

1963

Louise B. Taylor et al v. Virginia Clare Johnson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

SEP 27 1963

LOUISE B. TAYLOR, et al,
Plaintiff and Appellant,

vs.

VIRGINIA CLARE JOHNSON,
Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No.
9874

RESPONDENT'S BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

LOUISE B. TAYLOR, et al,
Plaintiff and Appellant,

vs.

VIRGINIA CLARE JOHNSON,
Defendant and Respondent.

} Case No.
9874

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by plaintiff, for herself, and as guardian of her minor children, asking damages for the death of her husband, who was killed while working on a trailer stopped on the highway. The trailer was struck by an automobile driven by the defendant.

DISPOSITION IN LOWER COURT

Jury trial resulted in a verdict of No Cause of Action. The trial court denied plaintiff's Motion for Judgment Notwithstanding the verdict, or in the alternative, for a new trial.

RELIEF SOUGHT ON APPEAL

Appellant states "Plaintiff seeks reversal of the judgment entered, and judgment as to liability in her favor as a matter of law, or that failing, a new trial." Respondent asks that the Jury Verdict be sustained and the trial court affirmed in all particulars.

STATEMENT OF FACTS

References are to the page numbers in the Transcript of Proceedings.

Respondent cannot agree with the statement of facts set forth by Appellant. Appellant has recited the facts according to his view of the evidence. This court in the case of **Ortega vs. Thomas**, Supreme Court of Utah, Docket No. 9709, Decision filed June 28, 1963, not yet reported in Utah or Pacific Reports, stated:

"The rule is so fundamental that the facts must be viewed in the light most favorable to the party who prevailed below, that it is an indefensible imposition upon this court and opposing counsel not to follow it."

There is no dispute as to the time and place of the accident, June 13, 1961, about 10:30 p.m., on Utah Highway U-28, approximately 9.3 miles south of Levan. (Tr. 5) It was a dark moonless night. The highway was asphalt, 37 feet wide, with a broken center line. (T. 132) There were painted lines on each side of the highway 2 feet, 2 inches from the edge of the hard surface. (T. 139) From the center

line to the east edge of the hardtop it was 19 feet 2 inches, and from the center line to the west edge of the hardtop was 17 feet 10 inches. (T. 138)

About 9:30 p.m., Don R. Milner, was driving his Chevrolet north on Highway U-28, pulling a home-made, 2 wheel, single axle trailer. (T. 9) Milner's car struck a deer, damaging the rear right wheel housing, and his car stopped on the highway, facing north. (T. 9) The right rear wheel left a tire mark on the highway, 158 feet 9 inches in length. This mark extended south on the highway from directly under the right rear wheel (T. 143;32), and was 8 feet east of the center line. (T. 141) There was 11 feet 2 inches between the east edge of the asphalt road and the right rear wheel of the Milner car. (Exhibit P. 13) The investigating police officer, Rex Hill, observed the Milner vehicle position on the highway and the tire mark leading directly to the right rear wheel and under the car. (T. 141)

After hitting the deer, Milner went behind his vehicle, and with a flashlight, flagged down a car approaching from the south. (T. 10) The car was driven by Everett Kester, accompanied by his wife, children and his sister-in-law. (T. 47) Kester pulled ahead of the Milner car, some distance north (T. 10) A passing car was flagged and the occupants requested to notify a wrecker. The wrecker was sent back to the accident scene. The wrecker operator, James Warner Taylor, passed by the accident scene,

and drove off the west side of the road where there was a clearing. (T. 11) This clearing, just south of the scene, was about 40 feet in width. (T. 155) When the wrecker arrived, the trailer was unhitched from the Milner automobile and moved to the East side of the Milner vehicle and the wrecker was backed into position directly behind the Milner car. (T. 13) Mr. Kester backed his car in position in front of the trailer, about a foot from the trailer tongue. The trailer hitch was taken off of the Milner car to be attached to the Kester car. (T. 14) While the trailer hitch was being attached to the Kester car, the wrecker operator was hooking the Milner car to the wrecker, and the rear end of Milner car lifted up. (T. 14)

After Taylor attached the wrecker to the Milner car, he went to the area where the trailer was being hitched to the Kester automobile, taking some wrenches to tighten the bolts. (T. 16)

As the wrecker was on the roadway it was facing south, with headlights on, two flashing amber lights on the fenders, and a rotating blue light on top. (T. 17)

The wrecker was not moved after it was placed into position behind the Milner car, and remained on the highway facing south with the headlights on. (T. 20)

There were several fusees, reflectorized stands, and pot torches in the wrecker, but none were put

out. (T. 156) At no time were any flares or lanterns placed on the highway. (T. 28) Fifteen to twenty minutes elapsed after the wrecker picked up the Milner automobile and the accident happened. (T. 29)

