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# P. K. Edmunds et al v. Kenneth Germer et al : Defendants and Appellants Brief

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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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 guardian 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

Case No.

9349

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## DEFENDANTS AND APPELLANTS BRIEF

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YOUNG, THATCHER & GLASMANN  
RAY, QUINNEY & NEBEKER and  
ALBERT R. BOWEN,

*Attorneys for Defendants  
and Appellants*

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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 guardian 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.*

Case No.

9349

## DEFENDANTS AND APPELLANTS BRIEF

### STATEMENT OF FACTS

This is an appeal from six judgments entered against appellants in favor of the respondents on the 9th day of March, 1960, in the District Court of Iron County, Utah, for a total sum of \$16,000.00, upon verdicts returned by a jury. From this point on, appellants elect to refer to respondents as they are designated below.

The plaintiff, P. K. Edmunds, recovered judgment for \$11,500.00. The plaintiff, Ella M. Edmunds, recovered for \$2500.00 and each of the other plaintiffs for \$500.00 (R. 88-99). Suit was commenced on the 6th day of July, 1959. At the conclusion of plaintiffs' case, defendants moved for directed verdicts and also at the conclusion of the evidence before submission of the case to the jury (Tr. 205-208, 313). Both of these motions were taken under advisement and subsequently were denied, along with defendants' motions for judgment notwithstanding the verdicts and for a new trial (R. 107).

These judgments were for personal injuries sustained in an automobile accident which occurred on November 27, 1955 on an abandoned section of U. S. Highway 91, about 1½ miles North of the town of Paragonah, Utah (Tr. 21-2).

The defendants were the successful bidders on a contract with the Utah State Road Commission and were constructing a section of new highway, U. S. 91, in Iron County, which paralleled the old U. S. Highway 91 for some 12 miles (Ex. 12, Tr. 243). This new highway was completed and was in use by the travelling public several weeks before the day of the accident. (Tr. 211-212, 220, 263).

The old section of highway had been cut in 20 places to provide for irrigation and drainage and was fenced off at various points throughout its length at six places, so that it was no longer useable for travel (Tr. 288-9, 255, 257, 296-7).

In the course of the trial the question arose as to whether all of these cuts in the old road had been made

prior to the 19th of November, 1955 or if some may have been made after the accident, in the following spring. Defendants' testimony was that they were all made before the 19th of November, 1955. If so, it would have been impossible for plaintiff Edmunds to have driven his automobile as far on the old road as he claims he travelled before encountering difficulty. Defendants regard this 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. This latter point is the only fact on this phase of the case of any importance.

The accident occurred on a Sunday afternoon between 3:30 and 4:00 p.m., when the plaintiff, P. K. Edmunds, took his wife and four of his children and their guest for an automobile ride. (Tr. 216). They left from their home in Cedar City and drove North through Paragonah to where this new section of highway had been constructed and where Edmunds owned land on both sides of the highway. According to the plaintiffs' testimony, in proceeding North from Paragonah the plaintiffs travelled on the new section of highway from the point of confluence of the old and new roads for a distance of about a mile (Tr. 96). They travelled to about the North line of plaintiff Edmunds' land, where they turned East on an access road leading from the new highway to the East right-of-way line where Edmunds owned property. They then turned around and drove West on an access road leading to property on the West side of the right-of-way, crossed the new highway and drove only as far as the abandoned road, where they turned South on this old road and drove to the point of accident (Tr. 94-98, 186-7).

As has been stated, plaintiff P. K. Edmunds owned land West of U. S. Highway 91. He wanted to see this land as well as his property East of the new highway and to show it to his guest. However, it was not necessary for him to use the old road in order to reach his property on the West. He had been provided with an access road to it pursuant to contract with the State Road Commission and could, had he chosen, have travelled South on the new road to his access road and this would have been as convenient for his purposes as the old highway (Tr. 143-145, 158). After seeing his property and perhaps even making a brief stop on the old road, he continued to drive South on this old road. After leaving his property, he could have returned to the new road, which he knew to be a much better highway, from at least two places (Tr. 102, 152-3). He chose not to do so and continued on until he ran into a drainage cut, located a few hundred feet North of the point where the old road, if still in existence, would have joined the highway again to the South (Tr. 104, 174, 192).

Plaintiff Ella Edmunds testified that she expected that her husband would use one of the access roads available to return to the new highway (Tr. 192).

Edmunds saw this cut in the old road but mistook it for an access road to his property until too late to stop and avoid running into it (Tr. 98-9). He claims that immediately before the accident he had been driving at about 45 miles per hour (Tr. 112).

This old road at the point of the accident and for a considerable distance in both directions was practically straight. It was also level. The weather was good, the surface of the old road was dry and it was broad daylight.



Visibility was unlimited and, according to the testimony, the driver was looking straight ahead (Tr. 43, 175, 186, 216, 295). Objects and road conditions could be observed at a great distance (Tr. 187-8).

According to the investigating officer, the cut was plainly visible (Tr. 44). This officer found where the driver had laid down 50 feet of heavy skid marks leading up to the edge of the cut (Tr. 27).

The cut into which Edmunds plunged his car was 27 feet wide at the top and about  $4\frac{1}{2}$  feet deep by actual measurement (Tr. 262).

Other testimony concerning its width and depth, including that of plaintiff P. K. Edmunds, estimated the cut varied from 20 feet wide to 10 to 12 feet wide and from  $2\frac{1}{2}$  to 8 feet deep (Tr. 42, 101). The sides of the cut were not abrupt, but were sloping. The car came to rest with its rear end in the bottom and the front end on the South bank of the cut (Tr. 24, 46, 47, 101, 214).

The defendant contractors were not working on the project the day of the accident, but had been ordered to discontinue work until spring due to adverse weather conditions. The shut-down began November 19, 1955 (Tr. 202-3, 225-229, 232, 233, Ex. 15, Ex. 17). The defendants had also removed all of their men and equipment from the job site (Tr. 45, 148, 149, 258, 259, 292, 293). By November 19, 1955, 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 in order to encourage growth of vegetation (Tr. 246, 293).

