

1961

P. K. Edmunds et al v. Kenneth Germer et al : Brief of Plaintiffs and Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

P. K. EDMUNDS, ELLA M. EDMUNDS,
CHARLOTTE EDMUNDS, a minor,
FRANKLIN EDMUNDS, a minor,
JOHN EDMUNDS, a minor, and ANN
EDMUNDS, a minor, by their guard-
ian ad litem ELLA M. EDMUNDS,

Plaintiffs and Respondents,

vs.

KENNETH GERMER, JED R. ABBOTT,
and DAVID R. WALDRON, partners,
doing business under the firm name of
GERMER, ABBOTT & WALDRON,

Defendants and Appellants.

FILED

10 1961

Supreme Court, Utah

Case No.
9349

Brief of Plaintiffs and Respondents

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Case No.
9349

Brief of Plaintiffs and Respondents

STATEMENT OF FACTS

As in the brief of defendants and appellants, the same designations of the parties will be used herein as were used in the trial court.

Defendants have appealed from six judgments which total \$16,000 (R. 94-99) entered by the District Court of Iron County, March 9, 1960, in accordance with jury verdicts (R. 88-93), in favor of the six plaintiffs, as follows:

Dr. P. K. Edmunds	\$11,500
Mrs. Ella M. Edmunds, wife	2,500
Charlotte Edmunds, daughter	500
Franklin Edmunds, son	500
John Edmunds, son	500
Ann Edmunds, daughter	500

Defendants made timely motions for directed verdicts at the conclusion of plaintiffs' evidence (Tr. 205-8), and at the conclusion of their own case (Tr. 313). Defendants also made a motion for judgment notwithstanding the verdicts (R. 104), and a motion for a new trial (R. 102-3). The motions were taken under advisement (Tr. 208, 313), were subsequently argued on June 8, 1960 (R. 106), and denied in a memorandum decision on August 22, 1960 (R. 107).

The verdicts and judgments were for personal injuries and property damage sustained by plaintiffs when an automobile driven by Dr. Edmunds, in which his wife, children and a guest were passengers, plunged into an unguarded and unmarked cut in the road (Ex. 5, Tr. 99-101, 164, 176). The accident occurred between 3:30 and 4:00 o'clock p.m., November 27, 1955, while Dr. Edmunds, his family and their guest were on a Sunday afternoon excursion to inspect farm lands owned by Dr. Edmunds on both sides of the highway north of Paragonah, Utah (Tr. 95, 186, 216). At the time of

the accident work on the highway construction project was temporarily suspended for seasonal reasons (Tr. 202-203, Ex. 15).

The following facts are undisputed:

Under a contract between defendants and the State Road Commission, executed May 10, 1955, defendants were engaged in constructing approximately 15.511 miles of new highway (Ex. 12). The contract also called for the "obliteration" of 6.625 miles of the old road, including that portion of the old road over which Dr. Edmunds was driving at the time of the accident (Tr. 202) and for "cuts" in the old road to provide drainage (Tr. 221). Part of the contract was a set of "Standard Specifications for Road and Bridge Construction (Ex. 12), which in part provided:

1-4.5 (p. 21): "*Maintenance of Traffic*. Adequate signs, flagmen, red lights and barricades shall at all time be provided by the Contractor at his own expense where traffic is diverted from the existing road or where rough road or a dangerous condition exists due to construction operations. * * *

"When construction operations are suspended by written order of the Engineer for seasonal conditions or other conditions for which the Contractor is not responsible, *maintenance of the road under traffic*, including signs, barricades, etc., shall be performed by and at the expense of the Commission during the period of such suspension. * * * Necessary signs and barricades *as provided by the contractor* shall be left in place during the time of suspension." (Emphasis added).

1-7.7 (p. 38): "*Public Convenience and Safety*. The Contractor shall at all times so conduct his work as to insure the least possible obstruction to traffic. The

convenience of the general public and the residents along the highway and the protection of persons and property are of prime importance and shall be provided for by the Contractor in an adequate and satisfactory manner.

"The Contractor shall maintain a safe and proper connection with all intersecting public or private roads or driveways, and conduct the work so as to cause no unnecessary inconvenience to residents along the road. No road shall be closed to the public except by express permission of the engineer. * * *

1-7.9 (p. 39): "*Barricades and Warning Signs*. The Contractor shall provide, erect, and maintain all necessary barricades, suitable and sufficient red lights, danger signals, and other signs, provide a sufficient number of watchmen and take all necessary precautions for the protection of the work and the safety of the public. Highways closed to traffic shall be protected by effective barricades, and obstructions shall be illuminated at night. Suitable warning signs, illuminated at night by lanterns, flares, or other approved means, shall be provided to mark the places where surfacing ends or is not compacted or other obstructions. * * *

1-7.15 (p. 43): "*Opening Sections of Project to Traffic*. At the option of the Engineer, certain sections of the work may be inspected, and completed work tentatively accepted for the use of traffic. Such acceptance shall not constitute final acceptance of the work or any part of it or a waiver of any provisions of the contract; * * *

1-8.9 (p. 51): "*Termination of Contractor's Responsibility*. The contract will be considered complete when all work has been finished, the final inspection made by the Engineer, and the project accepted in writing by the Commission. The Contractor's responsibility shall then cease, except as set forth in his bond."