As the wrecker was stopped on the highway, with the Milner car attached, the wrecker obscured the tail lights of the Milner car. (T. 40) The left front door of the wrecker was open. (T. 33) There was about 3 to 4 feet between the Milner and Kester cars. (T. 68)

After Taylor hooked the wrecker onto the Milner car, he left the wrecker on the highway, and spent several minutes between the trailer and the Kester vehicle, working on the trailer hitch. (T. 29)

The trailer had electric lights but they were not operative after the trailer was unhitched from Milner's car. (T. 30) The wrecker was south of the trailer, as the men worked on the trailer hitch. The tail lights on the Kester vehicle were obscured by the trailer. (T. 41)

With the cars on the highway the scene was laid. Miss Johnson, the defendant, had driven from Provo to Richfield to visit a friend who had attended Brigham Young University with her. She left Richfield after dark to return to Provo. (T. 184)

Just south of the accident scene she was traveling 50 to 60 miles per hour. It was a dark night,

with no moon or other lights in the area. She came around a slight curve, about one-half mile south of the accident scene, and observed headlights of the wrecker and the blue light on top. (T. 187) She saw no flares, or other warning signs and assumed the wrecker was moving toward her, and on its own side of the road. She looked at her speedometer and was travelling 50 miles per hour, and she took her foot from the gas pedal. As she neared the wrecker, she observed it to be partially in her lane of traffic and she had to decide whether to try to stop and hit head on, or to try to go to the side of the wrecker. (T. 191) She passed to the east of the wrecker and as her lights picked up the objects on the highway, after passing the wrecker, she tried to apply brakes but struck the rear of the trailer, knocking it into Kester car.

There were several flashlights at the scene before the accident, and Mrs. Kester had been going out south of the wrecker to wave the flashlight to warn vehicles from the south. (T.94) Mrs. Kester was between the Milner automobile and the Kester automobile when she saw the Johnson car approaching, but she did not get out in front of the wrecker to warn Miss Johnson. (T. 74) This was the only vehicle from the south that had not been signalled with a flashlight. (T. 73)

Officer Rex Hill of the Utah Highway Patrol investigated the accident and made measurements.

Although the wrecker and Milner car were removed before he made his measurements, he observed the wrecker on the road, facing south in the North-bound lane of traffic, (T. 123) and observed a long tire mark on the highway running underneath the right rear wheel of the Milner automobile. This mark was 8 feet east of the center line. (T. 141) He also observed other physical evidence on the roadway, gouge marks, skid marks. (T. 135, 137) He observed debris on the highway, where the open door of the wrecker had been struck, and paint knocked off, and he observed the damage to the wrecker door. (T. 140)

Exhibit P-13 received in evidence shows the measurements made by the officer, the location of the wrecker, Milner automobile, and other physical evidence he observed.

Plaintiff's brief contains a diagram with the following explanation:

“The following diagram, appellants think, fairly depicts the respective vehicles on the roadway at the time of the collision.”

The diagram is misleading and not in any way in accordance with the physical facts found by the investigating police officers.

Officer Hill found that the mark left by the right rear wheel of the Milner automobile was 8

feet east of the center line of the highway. (T. 141)
This would leave 11 feet 2 inches of hardtop surface of the highway east of the Milner automobile and the wrecker, as they were stopped on the highway. (T. 164)

The Milner car and the wrecker occupied 8 feet of the east side of the highway. There was 4 feet between the Milner car and the Kester car. The Kester car and trailer occupied the remaining 7 feet 2 inches of the highway.

In response to a direct question by the plaintiff's attorney, as to the probable point of impact, the police officer testified that it was indicated by gouge marks on the highway, (T. 133, 134) and that the Kester car came to rest 76 feet 4 inches north of the point of impact. The gouge marks indicated to be the probable point of impact, were on the hard surfaced portion of the highway, one gouge 6 feet west of the east edge of the highway, and the other, 1 foot 5 inches west of the east edge. (T. 139, Exhibit P 13)

For the use of the court, and to illustrate the testimony of the investigating police officer, Appendix 1 is a diagram of the accident scene, showing the measurements made by the officer, and the position of the vehicles as the scene was set, with the wrecker facing south with headlights on, the trailer behind the headlights, being attached to the Kester vehicle and the east half of the highway blocked.

STATEMENT OF POINTS

POINT I

THE DEFENDANT WAS NOT NEGLIGENT AS A MATTER OF LAW AND ANY NEGLIGENCE OF DEFENDANT, IF FOUND BY THE JURY, WAS NOT AN INDEPENDENT, SOLE PROXIMATE CAUSE OF THE ACCIDENT.

POINT II

PLAINTIFF'S DECEDENT WAS NEGLIGENT AND HIS NEGLIGENCE WAS A PROXIMATE CAUSE OF THE ACCIDENT.

POINT III

THE COURT DID NOT ERR IN INSTRUCTIONS GIVEN TO THE JURY.

