions to the instructions was to permit corection to be made before the matter was submitted to the jury and to lay a foundation for possible reversal by the losing party on appeal. In the present case, the failure to take the exception at the appropriate time precludes the appellant from contending that the instructions were improper for the reasons now assigned. *Employers Mutual Liability Insurance Co. Of Wisconsin v. Allen Oil Company*, 133 Utah 253, 258 P.2d 445 (1953).

Additionally, it is submitted that there is no merit to the appellant's contention that the instructions were so voluminous and inconsistent as to confuse the jury. The mere fact that 37 instructions were given does not mean that the instructions were

necessarily voluminous. Indeed, a good number of them were form instructions, dealing with general obligations of jurors and the presumptions and evidentiary standards to be applied. Instructions 1 through 13 fit generally into that category. Instructions concerning damages were necessary to present appellant's right of recovery in the event liability was found, as were instructions on the appropriate means of balloting, credibility of witnesses and comparable matters (See Instructions 33 through 37). Thus, only a hard core number of instructions on the actual issues of the case were given by the Court.

The appellant contends that the instruction on contributory negligence were unnecessary. We submit what has been said before in this Brief refutes this contention. The appellant's contention that counsel made appropriate exception is not sustained by the record. He made individual exceptions to the failure to give his instruction, and did not assign sufficient grounds to his exception.

The decision of *Taylor v. Johnson*, 15 Utah 2d 342, 393 P.2d 382 (1963), is inapplicable to this case. The Johnson case dealt with an entirely different factual situation where instructions were inordinately long, far longer than those in this case, where the issues were complex and the instructions were found to be heavily weighted to one particular side. The instructions were consistently couched in

language favorable to one party. The instructions given by the court in this case bear no resemblance whatsoever to the instructions condemned in the Johnson case.

In *Johnson v. Cornwall Warehouse Co.*, 16 Utah 2d 186, 398 P.2d 24 (1965), this Court affirmed the decision of the jury in an automobile accident case. In doing so, the court noted that there were 50 different instructions given and that some were very long, repititious and contained legal terms with complicated definitions. Such was not the case here. Even so, in the *Cornwall Warehouse* case this Court affirmed the decision of the trial court finding that at best the claim was harmless error. The instructions given in this case, when viewed as a whole, properly met the issues raised at the time of rtial and provide no basis for reversal. *Manning v. Powers*, 117 Utah 310, 215 P.2d 396.

CONCLUSION

Appellant was given a fair opportunity to convince a jury of her peers that she was entitled to compensation for alleged injuries sustained in an automobile accident with the respondent David Jerman. Full factual inquiry into the case was made with each party presenting its view of the evidence. The jury was adequately instructed by the trial court. The jury considering the facts determined that there was no claim for relief on behalf of the appellant. The errors that the appellant now assigns

as a basis for reversal have no legal merit and approach the frivolous. The conclusion seeking reversal by this Court set forth in the appellant's brief, no matter how poetic, overlooks the simple fact that under traditional law in this country the decision of a jury will not be set aside unless there was clear prejudice to one party, or the determination by the jury is wholly unreasonable. Neither of these criteria are met in this case. There is no basis for reversal and this Court should affirm.

Respectfully submitted,

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