2-11.1 (p. 79): "*Obliteration of Old Roads. Description.* * * * The obliteration of old roads shall consist of appropriate grading of portions of the old road that are to be abandoned, and shall include the removal or covering of pavements, scarifying, plowing, and harrowing all of the areas of the old roadway as directed.

2-11.2 (p. 79): "*Construction Methods.* After the old road is no longer needed for traffic, the existing oil or gravel surfacing shall be bladed into ditches, borrow pits, or alongside the embankment and covered with earth; * * * After the above work is completed, the area of the old road surfacing shall be scarified or plowed to mix effectively the remaining material with the earth. * * * "

The "cut" in the old road into which the Edmunds' car plunged was within the project covered by the contract and was made by defendants pursuant to the contract to provide for drainage of the area between the old and the new highways (Tr. 198). There is no dispute that the "cut" in question was made by defendants prior to the time—November 19, 1955 — when further work was suspended for seasonal reasons.

Defendants acknowledge that the contract required them to "substantially obliterate the old road" (Tr. 199, 308) and it is undisputed that the scarifying, or tearing up, of the old road did not take place until work was resumed in June, 1956 (Tr. 202, 247, 254). It is submitted that there is no dispute as to the condition of the old road at the time of the accident. Patrolman Reed testified that it was "travelled, polished" oil, and that it was in better condition than shown in the pictures which were taken 6 weeks later and which are

Exhibits 2 to 5, inclusive (Tr. 26, 32-33). Mr. Silas Morrell, defendants' superintendent of construction on this project, in response to a question as to whether the old road was in good condition on the day of the accident, answered, "Yes, it was passable, sure" (Tr. 290). Mrs. Edmunds testified that the "old road was a good highway. It was clear, no debris" (Tr. 187).

We believe it is undisputed that on the day of the accident—November 27, 1955—Dr. Edmunds, his wife and children and a guest, decided to go for a drive to inspect farm property owned by Dr. Edmunds lying along the east and west sides of the old and new highways near the south end of the construction project. They drove north from Cedar City to the south end of the project where the old and new highways joined. Dr. Edmunds drove north along the new highway to a point near the north end of his property. After briefly inspecting his property at that point they then crossed over to the old highway by an access road to look over his property along the west side of the old road right of way. After inspecting the property, and possibly after stopping to look at some flowing wells from a distance, Dr. Edmunds drove the car south along the old road. As he approached the south end of the project, where the old and new roads joined, he suddenly saw the "cut" in the road and before he could stop, the automobile plunged into the excavation. (See testimony of Dr. Edmunds Tr. 94-99).

Another undisputed fact is that there were no warning signs, barricades, or markers of any kind at or near the cut in the old road into which the Edmunds' automobile plunged

or at any of the approach roads leading from the new road to the old road (Tr. 89, 218-19; defendants' brief, page 13). It is also undisputed that there was no warning sign or barricade between the south end of the project and Lunt Memorial Park, a distance of about 5 miles (Tr. 289, 265, Ex. 19).

The principal questions about which there is some conflict in the testimony are:

1. Whether there was a barricade across the old road where it and the new highway joined at the south end of the project on the day of the accident.
2. Whether the cuts in the old road between the north point of Dr. Edmunds' property and the scene of the accident were made prior to or subsequent to the day of the accident.
3. Whether a cut in the old road south of the scene of the accident and north of a road connecting the new and old roads was made prior to or subsequent to the accident.

As to whether there was a signed barricade across the old road at its junction with the new highway on the south end the testimony may be summarized as follows: Sgt. Reed testified there was a "sawhorse effect sign saying 'Detour' or 'Road Closed,' he was not certain which, that did not completely block off the highway," and that there were "tracks evident on both sides that you could go around it" (Tr. 39); Dr. Edmunds testified that he saw no warning signs or barricades indicating that the old highway was not open to traffic (Tr. 113-14, 151); Mr. Hiatt, who drove the wrecker which removed the Edmunds' car after the accident, testified he