- A. Requested Instruction No. 3 of plaintiff was Properly Refused by the Court.
- C. Instructions Nos. 30, 33, and 34, as Given by the Court were Proper Instructions under the Law and Facts of the Case. Plaintiff did not Except to Instruction No. 34.
- B. Instructions Nos. 19, 20, 21, and 22 as Given by the Court were Proper Instructions under the Law and Facts of the Case. Plaintiff Failed to Except to Instruction No. 22.

ARGUMENT

POINT I

THE DEFENDANT WAS NOT NEGLIGENT AS A MATTER OF LAW AND ANY NEGLIGENCE OF DEFENDANT, IF FOUND BY THE JURY, WAS NOT AN INDEPENDENT, SOLE PROXIMATE CAUSE OF THE ACCIDENT.

At the time of the accident, the wrecker operator had completed operations with the wrecker, but left it in the middle of the highway, facing south with headlights burning, while he went over to assist in attaching the trailer to the Kester automobile, which had been backed into position just north of the trailer.

The only lights facing toward the south were those on the wrecker. The Milner car was attached to the wrecker, with the rear end hoisted and the front toward the ground, facing north. There were no tail lights on the trailer, and the trailer obscured the rear of the Kester vehicle, which was facing north. All the vehicles and people were behind the wrecker and its headlights. Mr. Kester was holding a flashlight to illuminate the area between the trailer and the Kester vehicle, and Mrs. Kester was between the Milner car and the Kester car. No one was on the highway warning oncoming motorists of the vehicles stopped on the roadway behind the wrecker headlights. The defendant, travelling north, observed headlights facing toward her. She saw a revolving blue light and assumed it was a wrecker; however, she saw no flares or lights on the highway,

and nothing to indicate any trouble and assumed that the wrecker was proceeding toward her. She did reduce speed by taking her foot off the gas, and the last time she looked at her speedometer, it indicated 50 miles per hour. With her foot off the gas she continued to approach the wrecker. As she approached the wrecker, she observed it to be in the center of the highway, and knowing there was sufficient width to pass to the east, turned right. The trap had been laid; the wrecker, with its headlights facing south obscuring anything behind it; and the trailer and the Kester car blocking the highway east of the wrecker. Defendant passed the headlights, saw something, applied brakes, but was unable to stop, and ran into the rear of the trailer. The speed of the plaintiff one-half mile back would not be a proximate cause of the accident. After Miss Johnson saw the wrecker apparently approaching, she took her foot off the gas, looked at her speedometer, and was then travelling 50 miles an hour, which was within the speed limit.

Appellant, in support of the claim that defendant was negligent, as a matter of law, and her negligence was an independent, intervening, sole proximate cause of the accident, has failed to support his contention with any factual situation or any case similar in fact or law to the case here involved. Appellant cites several Utah cases, but fails to set forth the facts of those cases or to point out how those cases are applicable.

Hillyard v. Utah By-Products Co., 1 Utah 2d 143, 263 P.2d, 287, was an action for the death of a guest passenger in an automobile, that struck a truck parked partially on the highway. The question in that case was whether the parking of the truck on the highway was a concurring proximate cause of the accident. That case specifically holds that it was a jury question as to whether the negligent parking of the truck was a proximate cause of the collision, and that the question of proximate cause was properly submitted to the jury. As to whether or not the driver of the car that collided with the truck was negligent, was held to be a jury question. The court stated:

“Ordinarily the question of proximate cause is one of fact for the jury, and not one of law for the court.”

“Where the actor fails to see the danger in time to avoid it, it is held that a jury question exists, based on the rational that it can be reasonably anticipated that circumstances may arise wherein others may not observe the dangerous condition until too late to avoid it.”

Although the defendant Virginia Johnson saw a vehicle approaching on the highway with a revolving blue light and assumed it to be a wrecker truck, there was no fact and no circumstance where she could observe, and she had no way of knowing there were other vehicles or persons blocking the highway. The scene was laid, the truck facing south

and it appeared to be approaching toward her and on its own side of the road. As she approached she reduced speed to within the speed limit. She got close to the wrecker and could see it was partially on the wrong side of the road. She turned to avoid the wrecker, but as she went past her vision was obscured and the accident resulted. There is no evidence in the record that defendant knew, or could have known that there was anyone on the highway behind the headlights of the wrecker. She did not know the situation existed, and could not know that the eleven foot portion of the east half of the highway, east of the wrecker, was blocked. She avoided the wrecker, although she did strike the open door that extended out two feet. She did safely pass by that portion of the wrecker that was visible. The striking of the door was in no way a cause of the accident.

In the **Hillyard v. Utah By-Products** case, this court quotes **Medvid v. Doolittle**, 220 Minn. 352, 19 N.W. 2d 788:

“If already at that time, by the negligence of its driver, the moving vehicle is in such a position and under such an impetus that an accident cannot be avoided, the negligence of the truck driver is as much a proximate cause of the accident as is the negligence of the driver of the car; the negligence of each has contributed to the result.”