The plaintiffs contend that they were given no warning of the cuts in the old road or that it had been with-

drawn from use by the public and that the defendant contractors had failed to post adequate warnings or barricades at the scene of the accident. The record in this case fairly establishes the following facts:

The plaintiff, P. K. Edmunds, owner of some of the land through which the new section of highway was to be constructed, had sold a portion of his land to the State of Utah to provide a right-of-way on which the new highway could be built (Tr. 95, 96, 143, 144, 157). Hence he knew of the plans of the state to construct a new road. Also, during all of the months that construction was going on, he was travelling this section of the highway frequently in going to and from his farm and travelling North as far as Salt Lake City (Tr. 142-3). Early in November, 1955, he had made a visit to his farm. Although he had no recollection of driving on the new highway and was unable to say when the new section had been opened for public travel, he undoubtedly used the new road on this occasion (Tr. 146-148). As we have already pointed out, this new road had been in use and non-use of the old abandoned road had been in effect from the end of September, 1955—two months before the accident (Tr. 211, 213, 220, 263). Edmunds was unable to definitely deny that he had travelled on the new road before the date of the accident. There is no question about his knowledge that the new road was in use on November 27, 1955, inasmuch as by his own statement, he used it on that day in travelling to the North line of his property (Tr. 184).

From the date when the new road was opened, there is ample evidence that no traffic, except Edmunds' car, made any attempt to use the old road after the new high-

way was opened for travel (Tr. 44, 45, 152, 153, 156, 212, 234, 268). On the day when the accident occurred, he was also aware that his was the only vehicle attempting to use the old highway. He gave no thought whatever to this significant fact as a warning of possible danger to himself and his family (Tr. 75).

Furthermore, for weeks before the accident, the old highway was completely torn up and obliterated and barricaded on the North end so that traffic could not even drive to it from the North (Tr. 210, 212, 222, 223, 231). On the South end a large sign and barricade, 16 feet long and 4½ feet high, was placed squarely across where the old road had been. This sign and barricade was directly in front of Edmunds as he drove North and turned slightly to the East onto the new road. This sign was marked in large luminous letters "ROAD CLOSED" and "DETOUR." There is no evidence that contradicts the defendants' evidence that this sign at the South end of the old road was in place and in plain view on the date of the accident (Ex. 18, Tr. 38, 39, 41, 42, 224, 231-233, 242, 264-266). The only thing Edmunds says about this barricade is that he did not see it on the day of the accident as he drove North, but he refused to deny that it was there (Tr. 41-42, 113, 150-151). In addition, over 200 feet of the old road, where it had been joined to the highway on the South, had been entirely removed and obliterated in October of 1955 and could not possibly have been used for travel. This was evident to anyone taking the trouble to even look. It would have been impossible for Edmunds to drive onto the old road from the South because of this condition (Tr. 24-25, 224-25, 233-35, 267-68). The cut

into which Edmunds drove his car was made by the defendants under the direction and supervision of the resident engineer, who designated to the contractors the points at which all of the cuts were to be made. Their purpose was to provide drainage away from the new roadway and in some instances for irrigation purposes. (Tr. 226-233, 240, 241, 244, 257). All of the cuts were readily discernible to anyone travelling on the new road, which was only about 100 feet East of the old roadway (Tr. 22, 187, 188, 212). In addition, at six points on the right-of-way, fences had been constructed across this old road and three of these fences crossed the old highway South of Lunt Park, located about 5 miles North of the South end of the project (Tr. 222, 223, 266, 267, 269, 284). In addition, there were roadblocking barricades and signs located at four different points at public cross-roads on the old right-of-way to warn the public not to travel on the old highway (Tr. 289).

As has been above stated, all operations of the defendants had been suspended by order of the State Road Commission, on November 19, 1955; prior to this date the resident engineer made an inspection of the project and ordered the defendants to take certain action in preparation to suspend operations (Ex. 17, Tr. 227-28). Afterwards, he made another inspection and satisfied himself that all of his requirements had been met and thereupon issued the suspension order (Ex. 15, Tr. 225, 248-49). Inspection by him included a determination that defendants had constructed the necessary fences and had installed or repaired and placed all signs required to insure the safety of the public (Tr. 225, 227, 243). Under these conditions the work was suspended on November 19, 1955 and the de-

defendants left the project for the winter, and the State Road Commission took over and assumed control until the following spring (Tr. 207). No suspension order would have been issued unless the defendants had fully complied with all of the requirements of the resident engineer (Tr. 249). After the suspension order became effective the defendants were not allowed to do any further work until ordered by the engineer (Tr. 272). The scarification of the surface of the old road was not a part of the work required before suspension of work. (Ex. 17, Tr. 203).

On the question of the erection of signs or barricades at drainage cuts, or on approach roads crossing the old highway, the resident engineer testified that contractors were never required to construct them (Tr. 249-50).

The plaintiffs, P. K. Edmunds and Ella Edmunds, seek to excuse the conduct of P. K. Edmunds by claiming that the appearance of the old roadway was deceptive in that the cut where the accident happened was mistaken by him for an access road covered with blacktop which would lead to the new highway. He admits that he saw it, but mistook it for an access road. The facts, however, are that there was no blacktopping at all near this cut, nor was any access road located near this point (Tr. 299). Edmunds admitted that he did not know if blacktopping on the access roads extended all the way to the property lines (Tr. 160).

The evidence is uncontradicted that at least half of the access roads provided by the state in this area were only blacktopped for a distance of 20 to 25 feet from the new highway and the rest of the way to the property line on these access roads the surface was the natural soil of the area (Tr. 230-231, 298-299).

That these plaintiffs were guilty of inattention is attested by the fact that they were engaged in pointing out the countryside to their guest, an activity in which P. K. Edmunds admitted that he participated (Tr. 151).

