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Walter Larson, Aleida P. Larson and Jon Larson v. Robert George Evans, M.D. : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

FEB 10 1961

WALTER LARSON, ALEIDA P.
LARSON and JON LARSON,
Plaintiffs and Appellants,

— vs. —

ROBERT GEORGE EVANS, M.D.,
Defendant and Respondent.

Supreme Court, Utah

Case
No. 9365

BRIEF OF APPELLANTS

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— vs. —

ROBERT GEORGE EVANS, M.D.,
Defendant and Respondent.

}
Case
No. 9365

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

The plaintiffs brought this action to recover damages against the defendant for personal injuries and property damage growing out of an automobile accident at the intersection of Evergreen Avenue and 23rd East Street on the evening of October 23, 1958, at approximately 8:50 p.m.

Plaintiffs appeal to this court from a jury verdict of no cause of action based upon its finding that plaintiff

Jon Larson, the driver of the automobile in which the plaintiffs were riding, was contributorily negligent, and that such contributory negligence was the proximate cause of the accident and plaintiffs' injuries. The lower court also held that the negligence of Jon Larson was imputed to the other plaintiffs.

STATEMENT OF THE FACTS

The undisputed facts in this case, as determined by the lower court and set forth in the pretrial order (R. 14-17), establish that the accident complained of occurred at the intersection of Evergreen Avenue and 23rd East Street in Salt Lake County on October 23, 1958, at approximately 8:50 p.m., and that traffic entering said intersection from Evergreen Avenue was controlled by a stop sign at the time of the accident. The plaintiffs were proceeding north on 23rd East Street in an automobile driven by Jon Larson, one of the plaintiffs. The defendant was driving west on Evergreen Avenue.

The testimony in the case was not contradictory and, even viewing it in the most favorable light for the defendant, consisted of the undisputed facts hereinafter set forth. The defendant testified that he was proceeding at 30 miles per hour or less and that he did not see the stop sign controlling his entrance to 23rd East Street and that he did not stop, or attempt to stop, in obedience to the stop sign. (R. 116, 117, 120, 124, 404). He even admitted that he considered the accident to be his own fault at the trial below (R. 124, 404) in addition to

making such admission to others at the scene of the accident. (R. 136, 174). The defendant testified that his speed at the time of impact was 20 miles per hour. (R. 119). Based upon the above admissions the court instructed the jury that the defendant was negligent as a matter of law. (R. 68).

With respect to the physical nature of the intersection as it existed at the time of the accident the evidence clearly indicated that a dense five or six-foot hedge and house obscured from the vision of the plaintiffs all west-bound traffic approaching 23rd East on Evergreen Avenue. The existence of such hedge, as shown on plaintiffs' Exhibit P-1 to extend along the south side of Evergreen Avenue to within a few feet of the edge of 23rd East, was confirmed by the defendant (R. 121), Deputy Sheriff Clifford J. Gunn (R. 127, 422), Clifford A. Coon (R. 136-137), Jon Larson (R. 175), and Alice Taggart (R. 366-367). The defendant admitted that the hedge obscured his vision of the northbound Larson vehicle on 23rd East. (R. 121). Deputy Sheriff Clifford J. Gunn testified that one could not see through the hedge because of its density on the night of the accident. (R. 422).

The width of Evergreen Avenue was established at 24 feet by Deputy Sheriff Gunn (R. 416) and plaintiff Jon Larson (R. 411). The right front of the Larson vehicle collided with the left front of the defendant's automobile at a point 21 feet 5 inches north from the projected south boundary of Evergreen Avenue as each driver swerved to avoid the collision after which both

vehicles came to rest facing north in the west or south-bound traffic lane of 23rd East Street. (Exhibits P-1, P-4). Deputy Sheriff Gunn testified that the Larson vehicle laid down 40 feet of skid marks prior to the point of impact (R. 128, 417) and that these skid marks commenced 13 feet 8 inches south of the obstructing hedge on Evergreen Avenue. (R. 420). Deputy Sheriff Gunn also testified that the skid marks indicated the speed of the Larson vehicle to be 30 miles per hour and, therefore, the normal reaction distance would be 33 feet from the time the driver was alerted to danger to the point at which the skid marks commenced, resulting in a total distance of 73 feet from the moment the driver of the Larson vehicle was alerted to his peril to the actual point of impact. (R. 419-420). The Deputy Sheriff also stated that there were no skid marks left by defendant's automobile (R. 130, 417) and that there were no skid marks after the point of impact. (R. 416).