The Hillyard case states in recognizing the proposition set forth in the **Medvid v. Doolittle**, supra,:

“The doctrine enunciated in the above quotations is based upon the proposition that one cannot excuse himself from liability arising from his negligent acts merely because the later negligence of another concurs, to cause an injury, if the later act was a legally foreseeable event. ***”

That is the question in this case which was submitted to the jury. It was a legally foreseeable event that a car might come from the south on the highway and be unaware of the situation that existed; that is, that the trailer and the automobiles were blocking the east half of the highway; and was the failure to place warning flares or signals out, negligence on the part of the wrecker operator? In this case the question was properly submitted to the jury. It is obvious that the people at the scene realized and recognized the danger, because the Johnson vehicle was the only automobile from the south that had not been warned with a flashlight. Certainly the other vehicles were able to slow down and avoid a collision, because when they approached, a person was sent out with a flashlight to warn them. When Miss Johnson came there was nothing but a trap set on the highway.

Appellant cites the case of *McMurdie v. Underwood*, 9 Utah 2nd 400, 246 P.2d 711 Appellant does not set forth what circumstances or under what facts, this case is similar in fact to

the cited case. Respondent contends this case is not in point and is a completely different fact situation. That was an appeal to the Supreme Court from a jury verdict of no cause of action, and the claim of error was to the court's instruction:

"You are instructed that the driver of the pickup truck was negligent as a matter of law, and if you find that she observed the hazards, if any, of the stopped vehicles as she approached on the highway, or in the circumstances should have observed said vehicles, but because of her negligence failed to do so in time to avoid the accident, then you are instructed the negligence on her part was a sole proximate cause of the collision, and your verdict must be in favor of the defendants against the plaintiff, No Cause of Action."

In the **McMurdie vs. Underwood** case, the court reviewed **Hillyard v. Utah By-Products**, 1 Utah 2d, 143, 263 P.2d 287, and states:

"In applying the test to foreseeability of the situations where a negligently created pre-existing condition combines with a later act of negligence, causing an injury, the courts have drawn a clear cut distinction between the two classes of cases. First situation is where one has negligently created a dangerous situation such as parking the truck, and the later actor observed, **or circumstances are such that he could not fail to observe**, but negligently failed to avoid it. The second situation involves conduct of a later intervening actor who negligently failed to observe

the dangerous condition and too late to avoid it. In regard to the first situation, it is held as a matter of law that the later intervening act does interrupt the natural sequence of events and cut off the legal effect of the negligence of the initial actor."

By the court's own quotation, in order for a later intervening act to be an independent intervening sole proximate cause, **there must be a dangerous condition and a later act observed or circumstances are such that he could not fail to observe.** We submit that in this case there is not one fact or circumstance that shows that defendant observed, or could have observed, the situation of cars blocking the highway north of the wrecker, with no lights or flares out, and no warnings. Defendant had a right to assume, and did assume, that the wrecker was approaching her on its own side of the road, or that it would return to its own side of the road. By the time she could tell that it was stopped and was not going to move to its own side of the road, she had her car under control and passed to the right of the wrecker, but ran into the hidden trailer. There is no evidence there was any dangerous situation that she could have observed. The **McMurdie v. Underwood** case was submitted to the jury for determination of the various questions and facts involved.

Appellant did not submit to the court any instruction to have the jury determine whether or not the circumstances were such that the defendant

should have observed, or could not fail to observe the dangerous situation.

Velasquez v. Greyhound Lines, 366 P.2d 989, Utah 2d 379, is not in point. In that case the facts were substantially different. A driver of a bus struck a large well-lighted truck parked upon the highway when there was at least one and one-half usable lanes of traffic to the left of the truck. The court held that the negligence of the bus driver in striking the truck was sole proximate cause of the collision. In that case the bus driver saw the truck, had all the time necessary to avoid striking the truck parked on the highway, but proceeded down the highway and hit the truck. The court held that the negligence of the bus driver in striking the truck when he saw it, and knew it was there, and had time to avoid it, was an independent, sole intervening act of negligence. That case is in fact greatly different from our case. If Miss Johnson had struck the wrecker as it was setting on the highway, her conduct in striking the wrecker may have been an independent intervening act; but she saw the wrecker with its headlights facing her, she had control of her car, there was a usable part of the highway, approximately eleven feet wide to her right. She did avoid the wrecker that was on the highway and passed around it, except

for the striking of the open door, which could not be seen behind the headlights.

None of the cases quoted in the plaintiff's Point I are in point with the facts and circumstances in this case. The trial court submitted to the jury the question of the defendant's negligence, and under instructions and the theories as requested by the plaintiff. The evidence is uncontradicted, that as the defendant Virginia Johnson drove north, and observed the lights of the vehicle coming from the north, she assumed that the same was travelling on its own side of the highway. This assumption is well founded and supported by case law.