It is essential to make some reference to the injuries of the various plaintiffs. The four children involved received only negligible bruises and perhaps one of them had a small cut or two. They were superficially examined by their father, P. K. Edmunds, who is a physician, at the accident scene. They were never hospitalized and their injuries required no treatment whatsoever. No medical or other expense of any kind was ever incurred in treating them or any of the plaintiffs (Tr. 178, 182, 183, 189).

The plaintiff, Ella Edmunds, received a bump on the back of the head and on the lower back and a twisted ankle (Tr. 177). She reluctantly went for an X-ray examination the day following the accident (Tr. 180). She had no further examination and no treatment. She treated herself with a few aspirin and some sedatives (Tr. 180, 190, 191). There were no fractures involved and her injuries had all disappeared in three to four weeks (Tr. 180-182). Following the accident, she carried on her usual household duties, caring for her husband and eight children (Tr. 181). She herself described her injuries as not serious and herself as fully recovered in a few weeks (Tr. 188, 189, 190, 191). Both Mrs. Edmunds and the children were taken home from the accident scene by a passer-by in a car (Tr. 101-102). They got into and out of his car without any assistance and presented no appearance of any injury (Tr. 215-216). They made no complaints of injury to him during the ride home (Tr. 217).

## STATEMENT OF POINTS

## POINT I.

THE DEFENDANTS ARE ENTITLED TO A REVERSAL OF THE JUDGMENTS:

- (a) BECAUSE DEFENDANTS WERE GUILTY OF NO ACT OF NEGLIGENCE CAUSING INJURY TO PLAINTIFFS.
- (b) BECAUSE THE EVIDENCE, AS A MATTER OF LAW, CONCLUSIVELY SHOWS THAT THE NEGLIGENCE OF PLAINTIFF, P. K. EDMUNDS, WAS THE SOLE PROXIMATE CAUSE OF PLAINTIFFS' INJURIES.

## POINT II.

THE DEFENDANTS ARE ENTITLED TO A REVERSAL OF THE JUDGMENT IN FAVOR OF PLAINTIFF, P. K. EDMUNDS, FOR THE REASON THAT SAID PLAINTIFF WAS GUILTY OF NEGLIGENCE, AS A MATTER OF LAW.

## POINT III.

THE DEFENDANTS ARE ENTITLED TO A NEW TRIAL AS TO PLAINTIFFS ELLA M. EDMUNDS, CHARLOTTE EDMUNDS, FRANKLIN EDMUNDS, JOHN EDMUNDS and ANN EDMUNDS, FOR THE REASON THAT THE DAMAGES AWARDED TO SAID PLAINTIFFS ARE EXCESSIVE, AS A MATTER OF LAW.

## POINT IV.

THE TRIAL COURT COMMITTED ERROR IN ITS INSTRUCTIONS NOS. 2, 9, 12 AND 17.

## POINT V.

THE TRIAL COURT COMMITTED ERROR IN ITS REFUSAL TO GIVE INSTRUCTIONS REQUESTED BY DEFENDANTS.

## ARGUMENT

## POINT I.

THE DEFENDANTS ARE ENTITLED TO A REVERSAL OF THE JUDGMENTS:

- (a) BECAUSE DEFENDANTS WERE GUILTY OF NO ACT OF NEGLIGENCE CAUSING INJURY TO PLAINTIFFS.
- (b) BECAUSE THE EVIDENCE, AS A MATTER OF LAW, CONCLUSIVELY SHOWS THAT THE NEGLIGENCE OF PLAINTIFF, P. K. EDMUNDS, WAS THE SOLE PROXIMATE CAUSE OF PLAINTIFFS' INJURIES.

The first proposition relied upon by defendants is that they were guilty of no negligent act causing injury to plaintiffs.

The alleged negligence relied upon by plaintiffs is that defendants wrongfully and negligently caused and permitted a hole or excavation to exist in a *public road*, without placing any barricades or signs at the point where the



hole and excavation was made to warn and prevent persons from using said road. It is conceded by defendants that at the place of accident no barricade or sign was erected by them. It is not conceded, however, that the place of accident was in any sense of the term a *public road*. The record is without dispute that the place of accident had been withdrawn from use as a highway by the State of Utah several weeks before the date of the accident. The accident occurred on the 27th of November, 1955. The new road constructed by the defendants was taken over and placed in use by the state in the last week of September, 1955.

Proof that the old section of highway had been withdrawn is the undisputed fact that barricades and signs had been placed and erected in at least four places on the old highway. This was done at the North and South ends of the abandoned road and at two other locations in between, where the old highway was crossed by other public roads (Tr. 264, 266, 288). Signs at each of these points warned the public that the old road was closed. Furthermore, there were right-of-way fences which crossed the old highway at six different points and which also constituted a barrier and a warning that the old road was no longer to be travelled (Tr. 284). Three of these fences were South of Lunt Park (Tr. 222-223). As further warning to the public that the old highway was abandoned and withdrawn from use, both the South and the North ends thereof had been completely obliterated and removed, so that on the day of the accident it was perfectly evident that the old road no longer constituted a highway. This obliteration on the North end, was for a distance of a hundred feet and, at

the South end, for a distance of two hundred to two hundred and fifty feet (Tr. 224-225, 267-68). Even this was not all. The old road had been cut through in twenty places by cuts which vary from twenty to thirty feet wide, further indicating that it was no longer a highway. These cuts could readily be seen from the new highway which was only about a hundred feet to the East from where the old highway had been. Three to five of these cuts were located between the North line of the Edmunds property and the point of accident, a distance of about a mile and a half (Tr. 301).

All of the cuts through the old highway, according to the testimony of defendants and the State Highway Engineer were made before the 19th of November, 1955 (Tr. 244-257). Finally, the new section of highway was open and in use for at least seven weeks before the date of accident.