did not recall seeing any warning signs and that there "were no barricades near where the car plunged in," that when he got Dr. Edmunds' car up on the roadway he "proceeded out the old road to somewhere where they came together, or near that point, gained access to the new road and on to Cedar," and that he did "recall going out the old highway" (Tr. 89-91); defendants' witness Claude Kemp Savage, who was driving south on the new road at the time of the accident, testified that he saw a barricade at the *north* end of the project on the day of the accident (some 12-15 miles north of the scene of the accident) but that he did not recall seeing any barricades, equipment or fences across the old road at the south end (Tr. 210-11, 218-19); defendants' witness Ben Lee, resident engineer, testified that there were barricades at both the north and south ends of the project (Tr. 231) but that "on the north we went in for more elaborate signing, because we, again, detoured from the new road over to the old road" (Tr. 232) and that some complaint about the signing at the north end was "another reason for the elaborate signing, was on the north end there. We didn't have it adequately signed" (Tr. 243); that at the south end "There was a barricade there at the time we turned the contractor loose. I mean, we shut him down for the winter" (Tr. 224), and that for two hundred feet they took out the old highway completely in order to get material to use on the new highway (Tr. 224-25); Mr. Silas Morrell, defendants' superintendent of construction, testified that they had placed 16-foot standard barricaded signs at the south end (Tr. 264-65) but that the signs could have been destroyed between the time work was suspended (November 19, 1955) and the date of the accident (November 27, 1955) (Tr. 286).

With reference to the importance of the question whether cuts in the old road to the north of the scene of the accident were made prior to or subsequent to the accident defendants seem to take contradictory positions. At page 3 of their Statement of Facts they state that they "regard his question as of small consequence in view of the uncontradicted fact that Edmunds drove on this old road for some distance before driving into one of these cuts." Despite this statement belittling the importance of the question, defendants repeatedly refer to the cuts throughout their Statement of Facts and the Argument as though it was clearly established the cuts had been made on the day of the accident. On page 2 of their brief they state that the "old section of highway had been cut in 20 places * * * and was fenced off at various points throughout its length at six places, so that it was no longer useable for travel," implying that such was the condition of the road at the time of the accident. On page 5 of their brief, they refer to the warning of the "cuts in the old road" and make the bald statement (which the record does not support) that by the time work was suspended "all of the work on the project covered by the contract had been completed, with the exception of the scarification of the surface of the old road." On page 8 they state that "all of the cuts were readily discernible to anyone travelling on the new road," again implying that they had all been made by the day of the accident and ignoring the irrelevancy of cuts made many miles from the scene of the accident. On pages 9, 14, 15, 17, 22, 32 and 33 of their brief defendants lean heavily upon the contention that the old road had been cut in 20 places.

In addition to the irrelevancy of cuts, fences, barricades

and signs at the north end of the project, or at any point north of the area travelled by Dr. Edmunds on the day of the accident, we call particular attention to Exhibits 2, 3, 4 and 5, which, we believe, completely demolish the contentions, upon which defendants rely so heavily, that all 20 of the cuts including the three to six cuts in that part of the old road traveled by Dr. Edmunds (Tr. 289, 297, 300, 222, 229, 234-35 256-57) were made prior to suspension of work and prior to the time of the accident. Exhibits 2, 3, 4 and 5, taken 6 weeks after the accident at points between the north end of Dr. Edmunds' property and the cut into which his car plunged show clearly that in January, 1956, there were no other cuts in the road and that there were no barricades or warning signs. Besides these exhibits, the testimony of Dr. Edmunds and that of his wife (Tr. 113, 176, 179, 184-88) that they travelled the old road for about one and three-eighths miles before encountering the cut into which their car plunged, is uncontradicted. Moreover, defendants' witness Claude Kemp Savage testified that he saw the Edmunds' car traveling on the old road for from 1½ to 2 blocks before it plunged into the open cut (Tr. 214). We submit that Exhibits 2, 3, 4 and 5, and the supporting testimony of Dr. and Mrs. Edmunds and of Mr. Savage clearly establish that the old road for a distance of at least one and three-eighths miles north of the scene of the accident had not been cut on November 27, 1955, and that Mr. Morrell and Mr. Lee were in error when they testified that that stretch of the old road had been cut prior to the accident.

That Mr. Lee and Mr. Morrell were in error when they testified that no cuts in the old road were made after the accident is also established by the testimony of Mr. Homer

Jones, the photographer, and by Exhibit 5. The latter is a photograph of the cut into which the Edmunds' automobile plunged and it shows Mr. Jones' car on the old road near the south edge of the cut. Mr. Jones testified that the car was driven there by way of a road connecting the old and new roads south of the accident scene (Tr. 84-86). At the time of the trial, however, there was a cut in the old road between the one where the accident occurred and the connecting road to the south. It is obvious, of course, that Mr. Jones' car could not possibly have been driven over the connecting road and then north up the old road to the south edge of the cut shown in Exhibit 5 if the other cut had been made in the old road prior to the accident.

We submit that the evidence clearly establishes that at least one cut south of the scene of the accident and from three to six cuts to the north were all made *after* resumption of work on the project in June, 1956.