In *Barnes v. Ashworth*, Va., 153 S.E. 2d 711, a motorist stopped his car on the wrong side of the highway on a rainy night, with lights on, and left it in this position, it was held to be negligence as a matter of law, and would preclude recovery by the driver. The case held the person approaching did not realize the car was parked on the wrong side of the road, until nearly upon it, and then swung to the right and collided with a car stopped on the right side, which was without lights and which the driver did not see. This case is similar to our case. The court held the one stopping on the wrong side of the highway, was negligent as a matter of law, and his negligence was a proximate cause of his injury and death.

At 70 A.L.R. 1021 is an annotation holding:

"The driver of an automobile on a public highway at night who sees in front of him the headlights of another car facing him has the right to assume that such car is in motion and will be operating and conform with the law of the road, and the driver approaching cannot be charged with contributory negligence as a matter of law in failing to stop or discover that the other car is stopped or discovered that the other car is stalled on its left of the center of the highway in such a position that there was no approaching room for the car to pass on the proper side, until it was too late to avoid the collision."

Hatch v. Daniels, Vermont, 117 A. 105, held:

"One driving an automobile on a public road who sees a car approaching on the highway has the right at the outset to assume it will observe the law of the road and will move to its right, and the driver may proceed on this assumption, and it is a jury question as to under what circumstances the approaching driver should realize the other car is or will remain on the wrong side of the highway."

Padgett v. Brangan, Kentucky, 15 S.W. Sec. 277, held:

"A party has a right to assume when approaching in the nighttime, a car parked on the wrong side of the road with its headlights on facing him that the car is on its own side of the road."

Bradley v. Clarke, Kentucky, 293 S.W. 2d 1082, held a plaintiff was not contributorily negligent as a matter of law, when he approached a stopped

truck with its lights on, and drove to the right of the truck, thinking that the truck was moving, and then discovered the situation that there was a parked car behind the truck lights, swung around to the wrong side and struck a wrecked car, which he could not see until too late to avoid it.

The case of *Doane v. Smith*, Calif., 147 P.2d 650 held:

“It cannot be said as a matter of law at what definite distance from parked vehicles at which an approaching driver must realize the vehicle is standing still, in order to be free of negligence, and it cannot be said that a plaintiff was negligent as a matter of law in failing to realize the truck was standing still until he was within 100 feet of it. It must be remembered that automobile drivers have the right to anticipate the standing vehicles ahead of them will be parked off the highway if it is practical to park there, and has the right to act upon that assumption until there is some reasonable grounds for believing there is some vehicle ahead that is not so parked.”

POINT II

PLAINTIFF'S DECEDENT WAS NEGLIGENT AND HIS NEGLIGENCE WAS A PROXIMATE CAUSE OF THE ACCIDENT.

At the time this accident occurred, Mr. Taylor had hooked onto the Milner automobile, was in a position to move off the highway, but went to where the trailer was being attached to the Kester car, and was assisting Kester and Milner in attaching the trailer to the car. There was no rescue operation

or any emergency that required the wrecker operator to assist Mr. Kester and Mr. Milner.

Although the defendant admitted she saw the wrecker when she was approximately a half mile away, and saw a revolving blue light, no warning devices, flares, fusees, pot lights were out on the highway. Counsel for appellant states that it seems unlikely that the failure to place flares would be of any consequence. Defendant testified that she looked for flares or warnings and saw none. All she saw were headlights approaching, with a revolving blue light which she assumed to be a wrecker moving on its own side of the road. There was no indication or warning of any trouble ahead on the roadway.

The appellant contends this case is similar to the *Velasquez vs. Greyhound* case, *supra* but the facts are much different. In that case, the driver of the bus did see the truck parked on the half of the highway to pass and intended to turn out, but claimed a blackout for some reason or another, and ran into the plainly visible bus. In this case, Miss Johnson did not run into the wrecker. The collision was with the trailer, hidden behind the headlights of the wrecker.

Appellant calls attention to the fact that all the other drivers coming from the south were able to bring their cars under control, and passed around the blockade. The evidence was that every car that

approached from the south, prior to the time Miss Johnson approached, had been warned with a signal by flashlight. The Johnson car was the only one not warned. Appellant states that defendant argues that Taylor, after attaching the auto to the wrecker, had time to remove the vehicles off the highway. Defendant contended that after the Milner car was attached to the wrecker, the wrecker could have moved off the highway in such a position that Mr. Taylor would have been in no danger and the wrecker out of the way so that its headlights were not blinding oncoming traffic, and the headlights of the Johnson car could have, and would have picked up the objects on the highway in front of her, and the accident could have been avoided. Mr. Taylor had flares, fusees and reflectorized stands, and none of these were put out on the highway. The trap was laid when he left the truck facing south and no warning signals out and Taylor was behind the headlights where northbound drivers couldn't see. The headlights of the wrecker did not constitute warning lights. The record fails to show, and appellant does not quote any law or case to indicate that a blue light on the top of the vehicle is any type of a warning light.