Jon Larson testified that he was proceeding north on 23rd East Street at approximately 25 miles per hour which was corroborated by Mrs. Larson. (R. 171, 173, 197, 229). He testified on direct examination that he applied his brakes the instant that he saw the defendant's car and that the car he was driving and the defendant's car entered the intersection at about the same time. (R. 171). When asked what attracted his attention to the defendant's automobile he stated that the first thing he saw were headlights which he could see for about 2 seconds, and that it appeared that the other car "was coming quite fast." (R. 173). With respect to the location of defend-

ant's automobile when he first saw it, Jon stated that it would have been the point at which the defendant's car first became visible to him. (R. 172). On cross-examination he testified that, to the best of his knowledge, the rectangles designated as "E-1" and "L-1" on Exhibit "P-1" represented the location of the defendant's automobile as well as the one he was driving at the moment he first saw the defendant's automobile. (R. 197-198). He also stated that he did not actually recall applying his brakes although he must have done so as shown by the testimony of Deputy Sheriff Gunn. (R. 199). With respect to one's faculty for memory under the circumstances of this accident, Dr. Paul Milligan, who was called as a witness for the defendant, testified that the combined factors of an accident resulting in a broken leg to a loved one could produce a state of shock to one who had suffered neck injuries in the same accident, and that such a state of shock could result in mental confusion and a failure to remember clearly the events precipitating the condition. (R. 399).

The defendant himself testified that, because of the hedge on the south side of Evergreen Avenue, he did not see the Larson vehicle until it was toward the front of him and that he wasn't aware of any danger until he had reached a point in the vicinity of the stop sign on Evergreen Avenue as shown on Exhibit "P-1." (R. 121, 118). Alice Taggart, a passenger in the defendant's automobile, testified that both cars were in the intersection when she first noticed danger. (R. 365).

The court submitted interrogatories to the jurors for their determination as to whether Jon Larson was negligent in the operation of the Larson automobile in that he (a) failed to keep a proper lookout, (b) did not have his car under control, or (c) was driving too fast for existing conditions. The jurors answered "yes" to said interrogatory and found that the negligence of Jon Larson was the proximate cause of the accident and plaintiffs' injuries. (R. 82-83).

STATEMENT OF POINTS

POINT I

THE VERDICT AND JUDGMENT OF THE LOWER COURT ARE NOT SUSTAINED BY THE EVIDENCE, AND THE LOWER COURT ERRED IN SUBMITTING THE QUESTION OF JON LARSON'S CONTRIBUTORY NEGLIGENCE TO THE JURY.

POINT II

THE LOWER COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANT IN ACCORDANCE WITH PLAINTIFFS' REQUESTED INSTRUCTIONS AS SET FORTH IN PAGES 27, 30 AND 31 OF THE RECORD ON APPEAL AND PLAINTIFFS' MOTION FOR A DIRECTED VERDICT SET FORTH ON PAGE 430 OF THE RECORD ON APPEAL.

POINT III

THE LOWER COURT ERRED IN FAILING TO GRANT THE PLAINTIFFS' MOTION FOR A NEW TRIAL.

POINT IV

THE LOWER COURT ERRED IN GIVING ITS INSTRUCTION NO. 3 FOR THE REASON THAT IT WRONGFULLY UNITED AN INSTRUCTION UPON THE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF JON LARSON WITH AN INSTRUCTION THAT THE DEFENDANT WAS NEGLIGENT AS A MATTER OF LAW.

POINT V

THE LOWER COURT ERRED IN SUBMITTING INSTRUCTION NO. 8 TO THE JURY.

ARGUMENT

POINT I

THE VERDICT AND JUDGMENT OF THE LOWER COURT ARE NOT SUSTAINED BY THE EVIDENCE, AND THE LOWER COURT ERRED IN SUBMITTING THE QUESTION OF JON LARSON'S CONTRIBUTORY NEGLIGENCE TO THE JURY.