The effectiveness of the measures taken by the defendants and the State of Utah to give notice to the public that the old road was no longer to be used is eloquently attested by the undisputed fact that all traffic on the highway used the new section of road from the time it was opened in the last week of September until the date of accident. Testimony in the record is that not one automobile was ever seen attempting to use the old road from the time the new road was opened. Plaintiff Edmunds was the only member of the public known to attempt such use (Tr. 44-45, 212). On the day when he made use of the old road to his misfortune, he noted that no one else was following his example (Tr. 156 )and furthermore, on the day of the accident, in travelling to the North line

of his property, he himself used the new road (Tr. 96).

As has been noted, plaintiffs complain because no barricade or sign was erected at the point where they ran into a drainage cut in the old road. We point out that if it was the duty of defendants to erect a sign and barricade at this point, they should have likewise done the same thing at every other point where the old road had been cut for drainage or to provide an irrigation channel. Since there were twenty of these cuts, this would have required the erection of forty signs and barricades on this old road. No provision of the contract required such action by the defendants and the engineer in charge of the project testified that highway contractors were never required to take such precautions (Tr. 249-250). We know of no case imposing such a burdensome duty upon a state or highway contractor.

Plaintiffs also complain that because there was no sign posted at the point where they drove from a private access road onto the old highway, warning them the old road was unsafe, defendants were negligent. The private roadways or access roads on this highway were located every 2100 feet along the new highway (Tr. 286).

No case we know of imposes a burden upon a state or highway contractor to place signs or barricades on an abandoned highway at every point where it is crossed by a private driveway or access road. To impose such a burden would be unreasonable and intolerable. So far as we are aware the requirements of reasonable safety are met if such a road is barricaded and signed at its ends and where it is intersected by public roads. The evidence is uncontradicted that at every such point the old highway had been barricaded and signed giving such warning.

In the contract between the state and the defendant contractors there is a provision which is part of the Standard Specifications requiring contractors to provide and maintain necessary signs and barricades for the safety of the public (Ex. 12, Standard Specifications 1-7.10, page 39). This specification, however, does not define nor particularize any standard of compliance and, we submit, will not support the contention of the plaintiffs that signs and barricades should have been erected at all the points where they contend they should have been placed.

On November 19, 1955, the work of the defendants was suspended due to weather and seasonal conditions, which made such suspension necessary. Work ceased upon an order issued by the resident engineer (Tr. 202-3, 225, Ex. 15). From this date no further work was done by the defendants or permitted by the state until June 28, 1956 (Ex. 16). Before work ceased on November 19, 1955, the engineer in charge for the state made an inspection of the project to determine what had to be done before the work could be closed down. He made certain requirements by written instructions (Tr. 227, Ex. 17). He came back to the project afterwards and before issuing his suspension order made a determination that all of his requirements, including safety precautions, had been carried out (Ex. 15, Tr. 225-227). It is to be observed that he especially satisfied himself as to the erection of signs and barricades and the work was not allowed to cease until he was fully satisfied.

It is earnestly submitted that the best criterion of reasonable care on the part of defendants in regard to the placing of barriers and signs lies in the action of the com-

petent state officials charged with the duty of supervising the construction of public highways and possessing knowledge and experience qualifying them to be the best judges of what would constitute adequate safety measures on a road project.

No attempt was ever made by plaintiffs to show that the precautions carried out by the defendants under the orders of the State of Utah were not adequate, nor was any testimony introduced by which it appeared by competent opinion that the defendants had failed in any respect. The case was simply permitted to go to the jury, composed of unskilled laymen, to determine whether the defendants were negligent because they did not erect signs or barricades at every private crossing or cut made through the old abandoned highway, and only erected such signs and barricades as the state required. No instruction was given to the jury as a guide, other than a general instruction that the jury could find in favor of the plaintiffs if they found negligence on the part of the defendants in leaving a trench or excavation in a *roadway* unguarded by a barricade or sign to warn travelers of the danger (Instruction No. 9, R. 75). Another instruction was given, which defendants assert was palpably error, which stated that it was the duty of the defendants to use reasonable care to exclude public travel from that portion of the *roadway* made impassable and dangerous by the drainage ditch and to erect barricades and warning signs and that failure to do so would constitute negligence (Instruction No. 12, R. 78). We shall have more to say hereafter concerning these instructions.

The evidence is manifestly clear that the old section

of road was no longer a public highway on the day of the accident. The case went to the jury on the undisputed testimony that defendants cut a drainage ditch in the old highway pursuant to the requirements of their contract and plaintiffs ran into this ditch in broad daylight, which they admit they saw, but which they claim they mistook for a private crossing from the new highway to private property West of the right-of-way. We contend that this evidence is insufficient to support any finding of negligence chargeable to defendants.

One of the provisions of the Standard Specifications gave the State Road Highway Engineer in charge sole discretion to make all decisions as to the work to be performed and as to the manner of performance (Ex. 12, Standard Specifications 1-5.1, page 23). We submit that this right of decision vested in the engineer should be binding upon the plaintiffs until a showing is made that he failed to perform his duty and that it was error under these circumstances to permit the jury to make a finding of negligence. Had the defendants gone ahead and erected barricades and signs at the places where plaintiffs, by hindsight, now claim they should have been placed, they would have been obliged to do so at their own cost and expense, since no provision of the contract or order of the engineer in charge required this to be done, nor made any provision for payment if it was done.

Another point illustrating the injustice of the judgments against the defendants is that they were held liable for the condition of an abandoned road over which they had no control when the accident occurred. From the 19th of November, 1955, when the above described sus-

pension order went into effect, the defendants were no longer on this project doing any work nor were they charged with any responsibility of any kind during this period of time. This was the period during which the State of Utah assumed sole responsibility for the project. Section 1-4.5 of the Standard Specifications, pages 21 and 22, provided "When construction operations are suspended by written order of the engineer for seasonal conditions \* \* \* 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).