Appellant contends plaintiff's decedent was not guilty of any contributory negligence. Instruction

No. 18 given by the court, is a requested instruction of the plaintiff, and covers contributory negligence. The issue of contributory negligence was submitted to the jury pursuant to a requested instruction by the defendant, and pursuant to a requested instruction on contributory negligence by the plaintiff. As this court said in the case of **Mann vs. Fairbourn**, 12, Utah 2nd. 342, 366 P.2d 603:

“If the instruction and theory of law were improper, it would come within the rule of invited error.”

In that case, the plaintiff had asked for instruction on contributory negligence of a child, and then later complained to the court in submitting the matter of contributory negligence to the jury, this court said:

“The plaintiff did not request an instruction to the effect that a child under six years of age could not be guilty of contributory negligence, and instruction No. 6 of which he now complains is substance the same as his requested instruction No. 3. Under such circumstances, the instruction, if erroneous, would come within the rule of invited error, of which the plaintiff cannot here avail himself.”

The court in making this statement cites **Alvarez vs. Paulus**, 8 Utah 2d 283, 333 P.2d 633, and **Pettingill vs. Perkins**, 2 Utah 2nd. 66, 272 P.2d 185.

The plaintiff asked the court specifically to instruct the jury on contributory negligence, and plaintiff cannot now complain.

Appellant has failed to cite any case or law in support of the contention that the plaintiff's decedent was not guilty of contributory negligence.

Appellant claims that if the plaintiff was negligent, such negligence was not a proximate cause of the accident. Appellant cites the **Velasquez vs. Greyhound Lines** case, *Supra*, in the support of the claim. In the previous point we have discussed the case of **Velasquez vs. Greyhound Bus Lines** as not in point, not similar in fact, in law, of the point herein involved.

The negligence on the part of the plaintiff was his failure to place flares or other warning devices on the highway, his failure to move the wrecker off of the highway when he had sufficient time to do so, from five to twenty minutes; and his failure to keep a lookout for his own safety.

At the conclusion of all the evidence, and when plaintiff's counsel took exception to the court's instruction, appellants counsel candidly stated:

"That the only question with respect to negligence which should have been submitted to the jury was whether or not the plaintiff was guilty of contributory negligence and which said contributory negligence, if any, was a proximate cause of the injuries claimed. This, of course, does not intend to exclude the submission to the jury the damages questioned." (T. 226)

No exception was taken by plaintiff to instruction No. 18 given by the court, which submitted the issue of contributory negligence to the jury. The plaintiff could not except to this instruction as he made the request for the instruction and never withdrew the same. Instruction No. 17 given by the court was an instruction concerning contributory negligence and its effect, defeating the claim of the plaintiff. There was no exception taken to this instruction and no objection to the jury being instructed upon that theory of the case. Appellant's counsel, now before the court, claims that it was error to submit the matter of contributory negligence to the jury. At the time of the trial he did not object to that matter going to the jury, and in effect stated that it was appropriate for the jury, and requested an instruction on that defense.

Appellant contends it would not be negligence on the part of Taylor, to stop on the traveled portion of the highway longer than a reasonable length of time or to occupy more of the highway than was reasonably necessary or fail to warn approaching traffic by lights designated by the Utah Road Commission, or by other lights, flares, or practical means, if his vehicle was not equipped with lights designated by the Utah Road Commission. Instruction No. 26 was a requested instruction by the plaintiff, and there was no exception taken by plaintiff. The plaintiff had the jury instructed that it was the

duty of the defendant not to stop on the traveled portion of the highway longer than a reasonable length of time, and not to occupy more of the highway than was reasonably necessary, and to reasonably warn approaching traffic of the obstruction on the roadway by lights designated by the Utah State Road Commission or by other lights, flares or practical means, if his vehicle was not equipped with lights designated by the Utah Highway Commission.

The record is void of evidence that the Utah State Highway Commission at any time designated any lights for wreckers. Admittedly, the statute allows the Utah State Road Commission to designate, but there is no evidence in the record as to what, if any lights have ever been designated for wreckers, by the Utah State Road Commission.

Evidence in the case was sufficient to have a jury find that Taylor failed to keep a proper lookout for his own safety, failed to place out any warning lights and signals, and obstructed the highway and left his vehicle facing south with its lights obscuring what was behind and interfering with oncoming traffic.

Cases are many holding that it is negligence for a person to stop a vehicle on the highway, with lights facing oncoming traffic, and failing to place out warning signs. *Gutierrez, et al vs. Koury*, 57 N.M. 741 263, P.2d 557, held that even though the

driver of a truck did not have a statutory duty to put flares or other lights on the highway to warn motorists when he, because of ignition trouble, stopped his truck on the highway at night, the truck driver owed the duty to motorists to exercise reasonable care to warn him of their peril and his failure to do so would constitute negligence which was the proximate cause of injury sustained by motorists when an auto ran into the rear of the stopped truck. The case held, in the absence of notice to the contrary, a motorist has the right to assume that the lane of traffic in which he is travelling is free from obstruction, and if not, that one responsible for its blockade would give adequate and proper warning thereof, and he is not bound to anticipate that a truck driver would leave the truck standing in the middle of the paved portion of the highway unattended, without lights.