STATEMENT OF POINTS

POINT I.

DEFENDANTS WERE GUILTY OF NEGLIGENCE IN NOT WARNING PLAINTIFFS OF THE DANGEROUS CONDITION ON THE ROAD CAUSING PLAINTIFFS' INJURIES.

POINT II.

THE ISSUE OF CONTRIBUTORY NEGLIGENCE WAS PROPERLY SUBMITTED TO THE JURY. PLAIN-

TIFF P. K. EDMUNDS WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE, AS A MATTER OF LAW.

POINT III.

THE JUDGMENTS ENTERED BELOW WERE NOT EXCESSIVE AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

ARGUMENT

POINT I.

DEFENDANTS WERE GUILTY OF NEGLIGENCE IN NOT WARNING PLAINTIFFS OF THE DANGEROUS CONDITION ON THE ROAD CAUSING PLAINTIFFS' INJURIES.

Although defendants contend they had no duty with respect to Dr. and Mrs. Edmunds and their children to do anything more than they did, the jury and the trial court concluded otherwise. Even granting, which we do only for the sake of argument, that there was some sort of sign at the south end of the construction project (which is one of the disputed issues of the case), there is no dispute whatsoever (see first full sentence on page 13 of defendants' brief) that there was no sign, barricade or warning of any kind at the cut in the road into which the Edmunds car plunged or on any of the access roads. The only thing that even the defendants contend was done (which we do not concede was done) to warn persons approaching from the south was the erection of some

kind of sign at the junction of the new and old highways. At the cut in the old road there was no warning of any kind. There was no warning on any of the access roads either where they took off from the new highway or where they crossed the old highway.

Much was said at the trial, and much is said in defendants' brief about the "more elaborate" signs at the north end of the project (Tr. 232) some 12 miles north of the scene of the accident. There had been some complaints as to the adequacy of the signs at the north end. Resident Engineer Lee testified: "That was another reason for the elaborate signing, was on the north end there. We didn't have it adequately signed" (Tr. 243). But Dr. Edmunds and his family didn't get within 10 miles of the "more elaborate" signs at the north end of the project. Like defendants' argument that they had done everything necessary to complete the *new* highway, their arguments about the character and sufficiency of the signs at the north end are meaningless. The accident happened on the *old* road, not on the new road, near the south end of the project, not near the north end. Dr. Edmunds and his family approached the area from the south and didn't travel more than about 11½ miles on the new highway before they turned west and, using one of the access roads, crossed over to the west side of the right-of-way to inspect lands owned by Dr. Edmunds.

As previously indicated, plaintiffs dispute the claim of defendants that a sign was placed across part of the old road at the junction of it and the new highway. Dr. Edmunds did not recall seeing such a sign (Tr. 113-114, 151). Defendants' witness Claude Kemp Savage testified he saw a barricade at

the *north* end of the project but that he did not recall seeing any barricades, equipment or fences across the old road at the south end (Tr. 210, 218-19). The driver of the wrecker which was used to remove Dr. Edmunds' car from the cut testified he did not recall seeing any warning signs and that there "were no barricades near where the car plunged in" and that when he got Dr. Edmunds' car out of the cut he "proceeded out the old road to somewhere where they came together, or near that point, gained access to the new road and on to Cedar" (Tr. 89-90). While Sgt. Reed, of the Highway Patrol, testified that there was a "sawhorse effect sign" at the south end of the old road, he also testified that it did not completely block off the highway and that "there was tracks evident on both sides that you could go around it" (Tr. 39).

In *Brower v. Moran Paving Co.*, 58 Utah 349, 199 Pac. 144, a passenger brought suit against a highway contractor and recovered for injuries received when the automobile ran into a trench in the street, only part of which was barricaded. The court stated:

"Barriers erected to prevent danger to travelers or warn the public of the dangerous condition of a street must be at least reasonably sufficient for that purpose. In the present case it was a question for the jury's decision as to whether the trestle was sufficient in length, and as to whether it was negligence to have from 18 to 30 feet of the trench without a barrier or guard of any kind.

"Whether plaintiff was guilty of contributory negligence is not free from substantial doubt. The question of contributory negligence was for the jury and not

for the court to decide, because different minds might reasonably arrive at different conclusions as to whether plaintiff was culpably negligent.

"We think the issues were properly submitted to the jury, and that the court committed no abuse of discretion in overruling appellant's motion for a new trial. The judgment is therefore affirmed, with costs."