It is submitted that, under this provision of the contract, on the date of the accident, the state, under its suspension order (Ex. 15) having assumed control of the project, it was the duty of the Road Commission to provide and maintain any necessary safety devices and precautions on this highway or its adjacent appurtenances and that the defendants were consequently relieved of such responsibility and of all liability in connection therewith. If the defendants had failed in any regard to perform some portion of the contract with respect to safety, then the state should have done the necessary work at the contractors' expense. This same provision of the Standard Specifications further provided: "\* \* \*, the engineer shall perform at the contractors' expense, such work which, in the engineer's opinion, is necessary to provide a satisfactory condition for traffic. \* \* \*."

We anticipate that plaintiffs will argue that the responsibility of the contractors continued until final acceptance and since this project had not been finally accepted, the responsibility of defendants was a continuing one under the provisions of the contract. The following cases and authorities hold that in instances where a new highway has been taken over by a public body which assumes control of it and places traffic thereon, that at that time acceptance for all practical purposes is complete and such acceptance relieves the contractor of any liability for accidents occurring after the date of such practical acceptance:

*Donaldson vs. Jones*, Washington, 61 Pac. 2, 1007

*Memphis Asphalt Co. v. Fleming*, Ark. 132 SW 222  
13 ALR 2, 191, pages 211, 219

58 ALR 2, 865, pages 876, 878

In this case, the new section of highway had been accepted by the state and had been put in public use and this occurred in the last week of September, 1955, at which time the new highway was fully completed (Tr. 220-221). After November 19, 1955, all that remained for the contractor to perform was to return when weather conditions permitted to break up the surface of the old road to encourage the growth of vegetation thereon (Tr. 293-294).

Since defendants were guilty of no negligence causing injury to plaintiffs and since they owed no duty to plaintiffs on the day of the accident, it naturally follows that the sole proximate cause of injury was the negligence of plaintiff P. K. Edmunds, driver of the vehicle which plunged into the drainage cut. It is defendant's conten-



tion that his negligence was the sole cause of injury and that consequently none of the plaintiffs should be entitled to recover.

In *Nielsen v. Christensen-Gardner*, 85 Utah 79, 38 P 2, 743, it was contended that a road contractor had failed to erect and maintain a suitable barricade across a new highway under construction and to properly light it. In that case, as here, an automobile was driven into an excavation. This court held that the barricade was sufficient to discharge the contractor's duty and further that the guest plaintiff could not recover from the contractor because his injuries were caused by the negligence of the driver alone. See *O'Brien v. Alston*, 61 Utah 368, 213 P. 791. We submit that these cases support our contention on the question of proximate cause.

That plaintiff, P. K. Edmunds, was negligent, is incontrovertibly demonstrated in the record. First of all, he departed from a safe and designated highway free of obstruction and hazard to travel at his own risk upon an abandoned road which he knew, or in the exercise of reasonable care, should have discovered, was no longer open for public travel. He was aware that the new section of highway was in use, having used it himself, and saw all of the travelling public using it exclusively.

It had been held by this court that where a street is laid out and is plainly designated for travel and is adequate, there is no duty to keep the undesignated portion of the right-of-way free from danger. A traveller departing from the designated way intentionally does so at his own peril. There are no implied assurances that the undesignated portions are free from obstructions or danger.

This court said, in *Jensen v. Logan City*, 89 Utah 347, page 372, 57 P2 708 “\* \* \* where one ceases by deliberation or intention to use the designated portion he can no longer be reasonably using it and he goes thereafter on his own responsibility.” See also *Herndon v. Salt Lake City*, 34 Utah 65, p. 81; 95 Pac. 646.

It is argued by plaintiffs that the old highway had the appearance of a road open and fit for travel and hence the plaintiffs had an implied right to use it. The fallacy in this argument lies in the fact that plaintiff P. K. Edmunds ignored all of the obvious signs and warnings, which we have heretofore mentioned, that this old highway was no longer a public road. He ignored the sign stating that the road was closed. This was not a little sign, difficult to see, it was 16 ft. long and 4½ ft. high and made of heavy timbers (Ex. 18, Tr. 264-65). It covered most of the entire width of what had been the old highway and was placed squarely across the center of it (Tr. 38-39, 41). P. K. Edmunds ignored completely the fact that all the travelling public but himself was using the new highway. He disregarded the plain indication given by the fact that the entire South end of the old road had been destroyed for 250 feet where it had formerly been part of the highway. Finally, if he had been alert and observant as he should have been, he would have seen that the old road was cut in many places. This was plainly visible from the new highway only 100 feet away. This is not a case where no indications existed which a traveller could reasonably be expected to see, giving him warning of danger.

The final answer to plaintiffs' claim that they were

justified in using the old road lies in the fact that in broad daylight, on a level, straight surface, with no obstruction to vision and unlimited visibility, Edmunds ran his car into a trench 27 feet wide and  $4\frac{1}{2}$  feet deep. No extenuating circumstance excused such conduct. He testified that he was looking straight ahead at the time, driving 45 miles per hour. Seated in the driver's seat and looking ahead and down at the surface over which he travelled, he could have seen the break in the surface for hundreds of feet, had he looked or paid attention. A plane drawn from the edge of the cut in a straight line to eye level of a driver seated in a car would have revealed the far bank of the cut long before it was reached. This is an inescapable physical fact. Eye level would have been at least  $4\frac{1}{2}$  feet above the surface of the old road.

Furthermore, P. K. Edmunds was not a stranger to the area. He had observed a new highway under construction in the area for months and had provided part of the right of way on which it was built. When the new road was opened, which he knew had occurred, he was bound to know that the old road was no longer intended for travel. We do not have a case here of a road being taken out of use without any warning to the public and without any other means of travel provided obvious to all travellers. Here we are confronted with the case of a new highway paralleling an old one at a distance of a hundred feet and which was in plain view, plainly and obviously indicated as the highway which should be used and which every other traveller was using. All the cases imposing liability for failure to warn of an abandoned highway are cases in which the public had

been given no reasonable notice that abandonment had taken place.