It is a basic hornbook law that there must be substantial evidence of negligence to sustain a verdict of negligence. It is also elementary that evidence which makes the question of negligence a matter of mere surmise, conjecture, or speculation, or which gives rise merely to a possibility of negligence, does not justify submission of the case to the jury. See 38 *Am. Jur., Negligence*, §332, P. 1031; 20 *Am. Jur., Evidence*, §1178; 65 *C. J. S., Negligence*, §253, P. 1141. Furthermore, a case should not be left to the jury if the evidence is as consistent with the

absence of negligence as with its existence. See 65 *C. J. S.*, *supra*, footnote 57, for authorities so holding.

The lower court submitted the following interrogatory to the jury in instruction No. 17, which was answered affirmatively by the jury:

“2. Was the plaintiff, Jon Larson, negligent in the operation of the Larson automobile at the time of the accident in one or more of the following contentions?

- (a) That he failed to keep a proper lookout for traffic entering 23rd East and Evergreen Avenue.
- (b) That he did not have his car under control.
- (c) That he was driving too fast for existing conditions.”

An examination of the record in this case fails to disclose any evidence whatsoever upon which the court was justified in submitting the above interrogatory, or any part thereof, to the jury. Let us consider the first contention relating to the failure of Jon Larson to maintain a proper lookout. The only evidence upon which such a finding could be based was the testimony of Jon Larson that, to the best of his recollection, his automobile, as well as the defendant's automobile, had entered the intersection when he first saw the defendant's automobile. This testimony, however, is clearly shown to be subject to the frailty of memory and contrary to the physical evidence (with justification) under the circumstances and trauma of this accident as they affected Mr. Larson. The

defendant's own witness, Dr. Milligan, testified that the combined factors of the accident, together with the injuries suffered by the driver and his knowledge of serious injuries to loved ones, such as that suffered by his mother in the accident, could produce a state of shock resulting in mental confusion and a failure to clearly remember the events precipitating the accident. That this is so is graphically illustrated by the fact that Mr. Larson also testified that he did not actually recall applying his brakes, although it was not disputed, and the evidence is conclusive, that the automobile he was driving laid down 40 feet of skid marks prior to the point of impact. This latter fact was established without contradiction through the testimony of the deputy sheriff who investigated the accident. The same investigating officer presented undisputed evidence that such skid marks, together with reaction time, established that the driver of the Larson vehicle had actually reacted to his visual observations of apparent danger at a point 46 feet 8 inches south of the hedge which was located on the south side of Evergreen Avenue at its intersection with 23rd East Street. Under these circumstances the lower court should have resolved the testimony consistent with the physical facts and the other testimony of the witness. Indeed, this court has held that in weighing the testimony of an individual witness, consideration should not be restricted to isolated portions thereof, but all of the witness' testimony, including that given on direct and on cross-examination, should be considered as whole. *Alvarado v. Tucker*, 2 U. 2d 16, 268 P. 2d 986, citing *Putnam v. Industrial Commission*, 80 U. 187, 14 P. 2d 973, 981. On cross-examination Jon Larson

stated that the skid marks were caused by his car. (R. 199). On direct examination he stated that he saw the defendant's vehicle at the very moment that it could have become visible to him (R. 172), and that he recalled seeing headlights for approximately 2 seconds. (R. 173).

In view of the above physical evidence it is the plaintiffs' contention that the testimony of Jon Larson, upon which the interrogatory relating to proper lookout was submitted, could not be given such probative value by the lower court as to sustain the verdict of the jury as a matter of law. *It is the general rule, and the rule in this state, that testimony which is contrary to uncontroverted physical facts, does not constitute substantial evidence. Haarstrich v. Oregon Short Line R. Co., 70 U. 552, 262 P. 101; 20 Am. Jur., Evidence, §1183; 32 C.J.S., Evidence, §1031(c).*