Frame vs. Arrow Towing Service, 64 P.2d 1312, Ore., held that there was common law duty of the operator of a tow car working on the scene of a wrecked automobile to place a sign on the roadway warning oncoming traffic of obstruction of the highway, and the failure to put out signals would establish a prima facie case of negligence against such operator. **Callison vs. Dondero**, 124 P.2d 852, held that where a defendant's vehicle was equipped with flame pots and the defendant failed to use the flame pots or otherwise warn drivers of the plaintiff's truck, might be properly considered in determining

whether the defendant was guilty of a failure to exercise ordinary care, although the defendant may not have violated a statute by failing to place the flame pots or other warning signals on the highway after he parked his truck on the highway.

In *Early vs. Jackson*, 243 P.2d 444, 120 Utah 464, the defendant had parked his car on the highway, at nighttime partially off the road and no flares were placed to warn oncoming traffic of the obstruction. The headlights were left burning facing slightly to the northwest, so that a driver was not able to determine until he was within 250 to 300 feet of the parked truck, that it was obstructing one entire lane of traffic. The Utah Supreme Court held, as a matter of law, that the one who parked the truck was negligent and stated:

“The driver of appellant’s car was confronted with an emergency of respondent’s making and was in a worse position than respondent, who knew of the danger at all times, to avoid the accident.”

The Supreme Court held the lower Court erred in failing to grant appellant’s motion for judgment notwithstanding the verdict. In this case, the Supreme Court recognized that it would be negligence to stop a car on the highway at night, without flares or lights to warn of blocking the lane of traffic.

See also *Fortman v. McBride*, Iowa, 263 N.W. 345, which held that a decedent was contributorily negligent as a matter of law in trying to push his car while it was blocking one side of the roadway and while his back was to oncoming traffic, was devoting his entire attention to attempting to move his car, when he must have known from the headlights of the defendant's automobile that a car was approaching and he could have seen it and failed to watch and move.

The case of *Ashe vs. Hughes*, Mississippi, 69 So. 2d 210, where a wrecker parked on the highway, while assisting a disabled vehicle, was held not subject to the statute requiring flares to be put out because the wrecker was not disabled, but the plaintiff in the action, who was suing the wrecker, because of colliding with the same, had the right to have submitted to the jury, under the proper instruction, the question of whether the failure to use flares was common law negligence. *Gonyo vs. Hewson*, 162 N.Y. Supp. 2d 304, held even though there was no statutory duty to place flares in the daytime,

there was a common law duty for a truck operator to put flares which were available in his truck while it was stopped on the highway during a snowstorm. **Gaber vs. Weinberg**, Pa., 188 A. 187, held that it was a jury question and might be a common law duty in the exercise of reasonable care, for the operator of a truck to warn approaching motorists by the use of flares or other signals when stopped on the highway. **Vandenack vs. Crosby**, Wisconsin, 82 N.W. 2d 307, held that a wrecker truck was engaged in an emergency rescue operation, did not excuse the driver's failure to place flares on the highway. The court held the operators of such trucks must exercise ordinary care to warn other traffic of the obstruction of the highway, and particularly where the truck had been stopped for some period of time.

An Idaho case, **Baldwin vs. Mittry**, 102 P.2d 643, held that although a statute did not make it obligatory for a wrecker operator to use flares on the highway, that the failure of a wrecker operator to put flares on the highway raised a jury question as to whether or not the operator of the wrecker had exercised ordinary care under the circumstances. **Whitworth v. Riley**, Okla. 269 P.350 held that a person who drives his automobile to the left of the center of the public highway in the nighttime, and becomes stalled in a position that would not permit passage of an automobile travelling in the opposite direction to the right, and so stands with the headlights on to indicate a moving car,

constitutes prima facie evidence of the negligence of the driver thereof, in event of collision by another automobile who by virtue of the rules of the road had the right to assume from the facts the headlights were on, that the stalled car was in motion and was being operated in conformity with the law. In *Edblad vs. Brewer*, Minnesota, 227 N.W. 493 a driver who had stopped late at night, on his right side of the highway to change a tire and defendant, passing in the opposite direction stopped to offer assistance and backed his car behind the stopped car so that the headlights on the defendant's car were facing forward on the wrong side of the road and an approaching car driver deceived and collided with the front of the car of the defendant, resulting in plaintiff's injuries. The court said in affirming the judgment for the plaintiff who had struck the car that was stopped:

“We think it is so clear the law of the road forbids stopping as where the appellant did that we shall not discuss the assignment of error on the part of the charge to advise the jury that it was negligent to do so, and that such negligence was a proximate cause of the collision that was liability, unless contributory negligence of the plaintiff was involved.”