Metcalf v. Mellen, 57 Utah 44, 192 Pac. 676, was an appeal from a jury verdict in favor of the plaintiff, who was the driver and owner of an automobile and was brought against a state road contractor who left unguarded, unlighted and unbarricaded an excavation in a state highway into which the plaintiff drove his automobile. As in the instant case, the contractor had "agreed and covenanted with the state road commission of the State of Utah to erect and maintain good and sufficient guards, baricades, and signals * * * to protect the public from any dangerous condition arising out of or incidental to said improvement of said street." The court affirmed the lower court's judgment on the jury verdict, and said:

"It is not necessary to review the evidence. It is sufficient to say that plaintiff's evidence fully justified the court in submitting each cause of action to the jury, and that the evidence on the principal issues was conflicting.

" * * *

"Except those of New Jersey, the courts have held that such contracts inure to the benefit of any one of the public who is injured by the negligent failure of the contractor to take those precautions which he agreed to take for the protection of the public. *The contract is a measure of the contractor's duty.* If he assumes a responsibility broader than that of his com-

mon law liability for negligence, he becomes liable for torts arising out of a breach of such duty which are the proximate cause of injury to third persons.

“ * * *

“In light of the above authorities, and upon principle, we conclude that a case was stated and proved against appellant, based upon his common-law liability for negligence, and also upon the tort arising from the breach of the contract, in which he assumed duties and obligations that he has no right to repudiate when his negligent failure to comply with and observe them has resulted in injury and damage to the property of respondent and that of his assignors.” (Emphasis supplied).

We submit that defendants failed to perform both their common law duty to plaintiffs and the duty they assumed under provisions of the contract pursuant to which the road project was being constructed. Under common law principles defendants owed a duty to plaintiffs to warn them of the dangerous condition defendants had created on the old road. This they neglected to do. They neglected to place any warning sign or barricade on the old road near the cut or on any of the access roads where they crossed or intersected the old road. Plaintiffs were fully within their rights in traveling north along the new highway to the north end of Dr. Edmunds' property and in using the access road to drive west from the new highway to the old road to view his property to the west of the right-of-way. It was the natural and normal thing for Dr. Edmunds to do to turn south from the access road and travel along the so-called old road—a polished, travelled oiled highway in good condition (Tr. 26, 32-33, 290). One sign or barricade at the cut or at the intersection of the old road and the nearest

access road would have warned plaintiffs of the dangerous condition. But defendants neglected to put up such a sign or barricade, and left an open, unguarded cut in the road.

As part of their contract with the State of Utah, defendants agreed (Ex. 12) in part, as follows:

"Maintenance of Traffic. Adequate signs, flagmen, red lights and barricades shall at all time be provided by the Contractor at his own expense where traffic is diverted from the existing road or where rough road or a dangerous condition exists due to construction operations. * * * (Ex. 12, p. 21, 1-4.5).

"Barricades and Warning Signs. The Contractor shall provide, erect, and maintain all necessary barricades, suitable and sufficient red lights, danger signals, and other signs, provide a sufficient number of watchmen and take all necessary precautions for the protection of the work and the safety of the public. Highways closed to traffic shall be protected by effective barricades, and obstructions shall be illuminated at night. Suitable warning signs, illuminated at night by lanterns, flares, or other approved means, shall be provided to mark the places where surfacing ends or is not compacted or other obstructions. * * * " (Ex. 12, p. 39, 1-7.9).

Part of the "measure of the contractor's duty" * * * that "inure(s) to the benefit of any one of the public who is injured" (see *Metcalf v. Mellen*, supra), was for defendants to provide "adequate signs * * * where * * * a dangerous condition exists due to construction operations" and "effective barricades" where "(H)ighways (are) closed to traffic," as well as to "take all necessary precautions * * * for the safety of the public," including but not limited to "suitable warning

signs * * * to mark the places where surfacing ends." These duties were not properly discharged in this case by defendants.

Throughout their brief defendants make repeated references to 20 cuts in the old road along the length of the project; to fences in six places; and, continually assert that the old highway had been abandoned. We submit that the cuts in the old highway north of the scene of the accident as far as the north end of Dr. Edmunds' property, clearly were made *after* the accident. We also submit that the record just as plainly establishes that one cut south of the accident location was made subsequent to November 27, 1955. The fences, like the "more elaborate signing" at the north end of the project, relate to areas far removed from the scene of the accident. In asserting that the old road had been abandoned, defendants overlook two express provisions in their contract. In Section 1-7.7 of the Standard Specifications (Ex. 12) it is provided that "No road shall be closed to the public except by express permission of the engineer." The record does not disclose that permission was given to close and abandon the old road prior to the day of the accident. Section 1-8.9 (Ex. 12) provides that the "contract will be considered complete when all work has been finished, the final inspection made by the Engineer, and the project accepted in writing by the Commission" and that the "Contractor's responsibility shall *then* cease" (emphasis added). This project was not accepted, and the contractor's liability did not cease, until after the work was completed in the spring of 1956.