The undisputed physical evidence indicates that Mr. Larson, who had the right of way, observed some threat to his continued course of travel northward on 23rd East at a point some 46 feet south of the hedge bordering Evergreen and that he reacted in the normal manner by immediately applying his brakes. These facts indicate a remarkable sense of awareness and defensive care on the part of Mr. Larson. Especially is this so in view of the existence of the 5 or 6-foot hedge and house that obstructed his view of Evergreen Avenue entirely. Even the defendant testified that the density of the bushes on the south side of Evergreen was such that he was not aware of any danger and did not see the Larson vehicle

until both vehicles had entered the intersection. (R. 118-121). The defendant's passenger, Alice Taggart, also testified that both cars were in the intersection before she sensed danger which she attributed partly to the existence of the aforementioned shrubbery. (R. 365-366). Certainly, if the defendant's view southward was obliterated by the hedge, Mr. Larson's northward view of Evergreen Avenue was likewise blocked. Under such uncontroverted circumstances Mr. Larson's statement that he did not see the defendant's *car* until both had entered the intersection is undoubtedly true as being the only physical possibility under the circumstances. HOWEVER, the aforementioned physical facts of a previous awareness of danger are even greater testimony of the extreme standard of care actually exercised by Mr. Larson, and his frankness in asserting facts from impaired memory which do not entirely comport with the undisputed physical evidence should not, under any circumstances, serve as the executioner to his cause of action, as well as that of the other plaintiffs, on the gangplank of contributory negligence. Certainly such statements could not, and should not, be held to establish a "preponderance" of the evidence. See *Stickle v. Union Pacific R. Co.*, 122 U. 477, 251 P. 2d 867, and *Ray v. Consolidated Freightways*, 4 U 2d 137, 289 P. 2d 196.

This court has held that contributory negligence is a question of law where the evidence shows, with such certainty that reasonable minds could not differ thereon, that the conduct in question either met or failed to meet the standard of due care. *Cooper v. Evans*, 1 U. 2d 68,

262 P. 2d 278; 65 *C.J.S., Negligence*, §255. And, notwithstanding that contributory negligence is ordinarily a question of fact, where undisputed facts lead reasonable minds to one conclusion, the court must declare such conclusion as a matter of law. *Maybee v. Maybee*, 79 U. 585, 11 P. 2d 973. This court has also held that (1) an instruction must be based on evidence; (2) it is prejudicial error to submit a charged act of negligence to a jury for its consideration in the absence of evidence tending to support a finding that the act occurred; (3) a court may not permit a jury to speculate on evidence; and (4) a finding of fact cannot be based on surmise, conjecture, guess, or speculation. *Olsen v. Warwood*, 123 U. 111, 255 P. 2d 725, and cases therein cited. To allow the jury to consider the question of whether or not Jon Larson maintained a proper lookout for traffic entering 23rd East on Evergreen Avenue under the undisputed physical facts and evidence in this case does violence to every rule above set forth. Such a ruling would result in the realization of a practice clearly denounced by Judge Wolfe in the case of *Pauly v. McCarthy*, 109 U. 398, 166 P. 2d 501, 513-514, where he cited Lord Cairns in *Metropolitan Railway Co. v. Jackson*, 3 App. Cases 193, 197, 47 L. J. C. P. 303, as follows:

“The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred, the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, my opinion, of the greatest importance in the administration

of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of a jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; *and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.*" (Latter emphasis added.)

It necessarily follows from the above, as a matter of law, that the lower court erred in submitting the question of plaintiff's contributory negligence to the jury on the basis of improper lookout for the following reasons: (1) there was no evidence whatsoever upon which to base such a finding, (2) there was no substantial evidence upon which to base such a finding, (3) there was no preponderance of evidence upon which to base such a finding, (4) reasonable minds could not differ upon the evidence in this case as to the exercise of due care by Jon Larson, (5) it clearly allowed the jury to speculate on the evidence, (6) it allowed the jury to base a finding of fact on surmise, conjecture, guess, or speculation, (7) the only evidence upon which such a finding could have been found was as consistent, and even more consistent, with the absence of negligence than with its existence, and (8) it left to the province of the jury the power to "hold that negligence might be inferred from any state of facts whatever." For the reasons the verdict and judgments are improper as a matter of law.