Here we merely have a case involving a driver who was inattentive, engaged in showing a guest the features of the surrounding country and his own property and not maintaining proper lookout. (Tr. 151).

To relieve the plaintiff, P. K. Edmunds, of the stigma of negligence an attempt was made to show that he was deceived into thinking that the cut through the old highway, which, by his own admission, he saw, was an access road or private crossing, providing access to private lands from the new highway. He described it as appearing to him to be a blacktop surface. The facts are that there was no blacktop in the area of the cut and hence the cut would have had the color of the natural soil of the area. There is no evidence in the record that the natural color of the soil was black.

Hereafter we will cite many decisions which this and other courts have decided imposing the duty upon travellers and drivers to look where they are going and charging them with the duty to see what is plain to be seen. A party will not be heard to say that he could not or did not see what reasonable diligence would disclose. The cut into which P. K. Edmunds drove his automobile was not narrow or small or concealed, nor was it just a cut capriciously made by the defendants which they dug and went away and forgot about. It was a part of the structure of the new highway and was vital to its life and maintenance and was a permanent part of the highway project itself.

A Utah decision exemplifying the duty of a driver

to look is found in *Spackman v. Carson*, 117 Utah 390, 216 P. 2 640. “\* \* \* a duty to look carries with it the duty to see what is there to be seen.”

We submit that none of the plaintiffs should recover in this case for an accident which was caused solely by the negligent act of a driver who could have seen, if he had looked with purpose.

## POINT II.

THE DEFENDANTS ARE ENTITLED TO A REVERSAL OF THE JUDGMENT IN FAVOR OF PLAINTIFF, P. K. EDMUNDS, FOR THE REASON THAT SAID PLAINTIFF WAS GUILTY OF NEGLIGENCE, AS A MATTER OF LAW.

All that has been said regarding the conduct of plaintiff, P. K. EDMUNDS, as negligent and as the sole cause of the injuries suffered by all the plaintiffs, applies with special emphasis to him.

Without repetition of argument already made, defendants will limit their argument on this aspect of the case to references to the cases where claimants have been denied recovery because of their own fault.

To begin with, it is an elementary proposition that every person is under a duty to use reasonable care for his own safety, which includes, of course, a duty to keep a reasonable lookout under all conditions where danger would be reasonably anticipated. The following cases are among those in which this court has spoken so often on this subject:

*Scofield v. Sprouse-Reitz Co.*, 1 Utah 2, 218, 265, P2, 396.

*Knox v. Snow*, 119 Utah 522, 229 P2, 874.

There are many Utah decisions involving automobile accidents where plaintiffs have been denied recovery because of their failure to look and to maintain a lookout for danger which they saw or should have seen. The following are representative:

*Spackman v. Carson*, *supra*.

*Mingus v. Olson*, 114 Utah 505, 201 P2, 495

*Conklin v. Walsh*, 113 Utah 276, 193 P2, 437

*Covington v. Carpenter*, 4 Utah 2, 378, 294 P2, 788.

There are of course many cases dealing with automobile accidents where drivers have driven into excavations and holes in public highways.

In Utah, *Nielsen v. Christensen-Gardner*, *supra*, is typical. That case differs somewhat in its facts from this case because the plaintiff in that case was a guest and also in the fact that the accident happened at night on a highway which was in use, but through which a cut had been made for a culvert. The driver in that case ran into a barricade with a red lantern on each end. The lanterns were visible for 600 feet, but the barricade was not seen by the driver until he was just a few feet away from it. In that case this court discussed the negligence of the driver for paying no heed to the lanterns and driving into a cloud of dust which obscured his vision and concluded that such conduct was negligent as a matter of law and the sole cause of the accident. We think that case is pertinent in principle to this case, imposing a duty upon a driver to keep a proper lookout and to pay attention to his surround-

ings and what is visible in his path ahead. In this case it should be observed that Edmunds does not deny that he saw the cut in the highway; he did see it, but wants to excuse himself on the ground that he mistook it for something else. Having seen something in the highway ahead of him, he should have slowed down until he could determine what it was in fact.

In *Christensen v. Grays Harbor County*, Wash., 210 P2 693, a jury verdict in defendant's favor was affirmed in a case where a driver drove into a chuckhole. That court concluded that a driver is under a duty to avoid difficulties and obstructions which could be seen by exercise of reasonable care.

In *Denny v. Garavaglia*, Mich. 52 NW2, 521, a driver was denied recovery for injuries sustained when at night he drove into a hole extending half way across a highway only 18 inches deep and filled with water. The court in that case pointed out that there was a warning sign several hundred feet from the point of accident cautioning drivers to go slow and indicating road repairs were in progress. The court held a reasonably careful person would have given heed to the sign. That case was much stronger in favor of the plaintiff than this one and yet in that case recovery was denied. All of the many indications open and apparent to Edmunds if he had looked and paid attention made his conduct inexcusable. In this case there was a sign, among other things, in plain view of P. K. Edmunds, warning him that the old road was closed. His failure to see or heed it was inexcusable.

See also *Marshall v. City of Baton Rouge*, La. 32 So. 2, 469

*Ritter v. Olson*, Pa. 68 Atl. 2, 732

*Price v. City of Monroe*, N. C. 68 SE2, 283

*Arceneaux v. Louisiana Highway Commission*, La. 15 So. 2, 638

The last before mentioned case was one where plaintiff's chauffeur ran into a hole in a public highway. That court held that the plaintiff could not recover for his injuries. The following is part of the opinion of the court:

"\* \* \* There should be no recovery because the hole was open and apparent and could easily have been seen and should have been seen by plaintiff's driver and therefore, if plaintiff's driver drove the said automobile into the hole, the accident resulted from his contributory negligence."