Even if the old road had been abandoned on the date of the accident, which plaintiffs deny, the Michigan court

in *Jewell v. Rogers Township*, 175 N.W. 151, held that where a road had been closed and destroyed at one point by the erection of a quarry, the legal duty existed to exclude public travel by signs and barriers that would plainly warn travelers of the danger.

There can be no question that the issue as to whether or not the defendants violated their duty to the Edmunds family on that November Sunday, 1955, was a question for the jury. As in *Brower v. Moran Paving Co.*, supra, and *Metcalf v. Mellen*, supra, it was a jury question whether the alleged sign at the south end of the project, and defendants' failure to erect any other sign, warning or barricade of any kind, adequately discharged defendants' duty to Dr. Edmunds and his family. Any speculation by the defendants that their duty to warn these plaintiffs of the peril created by defendants' construction of the drainage excavation would be burdensome or unreasonable because of the numerous cuts (which actually did not exist in November, 1955), and numerous access roads, required to be constructed by the contract, must be considered for just what it is: speculation. The duty of the defendants to provide effective barricades, danger signals and other signs is clear under the cases as well as under the contract.

Defendants next claim that they were relieved from liability to plaintiffs Edmunds because work on the project was suspended eight days before the plaintiffs were injured due to seasonal conditions (Ex. 15). In support of their position defendants recite from Section 1-4.5 of the Standard Specifications (Ex. 12, p. 21-22; defendants' brief, p. 19) which provides, in part, "When construction operations are sus-

pendent * * * for which the contractor is not responsible, *maintenance of the road under traffic* including signs and barricades, etc., shall be performed by and at the expense of the Commission during the period of suspension * * * necessary signs and barricades *as provided by the contractor* shall be left in place during the time of suspension." (Ex. 12, Standard Specifications). Completely ignoring the plain language just quoted that, in the event of suspension, the Commission shall only be responsible for "maintenance" of the project as left by the contractors, defendants nevertheless allege that the Commission thereafter had the duty to "*provide and maintain*" any necessary safety devices. The defendants also apparently do not recognize that the Commission's duty of "*maintenance*" did not apply to the old road where the plaintiffs were injured, but refers only to the new road which was the "*road under traffic*." The quoted provision further emphasizes that it was the defendants' duty to *provide* signs, warnings and barricades on the old road as well as the new road, during the period of suspension.

Finally, defendants urge that the placing traffic on the new portion of U. S. 91 constituted practical acceptance of the project not requiring formal acceptance as specified in the contract. Obviously this doctrine has no application to the facts of this case, first, because the plaintiffs were not injured on the completed portion of the project, namely, the new highway; second, because work on the old section of the highway where the accident occurred was not completed as to required drainage cuts, scarifying and obliteration; and, third, because (as recognized in the annotation cited by defendants, 58 ALR 2d 865 at page 877) the doctrine that

practical acceptance obviates the need of actual acceptance may be modified by contract. Sec. 1-7.15 of the Standard Specifications at page 43 (Ex. 12) provides: that although portions of the work may be tentatively accepted for the use of traffic, "such acceptance shall not constitute final acceptance of the work or any part of it *or a waiver of any provision of the contract; * * **" (emphasis added). See also page 51 of the Standard Specifications, Sec. 1-8.9, "*Termination of Contractor's Responsibility*" set forth in the Statement of Facts herein.

Inasmuch as it is apparent that defendants failed in their duty to adequately warn plaintiffs of the dangerous excavation, defendants cannot successfully contend that Dr. Edmunds' conduct was the sole proximate cause of the injuries sustained by plaintiffs. The cases relied upon by defendants demonstrate clearly that the claim of defendants is untenable under the facts of the case. *Nielsen v. Christensen-Gardner, Inc.*, 85 Utah 79, 38 P.2d 743, is readily distinguished from the instant case, because the highway contractor there fully discharged his duty to warn travelers by maintaining a barricade at the excavation six feet tall and 18 feet wide with two lighted red lanterns which the driver testified he saw 600 feet away. At page 746 of 38 P.2d the court quotes 7 McQuillin, Municipal Corps. 216, as follows:

"The question as to the sufficiency of the guard or warning is not susceptible of a precise answer. The test is whether the means employed are reasonably sufficient for the purpose intended, namely, to protect travelers; and it may be added that the question of sufficiency is generally one of fact for the jury, although in particular cases barriers may be held sufficient or insufficient as a matter of law."

The *Nielsen* case also quotes the general rule stated in *Thomas v. City of Lexington*, 168 Miss. 107, 150 So. 816, 817:

“As a general rule, the question as to whether or not signals or warnings against existing defects in a street are sufficient is one for the determination of the jury. Such is the case where the evidence is conflicting, or is such that reasonable minds might arrive at different conclusions; but where the evidence is undisputed and only the inference of negligence can be drawn from the proven facts as to the nature or character of the signals or barriers erected as a warning of a defective or dangerous condition in a street, the question of negligence in respect to the particular defect or obstruction or warning signal is one for the court.”