It might well to here point out that the trial judge, in a memorandum opinion denying the plaintiffs' motion for a new trial, assumed that the evidence indicated, and that the plaintiff driver had admitted, that he could see the lights of the defendant's car through the thick, high hedge, and that the jury, therefore, might believe that Jon Larson, after seeing the car lights through the hedge, "gave no further thought to what was happening on his right, until the instant before the collision." (R. 102). Such an assumption as to the evidence is absolutely incorrect and has no basis in the record of this case whatsoever. The evidence was conclusive that, on the night of the accident, auto lights could not be seen through the hedge from the point where the Larson vehicle commenced laying down skid marks. Furthermore, the possible jury conclusion which the trial judge indulged from the assumed facts is absolutely contrary to, and refuted by, the physical evidence of continued skid marks to the joint of impact. The trial court's declaration would allow the most flagrant type of speculation by the jury upon the evidence.

The trial court in its memorandum decision also recognized the holding in *Holmes v. Nelson*, 7 U. 2d 435, 326 P. 2d 722, and cited Justice Crockett's concurring opinion therein to the effect that "(t)he verdict, *when supported by substantial evidence* should be regarded as presumptively correct and should not be interfered with merely because the judge might disagree with the result." (Emphasis added). It is the plaintiff's contention that, in view of the authority of *Haarstrich v. Oregon Short*

Line R. Co., supra, which holds that testimony contrary to undisputed physical facts does not constitute substantial evidence, the lower court applied the doctrine of *Holmes* incorrectly in this case.

Secondly, the court instructed the jury to consider the question of whether Jon Larson had his car under control in determining the existence of contributory negligence. There is not one scintilla of evidence in the record that would warrant that portion of the instruction. The undisputed physical evidence, as set forth hereinabove, indicated the plaintiff driver's awareness and prudent reaction to the circumstances confronting him. Even the defendant admitted that the plaintiff driver attempted to avoid the accident (R. 116) thereby implying the latter's control over the vehicle while he was driving. Insofar as the evidence of the speed of the Larson car is related to the control exercised by the driver over the vehicle, the subject shall be hereafter explored in the next succeeding paragraphs.

Lastly, the jury was charged with the responsibility of determining whether the plaintiff driver was driving too fast for existing conditions as an element of contributory negligence. The lower court placed considerable emphasis upon the combination of skid marks, the force of the collision and the distance plaintiff's car traveled after impact as evidence for the jury to evaluate upon the question of speed. (R. 103). The fatal error of the court in this regard is the total absence in the record of any evidence of the prevailing speed limit or the reason-

able speed under the conditions then prevailing upon 23rd East Street. The weather was clear, the roads dry, and there was no traffic on 23rd East approaching from the north. (R. 405). The only evidence in the record of the speed of the Larson automobile prior to the accident is Jon Larson's testimony, corroborated by that of his mother, that he was traveling 25 miles per hour and the testimony of Deputy Sheriff Gunn that the skid marks revealed a speed of 30 miles per hour for the Larson auto. It was undisputed that the speed of the defendant's automobile was at least 20 miles per hour at the time of the impact (R. 119) which would account for considerable force in the actual collision and would likewise add a forward movement to the plaintiffs' automobile following impact by reason of the ultimate common direction of both vehicles and the free-wheeling of the vehicles resulting from the release of brakes caused by the impact itself as evidenced by the lack of skid marks following the point of impact. Certainly, the damage to the vehicles and their location following the point of impact is as consistent with the absence of negligence on the plaintiff driver's part as with its existence. See 65 *C.J.S.*, *Negligence*, §253, footnote 57. BUT, even assuming that such evidence is sufficient to indicate additional speed of the Larson vehicle, there is no evidence to indicate the amount of any such additional speed and no evidentiary guide whatsoever for the jury to follow in determining what speed was reasonable and prudent under the conditions and with regard to the actual and potential hazards then existing as required by *Section 41-6-46, U. C. A. 1953*, as amended.