The court said further:

"The record creates in our mind a conviction that the hole was 'unseeable' to Smith only because he did not see it because he was paying no attention whatever to the road ahead \* \* \*."

*Robman v. Richmond Heights*, Mo. 135 SW2, 378, is a case very similar to this case and well illustrates why the plaintiff, P. K. Edmunds, should not recover at all. The court, in deciding that case, made the following observations:

"\* \* \* Where the driver has knowledge that the street is in a difficult condition or that construction or repair work is in progress on the street, he may not assume that the street is reasonably safe for travel. Nor does the rule excuse the traveller in any case from the exercise of his faculties to discover and avoid obvious dangers. No one may be excused



from seeing that which is in plain view and which he could readily see by the exercise of due care  
\* \* \* .”

“\* \* \* he is not only required to look but to look in such an observant manner as to enable him to see the conditions which a person in the exercise of due care and caution for his own safety and the safety of others would have seen under like or similar circumstances and it is as much negligence to fail to see that which can be observed by due care as it is negligence not to look at all. \* \* \* not to see what is plainly visible when there is a duty to look constitutes negligence.”

That Court said further:

\* \* \* “This condition of the backfill was in plain view. It was broad daylight at the time of the accident. \* \* \* nevertheless, plaintiff in broad daylight drove his car heedlessly onto this rough and dangerous fill at such a high rate of speed that when it hit one of the holes in the fill it jumped up in the air.”

“To allow plaintiff to recover under the facts as shown by his own evidence would be to reward him for his own reckless conduct that endangered not only his own life but the lives of others rightfully using the street.”

Finally, the Court says:

“\* \* \* \* but saying he (plaintiff) could not see what was in plain view in broad daylight is without probitive force.”

Plaintiff in that case was denied recovery because of contributory negligence as a matter of law.

See also:

*Miller v. Baltimore, Md.*, 157 Atl. 289

*Taecker v. Pickus*, So. Dakota 235 NW 504

*Abraham v. Sioux City*, Iowa 250 NW 461

*Schawe v. Leyendecker*, Texas 269, SW 864

*Presley v. C. M. Allen & Co. Inc.*, N. C. 66 SE2, 789

It is to be observed that in all of the cases quoted above, the accidents occurred on highways which were actually in use and not on highways which had been abandoned and withdrawn from use. That being so, even assuming, in this case, that the old roadway was in fact still a highway or that it presented the appearance of a highway, which the plaintiffs were invited to use, the plaintiff P. K. Edmunds should not be permitted any recovery because he should have seen the drainage cut in ample time to have stopped before running into it. That being so, we submit the judgment in his favor must be reversed.

### POINT III.

THE DEFENDANTS ARE ENTITLED TO A NEW TRIAL AS TO PLAINTIFFS ELLA M. EDMUNDS, CHARLOTTE EDMUNDS, FRANKLIN EDMUNDS, JOHN EDMUNDS AND ANN EDMUNDS FOR THE REASON THAT THE DAMAGES AWARDED TO SAID PLAINTIFFS ARE EXCESSIVE, AS A MATTER OF LAW.

The recital in the record of the injuries to the four minors, CHARLOTTE, FRANKLIN, JOHN AND ANN EDMUNDS shows beyond question that they received no injury in the accident worthy of mention. They had a few bruises and one of them, just which one, is not

clear, had a small cut. They received no treatment of any kind. (Tr. 178, 183, 189).

In spite of the lack of any evidence of material injuries the jury awarded these children each \$500.00 damages. It is submitted that these awards were grossly excessive and manifested a disposition on the part of the jury to give away the defendant's money, not to award a sum commensurate with injury actually sustained.

The trial court refused to rectify the jury's error or to modify the verdict or to grant a new trial. It is submitted that this action entitled defendants to a new trial. Although a judgment for \$500.00 may appear to be small, as judgments go in personal injury cases in these days, when the evidence shows that an award given by a jury is ten times as much as it should have been, the injustice should not be allowed to go unnoticed or uncorrected.

The judgment in favor of plaintiff Ella M. Edmunds had more basis in reality than the cases of the children, but nonetheless, it too, was grossly excessive. Mrs. Edmunds was X-rayed to determine the extent of her injuries, but she never was treated (Tr. 180). There were no fractures and all evidence of injury had disappeared in three to four weeks. In the meantime, she carried on all her household duties without interruption (Tr. 180-182). She characterized her injuries as slight or not serious with uneventful and full recovery (Tr. 188-191). In less than a week after the accident Mrs. Edmunds acted as her husband's chauffeur, driving him to Las Vegas and then returned home by bus (Tr. 105, 106). Three weeks later she went to California and drove her husband back home (Tr. 106-111). There was no justification for awarding this plain-

tiff \$2500.00. It is submitted that as a matter of law the defendants are entitled to a new trial to correct the intemperate action of the jury.

#### POINT IV.

#### THE TRIAL COURT COMMITTED ERROR IN ITS INSTRUCTIONS NOS. 2, 9, 12 AND 17.

Defendants complain of error committed by the court in instructing the jury. The first of these errors occurred in Instruction No. 2. In paragraph two of this instruction the following language appears:

“The plaintiffs claim that the defendants were guilty of negligence in failing to place barriers, obstacles or other devices to warn travellers of an excavation across the roadway.”

It is submitted that the reference to an excavation across “the roadway” was misleading and erroneous. All the evidence shows conclusively that at the place where this cut was made there was in fact no roadway, either authorized or in use. The old roadway had ceased to be a roadway long before the accident. The fencing of it, the twenty cuts across its length, the obliteration of the ends of the old highway on the North and South, all precluded it from being described as a highway.

The vice in this instruction is that it permitted the jury to speculate that the defendants may have been using the old road on the day of the accident as a matter of right and that hence the defendants were under a duty to place warning signs and barricades at the point where the excavation was made. At least the jury should have been instructed that before they could find negligence, they

should first find that the old highway was still in use or that there were no indications that it was not to be used.