The Utah court then concludes that under the facts the trial court should have withheld the case from the jury and directed a verdict contrary to the general rule which was not applicable.

O'Brien v. Alston, 61 Utah 368, 213 Pac. 791, is another case where the defendant highway contractor had not failed to adequately warn users of the highway of the danger, but had erected a proper barricade at the point of danger. The facts of the *O'Brien* case are not similar to those before the court now.

Clearly the defendants owed the Edmunds family the duty to erect some sign, warning or barricade on the old portion of the highway at or near the drainage excavation, and their failure so to do was the proximate cause of plaintiffs' injuries.

POINT II.

THE ISSUE OF CONTRIBUTORY NEGLIGENCE WAS PROPERLY SUBMITTED TO THE JURY. PLAINTIFF P. K. EDMUNDS WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE, AS A MATTER OF LAW.

The jury having found the issues in favor of plaintiffs, the latter are entitled to have all of the evidence, and every inference and intendment fairly arising therefrom construed in the light most favorable to them. This is particularly true as to the question of contributory negligence. See *Toomer's Estate v. Union Pacific Railroad Co.*, 121 Utah 37, 239 P. 2d 163. Dr. Edmunds described the accident as follows:

" * * * We were traveling along the old highway, which was gray, a light color in contrast to the new highway, which was black, and about every quarter mile there was a strip of black coating across the gray—old highway to the new highway. * * * And at every quarter mile that was visible to us. And, I think, it must have been accentuated by the fact it had been wet, because it had been recently raining. * * *

"But the blacktop, as most people have observed, looks blacker when it's wet; and, as I recall, these strips that had crossed the old-gray highway, old 91, were quite dark, and then, oh approximately, oh three-eighths of a mile, I would estimate, more or less, beyond the southern extent of our property one of these apparent road strips across the old highway turned out to be a cut in the road. But it was marvelously deceptive. It looked just exactly like these strips across the highway. And we were on top of it before I could discern the difference and see that it was a cut in the road and too late to keep from crashing into it." (Tr. 98-99).

Mrs. Edmunds testified similarly as to the deceptive appearance of the excavation (Tr. 176, 186-188). The investigating officer stated that the Edmunds car made two heavy skid marks for approximately 50 feet (Tr. 27). Photographs of the old roadway (Ex. 2-5) are especially helpful in visualizing this situation inasmuch as they were taken at a height equivalent to that of the driver of an automobile and were taken in sequence progressively closer to the cut (Tr. 100). The jury was permitted to view the accident scene (Tr. 311-12) and was in possession of all available facts.

Defendants' witness Morrell testified that at the time of the trial (about $4\frac{1}{2}$ years after the accident) the cut into which Dr. Edmunds' car plunged was 27 feet across and $4\frac{1}{2}$ feet deep (Tr. 262). Dr. Edmunds estimated the cut was "approximately ten to twelve feet across" and from "two and a half to maybe three feet" deep (Tr. 101). No doubt the plunging of Dr. Edmunds' car into the cut and the hauling of it out could have broken down the edges and widened the cut. In this connection the testimony of Sgt. Reed is interesting. At page 33 of the Transcript Sgt. Reed, in testifying as to Exhibit No. 5, the photograph of the cut into which the car plunged, taken 6 weeks after the accident, said:

"Well, these look like equipment ruts and tractor ruts (indicating) that were not there at that time. This oil was traveled, polished, and this debris and so on that is shown here was not there at that time."

Previously in his testimony, at page 32 of the Transcript, he had stated with reference to the 4 photographs of the old road:

"They are a fair representation of the area, but the oil on it had been torn up considerably; in worse shape that it was on the old road."

The testimony of Sgt. Reed could be the explanation for the differences in estimates as to the width of the cut and its depth. It would not take many trips by heavy equipment, such as tractors, over the edges of the cut to considerably widen the gap. His testimony clearly indicates, also, that *after* the accident, and within a period of 6 weeks, there was sufficient travel of vehicles of some sort along the old road so that the "oil on it * * * (was) torn up considerably."

All of the cases cited by defendants are to be distinguished on their facts. Some involve pedestrians who had time to prevent their injuries as in *Jensen v. Logan City*, 89 Utah 347, 57 P. 2d 708; *Mingus v. Olson*, 114 Utah 505, 201 P. 2d 495 (crossing busy street without looking)—trial court directed verdict; *Scofield v. Sprouse-Reitz Co.*, 1 Utah 2d 218, 265 P 2d 396 (fall down stairs); *Knox v. Snow*, 119 Utah 522, 229 P 2d 874 (fall into service station grease pit). The others involve collisions between two motor vehicles—*Covington v. Carpenter*, 4 Utah 2d 378, 294 P 2d 788 (directed verdict for defendant affirmed); *Spackman v. Carson*, 117 Utah 390, 216 P 2d 640, (jury determined no contributory negligence, affirmed); and *Conklin v. Walsh*, 113 Utah 276, 193 P 2d 437 (intersection collision). None of the authorities cited by defendants has direct application.