The prima facie speed limit on 23rd East Street south of Evergreen Avenue could be as high as 50 miles per hour so far as the evidence in this case is concerned and bearing in mind that this accident occurred at night. It is submitted that perhaps this court will take judicial notice of the ordinances of Salt Lake County which established the prima facie speed limit upon this street at 35 miles per hour on the night in question. In any event, it is clear that the jury had no sufficient evidence upon which to make a determination as to the excessiveness or unreasonableness of the speed of the Larson vehicle and it was the defendant's duty to provide the evidence upon which such a finding could be made by the jury. The jury was thus allowed by the lower court to resort to the most flagrant speculation, conjecture and guessing in arriving at the standard of a reasonable speed to apply to the operation of the plaintiffs' automobile on the night in question.

The following statement of Justice Pratt in his dissent in *Horsley v. Robinson*, 112 U. 227, 186 P. 2d 592, is most appropriate:

“To hand the jury various speeds and various distances and ask them to select which is reasonable and which is unreasonable without giving them an evidentiary standard upon which to base their selection, is to ask them to speculate. In the majority of the cases, it will result in their reasoning backward from the resultant accident that the speed at which they conclude the driver was going must have been unreasonable or else the accident would not have happened. Such reasoning by its very nature assumes the proximate cause element; * * *.”

Ordinarily it is not negligence to operate a motor vehicle within the speed limit prescribed by statute or ordinance except under special circumstances such as fog limiting visibility or ice and snow upon the road. See *Lochhead v. Jensen*, 42 U. 99, 129 P. 347; *Shields v. Ramon*, 122 U. 474, 251 P. 2d 671; *Horsley v. Robinson*, *Supra*; *Hunter v. Michaelis*, 114 U. 242, 198 P. 2d 245; *Alvarado v. Tucker*, 2 U. 2d 16, 268 P. 2d 986. There can be no question that special circumstances, such as fog, ice or snow did not exist on the night of the subject accident so as to limit the general rule above stated. However, the evidentiary yardstick, i. e., the prima facie speed limit, was unavailable to the jury in their deliberations upon the evidence in this case. It necessarily follows that the jury could do nothing but speculate as to what would constitute an excessive or unreasonable speed for the Larson auto under the conditions then prevailing. Such a result is clearly proscribed in *Olsen v. Warwood*, *supra*. The rule was succinctly stated in *Alvarado v. Tucker*, *supra*, as follows at page 988 of 268 P. 2d:

“The burden was upon plaintiff to prove the charge of speeding; such a finding of fact could not be based on mere speculation or conjecture, *but only on a preponderance of the evidence*. This means the greater weight of the evidence, or as sometimes stated, such degree of proof that the greater probability of truth lies therein. *A choice of probabilities does not meet this requirement. It creates only a basis for conjecture, on which a verdict of the jury cannot stand.*” (Emphasis added).

The only standard of a speed limit that could be applied under the evidence in this case would be that set forth under the statute, namely 50 miles per hour. And it is certain beyond any doubt that the evidence in this case would not warrant a finding of the plaintiffs' speed in excess of that speed limit. Indeed, the evidence would not sustain a finding of plaintiffs' speed in excess of 30 miles per hour, and most certainly not in excess of 35 miles per hour. Therefore, it was error for the lower court to submit the question of the plaintiffs' speed to the jury for their determination with respect to the contributory negligence of Jon Larson.

It follows from the above that each and every contention relating to the possible contributory negligence of the plaintiff Jon Larson was not sustained, as a matter of law, by the evidence and, therefore, the court erred in submitting the special interrogatories contained in Instruction No. 17 to the jury. It likewise must be concluded that the verdict and judgment rendered thereon are not sustained by the evidence as a matter of law.

POINT II

THE LOWER COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANT IN ACCORDANCE WITH PLAINTIFFS' REQUESTED INSTRUCTIONS AS SET FORTH IN PAGES 27, 30 AND 31 OF THE RECORD ON APPEAL AND PLAINTIFFS' MOTION FOR A DIRECTED VERDICT SET FORTH ON PAGE 430 OF THE RECORD ON APPEAL.

Plaintiffs incorporate herein the argument set forth under Point I and for the reasons therein set forth urge this court to set aside the verdict and judgment of the lower court and order said court to grant the plaintiffs a new trial solely for the purpose of ascertaining the amount of damages suffered by each individual plaintiff and that the lower court enter judgment for plaintiffs in accordance with such findings.