Again, in Instruction No. 9, the Court referred to the excavation as having been made in a "roadway." There can be no question but what the state was at liberty to close, cut through or do anything else to the old roadway necessary to preserve and maintain the new road. For this reason the term "roadway" applied to the place of accident was inapplicable and was misleading to the jury.

Defendants particularly complain of Instruction No. 12; this instruction was little, if any, removed from the scope of a directed verdict for the plaintiffs. It was erroneous for the reason that it permitted the jury to consider the old roadway as part of the highway in the face of the uncontradicted evidence that it was not a part of the highway intended for travel from the time the new section of highway was opened for public use. After the opening of the new highway, the defendants, under the direction of the state, barricaded the old highway at both ends and at other points where it intersected public cross-roads. (Tr. 289). Signs were posted advising travellers that the old road was closed. It was then fenced off at at least six different places and twenty drainage and irrigation cuts were made through it. After all this had been done this old roadway by no stretch of the imagination could be considered a "roadway" in the sense that it was intended for travel.

This instruction was further erroneous because it stated that defendants were in some way bound to exclude travellers without any limitation as to the steps required to accomplish such exclusion. Just how the plaintiffs or anyone else could have been so completely excluded from

the old road as to absolutely prevent its use does not appear in this record. We think that the instruction was too broad and was misleading to the jury. Furthermore, after November 19, 1955, when the state assumed full control of the whole project, including the old roadway, the defendants were under no duty or obligation during this period of suspension of work to exclude anybody from using the old highway. They were fully relieved of all duty toward the plaintiffs on the day of the accident. Any duty in this respect at that time rested upon the State of Utah. Finally, the opening of the new road and its acceptance relieved the defendants from any liability for accident occurring on any part of the project from that time on. (13 A.L.R.2, 191; 58 A.L.R.2, 865, *supra* and cases therein cited.)

The last paragraph of Instruction No. 17 invited the jury to award damages to all the plaintiffs for future disability. Defendants excepted to this charge because the record shows without any dispute that none of the plaintiffs except P. K. Edmunds made any claim of future disability or permanent injury. The four children recovered completely from their superficial injuries and plaintiff Ella M. Edmunds was fully recovered in three to four weeks following the accident (Tr. 178, 181-183, 188-191). To permit the jury to speculate concerning future disability and injury to these plaintiffs was manifestly erroneous and an error entitling the defendants to a new trial. The size of the verdicts in favor of these plaintiffs was so disproportionate as to leave the impression that the jury was misled by the trial court's error.

## POINT V.

## THE TRIAL COURT COMMITTED ERROR IN ITS REFUSAL TO GIVE INSTRUCTIONS REQUESTED BY DEFENDANTS.

Of the twenty-two numbered instructions requested by defendants, the trial court gave but one as requested and the substance of one other. These requests set out the defendants' theory of the case and defendants were entitled to have them given.

*Morgan v. Bingham Stage Lines*, 75 Utah 87, 283 Pac. 160

Defendants do not desire to argue extensively the action of the trial court in denying their requests, but attention should be directed to some of them.

By its refusal to give Instruction No. 7, the court denied the right of the defendants to have the jury instructed upon the duty of plaintiff Ella M. Edmunds to keep a lookout. That she was under such a legal duty is clear. Her duty to look was not as imperative as the duty of the driver, but none the less she was under a duty to pay attention to obvious danger seen by her and warn the driver. (*Nielsen v. Christensen-Gardner*, supra). In refusing to give this request and failing to give an adequate instruction on the subject, the jury was entitled to assume that Mrs. Edmunds was under no duty whatsoever to see dangers plainly apparent to her and give some warning thereof. Ella M. Edmunds admits that she saw the cut in the road, as did her husband. She affirmed the clearness of the day, the unlimited visibility and that objects could be seen at great distance (Tr.

186-188). The undisputed fact that she saw the cut entitled defendants to the requested instruction.

Requested Instructions Nos. 15, 19, 20 and 21 were in conformity with defendants' theory of the case and were supported by the evidence. Defendants' theory, as reflected by said requested instructions, has been extensively argued in the main portion of this brief and need not be repeated. If the case should be remanded for a new trial, this court should instruct the trial court that these requests should be given. We earnestly contend that a jury could find from the evidence that plaintiff P. K. Edmunds was on sufficient notice that the old road had been closed to require him, in the exercise of reasonable care, to travel on the new highway and that his failure to do so constituted negligence. Defendants further submit that the record and the law would likewise support a verdict that defendants had been relieved of all liability with respect to the old road by the state's assumption of use and control of the new road. If the new road was open no duty rested upon either the State of Utah or the defendants to keep the old road safe for travel.

### CONCLUSION

The record in this case discloses as conclusively as one could ever require that the accident to the plaintiffs on November 27, 1955, was caused by the sole negligence of the plaintiff, P. K. Edmunds, in driving his automobile in broad daylight into a 27 ft. cut through an abandoned public highway which was in plain view by the exercise of reasonable care and that defendants were guilty of no negligence in any way causing or contributing to said accident.



This record also shows that the plaintiff was guilty of contributory negligence as a matter of law in failing to see this cut and avoid running into it and that all the circumstances surrounding the accident put him on notice that the abandoned highway had been withdrawn from travel. Consequently defendants were entitled to directed verdicts as to all plaintiffs and especially so with respect to plaintiff P. K. Edmunds.

The verdicts in favor of the plaintiffs, Ella M. Edmunds and CHARLOTTE, FRANKLIN, JOHN and ANN EDMUNDS were grossly excessive for the amount of injury sustained by them, assuming that said plaintiffs were entitled to recover at all.

Finally, the trial court's error in instructing and in refusing to give instructions requested by defendants prevented them from obtaining a fair trial.

It is submitted that the judgments of the trial court should be reversed.

Respectfully submitted,

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