The automobile headlight cases involving the duty of the driver to stop his car within "the assured clear distance," although not directly in point, are persuasive in the instant case. The earlier cases were prone to find the existence of

contributory negligence as a matter of law. (See *Dalley v. Mid-Wesetrn Dairy Products Co.*, 80 Utah 331, 15 P 2d 309, and 3 Utah Law Review 198-9, subdivision entitled "Negligence and Assured Clear Distance.") Later cases, as stated in *Fretz v. Anderson*, 5 Utah 2d 290, 300 P 2d 642, have allowed the jury "to determine, *in the light of existing conditions*, what a reasonable and prudent person would do under the circumstances. *Moss v. Christensen-Gardner, Inc.*, 98 Utah 253, 98 P 2d 363 (an accumulation of smoke and mist in addition to sudden glare from the lights of an approaching automobile; *Nielsen v. Watanabe*, 90 Utah 401, 62 P 2d 117 (sudden blinking lights); *Trimble v. Union Pacific Stages*, 105 Utah 457, 142 P 2d 674 (fog); *Hodges v. Waite*, 2 Utah 2d 152, 270 P 2d 461 (curve in road obscuring the obstruction))."

Without pausing, the opinion in the *Fretz* case continues:

"Appellant reads these later cases as indicating that the only conditions which may be considered by the jury are those which occur so suddenly and without warning that the motorist has no opportunity to stop his vericle. However, as respondent points out, neither the fog in the *Trimble* case nor the curve in the *Hodges* case were unforeseeable, and in those cases the motorist was not required to stop but merely to exercise more than the ordinary amount of care.

" * * * The jury determined that her (plaintiff's) conduct was reasonable under the circumstances and we feel that the law lays no heavier duty upon her."

The evidence in this case is that Dr. Edmunds had no warning of any kind, and that existence of the excavation was not foreseeable. Certainly under all of the existing conditions

the issue of contributory negligence was properly submitted to the jury and should not be disturbed on appeal.

POINT III.

THE JUDGMENTS ENTERED BELOW WERE NOT EXCESSIVE AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

That the minor plaintiffs were substantially damaged is attested by the testimony of their mother and guardian ad litem, who described their cuts, bruises and fright (Tr. 182-3, 189, 192-3). Dr. Edmunds testified that he treated his children as their physician and described their contusions, abrasions and wounds (Tr. 126-7). The item of fright alone, without other injury, would more than justify the nominal verdicts of \$500.

Plaintiff Ella M. Edmunds received substantial injuries to her head, lower back, left ankle (Tr. 177, 179-181) requiring X-rays (Tr. 126, 179). Mrs. Edmunds testified:

“ * * * in falling I must have hit the back of my head and broke the windshield, and I must have turned, because I twisted my ankle and also hit the hump (in the floor of the car), I imagine, and hurt my back, the lower spine.” (Tr. 177).

Mrs. Edmunds, a registered nurse (Tr. 179), testified that the bump on her head created a lump about the size of a big “double yolked egg” (Tr. 177). Dr. Edmunds stated that a blow on the head like his wife received always results in a concussion of the brain (Tr. 126).

Defendants also complain the trial court committed error in giving instructions that refer to the scene of the accident as a "roadway." That this term could not be too objectionable is indicated by the defendants' use of it themselves in their requested instructions No. 20, 21 and 22. This argument of defendants is based upon the disputed existence of 20 cuts, the fencing, and the obliteration which have been thoroughly discussed and disposed of earlier in this brief. There was no error in the trial court's instructions occasioned by use of the term "roadway." Nor was there any error in Instruction No. 12, which stated that defendants had the duty to use *reasonable care* to exclude public travel through adequate signs and barricades, etc. Instruction No. 5 defines "ordinary care," and Instruction No. 4 refers to "ordinary and reasonable care" and there was no error committed in the instructions given by the court.

Finally, plaintiffs submit that no error was committed by the trial court not giving instructions requested by defendants. The substance of defendants' requested Instruction No. 7 concerning the duty of Mrs. Edmunds to keep a lookout was adequately covered in the court's Instruction No. 14. The other requested instructions of defendants were either not proper or were otherwise adequately covered in the court's Instructions. The merits of the contents of requested instructions Nos. 15, 19, 20 and 21 have been adequately covered under Point I of this brief.

CONCLUSION

Plaintiffs and respondents submit that, under the facts of this case and the authorities above cited, the judgments of

the trial court entered on the jury's verdicts were properly entered, and should, therefore, be affirmed.

Respectfully submitted,

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