POINT III

THE LOWER COURT ERRED IN FAILING TO GRANT THE PLAINTIFFS' MOTION FOR A NEW TRIAL.

Plaintiffs incorporate herein the argument set forth under POINTS I, IV and V.

POINT IV

THE LOWER COURT ERRED IN GIVING ITS INSTRUCTION NO. 3 FOR THE REASON THAT IT WRONGFULLY UNITED AN INSTRUCTION UPON THE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF JON LARSON WITH AN INSTRUCTION THAT THE DEFENDANT WAS NEGLIGENT AS A MATTER OF LAW.

Instruction No. 3 given by the lower court commenced by charging the jury that the defendant was negligent as a matter of law. In the very next paragraph therein the court proceeds to instruct the jury upon the contributory negligence of the plaintiff Jon Larson and the effect of the same upon the remaining plaintiffs. (R. 68). It is too clear for argument that each instruction related to matter totally disconnected from the other.

In fact one part of the instruction related to the theory of the plaintiff on one distinct question and the other portion related to the theory of the defendant upon a completely separate question. The net result would very likely result in confusion to the jury and, in this particular case, could have resulted in the application of the plaintiffs' theory of the case, i.e., negligence as a matter of law, to the conduct of the plaintiff Jon Larson by the jury. And, although this court has held that the respective theories of both parties *upon a single proposition* may be embodied in a single instruction, *Toone v. J. P. O'Neill Construction Co.*, 40 U. 265, 121 P. 10, it has never espoused a rule which would allow the theories of the parties *upon unrelated propositions* to be included within the same instruction. Quite to the contrary this court has held that a judge may not give an instruction which will tend to confuse the jury in the consideration of the issues in the case. *Riding v. Roylance*, 63 U. 221, 224 P. 885. As to misleading and confusing instructions generally see 53 *Am. Jur., Trial*, §555. Furthermore, it is generally held that it is good practice to embody each separate proposition of law in a single instruction and that the blending of separate and distinct legal propositions in the same instruction is bad form. *Rocky Mountain Motor Co. v. Walker*, 71 Colo. 53, 203 P. 1095; *H. & S. Theatres Co. v. Hampton*, 300 Ky. 677, 190 S. W. 2d 39.

In view of the inherent confusion in the named instruction as to the respective liabilities of the parties under separate propositions of law and its very possible prejudicial effect upon the jury's consideration of the

plaintiffs' case, it is submitted that this court should reverse the ruling of the lower court upon this point and grant the plaintiffs a new trial even if this court should disagree with the appellants on Point I.

POINT V

THE LOWER COURT ERRED IN SUBMITTING INSTRUCTION NO. 8 TO THE JURY.

Instruction No. 8 reads as follows:

“The party upon whom the burden of proof rests must sustain it by a preponderance of the evidence. The law does not permit you to base a verdict on speculation or conjecture as to the cause of the collision in question. *If the evidence does not preponderate in favor of the party making the charge of negligence, then that party has failed to fulfill his burden of proof and your finding must be against the party on that issue.* In other words, if after considering all of the evidence, it should appear to you just as probable *that the party charged with negligence was not negligent or that he was, or that his negligence, if any, was not a proximate cause of the collision, or that it was such a proximate cause,* then a case has not been established against him by a preponderance of the evidence as the law requires.”
(Emphasis added)

In a previous instruction the court had directed that the defendant was negligent as a matter of law. Without limiting the application of the above instruction to the claimed contributory negligence of plaintiff Jon Larson, the jury was free to reconsider the existence of negligence on the part of the defendant and was, in fact, invited to do so. When the court had determined that the

defendant was negligent as a matter of law it clearly was error thereafter to instruct the jury on negligence and whether or not they should determine its existence without limiting its application to the only remaining party charged with acts of negligence. Under this instruction the jury could conclude that it must find, by a preponderance of the evidence, that the defendant was in fact negligent. This is manifestly inconsistent with the prior instruction and, therefore, is sufficient ground for reversal. *State v. Waid*, 92 U. 297, 67 P. 2d 647; *Konold v. Rio Grande W. Ry. Co.*, 21 U. 379, 60 P. 1021, 81 Am. St. Rep. 693. In the latter case the court stated the rule as follows at page 1025 of 60 P. Reporter :

“Instructions on a material point in the case which are inconsistent or contradictory should not be given. The giving of such instructions is error, and a sufficient ground of reversal, because it is impossible, after verdict, to ascertain which instruction the jury followed, or what influence the erroneous instruction had in their deliberation. This has been so uniformly held that citations are unnecessary.”

See also *Jensen v. Utah Ry. Co.*, 72 U. 366, 270 P. 349.

This court, in the *Waid* case cited the rule set forth in 65 C. J. 671, §600, as follows :

“It is proper to refuse, and error to give conflicting and contradictory instructions, since a charge containing two distinct propositions conflicting with each other tends so to confuse the jury as to prevent their rendition of an intelligent verdict, the jury cannot be required to determine what part of a contradictory charge is correct, or left to reconcile conflicting principles of

law; it ordinarily cannot be determined from the verdict which rule was adapted by the jury, the court is left in doubt and uncertainty as to the facts actually found by the jury as a basis for its verdict, and where instructions are inconsistent with, or contradict, each other, it is usually impossible to say whether the jury were controlled by the one or the other."

See also 88 *C.J.S., Trial*, §339.

The case of *Morrison v. Perry*, 104 U. 151, 140 P. 2d 772, is not only in point on the law, but also on the facts. In that case it was held that instructions that if a person drove an automobile in a certain manner he was negligent, and that if he drove in that manner the jury was to determine whether or not he was negligent, were conflicting and erroneous in that the instructions permitted the jury to decide that acts negligent as a matter of law were not negligent. The giving of such instructions was held to constitute error in that case.

Upon the above authority it would appear unrefutable that the giving of Instruction No. 8 by the lower court was reversible error.

CONCLUSION

In view of the undisputed evidence in this case, the duty imposed upon the plaintiff driver by the lower court was such as required of him a standard of care which would preclude his involvement in a moving automobile accident at any intersection, regardless of the

traffic control devices there employed and the observance of the same by the other drivers, without calling in issue his own contributory negligence. Such was the effect of letting the jury consider the driver's honest but understandably erroneous statements, which were contrary to the undisputed physical evidence, upon the issue of his own negligence. The net result was the anomalous verdict of the jury which necessarily had to be based upon unsubstantial evidence and against the great preponderance of the evidence contrary to law. In addition it allowed the jury to speculate upon the evidence and to resort to surmise, conjecture or guesswork in reaching its verdict upon evidence which was clearly more consistent with the absence of Jon Larson's negligence than with its existence.

The complete absence of any evidence of Jon Larson's lack of control over his vehicle at the time of the accident, together with the absence of any evidence of excess speed on the part of the Larson vehicle, particularly in view of the failure of the defendant to establish any speed standards in the record, absolutely invalidated the instruction and interrogatories of the trial court on the issue of the plaintiff driver's contributory negligence. Surely there could be no more classic example of allowing a jury to infer negligence from "any state of facts whatever" than has been done in this case. *The evidence is complete. The negligence of the defendant is established as a matter of law. The absence of contributory negligence on the part of the plaintiff driver has been established as a matter of law. There remains only the*

determination to be made of the damages suffered by the plaintiffs. This court should, therefore, set aside the verdict and judgment of the lower court and remand the case to that court for a jury determination upon the question of damages only after which a judgment should be entered for plaintiffs in accordance therewith.

It must also be concluded, as a matter of law, that the lower court erred in submitting to the jury Instruction No. 3 which incorporated a charge that the defendant was negligent as a matter of law with a totally unrelated instruction upon the open question of Jon Larson's contributory negligence. Such an instruction is fraught with possibilities for confusion and incorrect application of the law by the jury, and the court should here determine that the giving of Instruction No. 3 was reversible error.

Finally, it is absolutely clear that the giving of Instruction No. 8 had the effect of allowing the jury to reconsider the negligence of acts which had already been determined negligent as a matter of law by the court and, because it is impossible to determine what effect this had upon the deliberations of the jury, the judgment of the lower court should be reversed.

Respectfully submitted,

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