Padgett vs. Brangan, Kentucky, 15 S.W. 2d, 277,
held a defendant negligent as a matter of law

in parking his truck on the left side of the road with the lights on at night. *Barnes vs. Ashworth*, Va., 153 S.E. 2d 711, held that one stopping his car on the wrong side of the road on a rainy night, with the lights on is negligent as a matter of law.

Cooper vs. Teter, 15 S.E. 2d 152 West Va., held that a wrecker truck being used to restore a wrecked automobile to the highway may stand on the traveled portion of the highway for a reasonable length of time but must not occupy more highway than is reasonably necessary, and approaching traffic must be fully warned to the obstruction by lights, flags, guards or all other practical means.

Blashfield Encyclopedia Automobile Law, Vol. 2A, Sec. 1202, page 50, states:

“Irrespective for the reason for stopping the vehicle on the highway the driver is under a reasonable care to give proper and adequate warning to other motorists who may be using the highway.”

Rasing vs. Heazler, Kan., 142 P.2d 832, held that a defendant, stopped on the highway supplied with flame pots or flares, his failure to use them might be considered negligence, although his failure was not a violation of the statutes for the reason that the truck was not disabled.

Respondent respectfully contends that there was clear evidence of the negligence of the plaintiff's decedent in failing to put out any warning lights, when he had them, and in working between the trailer and the car under the situation set up when the trailer and the Kester car were behind the lights, and leaving his wrecker on the highway facing the wrong way to mislead the oncoming drivers, who had a right to assume that it was moving and on its own side of the highway. By the time the oncoming driver could determine that the vehicle was not moving or was not on its own side of the highway an emergency situation had arisen, and defendant, with the car under control, drove to her right and passed to the side where there was sufficient width of the highway, and came into the situation that had been set up and, which had been obscured from her vision, because the headlights of the wrecker faced directly down the road. There was sufficient facts for the jury to determine that the plaintiff's decedent was negligent. The case was properly submitted to the jury upon the theory of negligence, and contributory negligence. There was never any objection from the attorney for the ap-

pellant, to the submission of the case to the jury on the matter of contributory negligence of the plaintiff's decedent.

POINT III

THE COURT DID NOT ERR IN INSTRUCTIONS GIVEN TO THE JURY.

- A. Requested Instruction No. 3 of plaintiff was Properly Refused by the Court.
- B. Instructions Nos. 19, 20, 21, and 22 as Given by the Court were Proper Instructions under the Law and Facts of the Case. Plaintiff Failed to Except to Instruction No. 22.
- C. Instructions Nos. 30, 33, and 34, as Given by the Court were Proper Instructions under the Law and Facts of the Case. Plaintiff did not Except to Instruction No. 34.

Appellant's counsel makes a blanket complaint to the court's instructions as a whole and states they are contradictory; serve to over emphasize particular aspects of the case; permit the jury to speculate; are indefinite; and prejudicial to the plaintiff. Appellant fails to advise in what particulars the instructions were contradictory; how they over emphasized particular aspects of the case; how they permitted the jury to speculate; how they were indefinite; and how they were prejudicial to plaintiff. The all inclusive complaint about the instructions, without specifying the particulars of the alleged error and with no law to support the bald

claims of error, makes it difficult to know of what plaintiff complains. With no specification as to the contradiction; over emphasis; speculation; indefiniteness; and prejudice, the claim of error in appellant's point three opening paragraph lacks merit. It should not be incumbent upon respondent to answer bald claims of error made without specification or particular.

Appellant complains of the failure of the court to grant a directed verdict for the plaintiff, on the issue of liability. There was no exception to the court's refusal to instruct the jury to return a verdict in favor of the plaintiff. The motion by plaintiff or a directed verdict was made with no reason or basis specified. The court refused to so instruct the jury, plaintiff failed to except to the failure to instruct the jury in accordance with the request to return a verdict of liability for plaintiff, and plaintiff has waived any objection to the failure of the court to so instruct the jury on the liability issue.

Appellant takes the position that the only question which should have been submitted to the jury, was the question of damages, and the court should have directed a verdict for plaintiff. At the time of taking of exceptions to the jury, counsel for plaintiff stated into the record:

"That the only question with respect to negligence which should have been submitted to the jury was whether or not the plaintiff was guilty of contributory negligence and

which contributory negligence, if any, was a proximate cause of the injuries claimed.” (T. 226).

Counsel cannot now logically contend that the court should have directed a verdict for plaintiff, when for the record, he stated that the issue of negligence of the plaintiff’s decedent, and proximate cause, were questions for the jury.

A. PLAINTIFF’S REQUESTED INSTRUCTION NO. 3 WAS PROPERLY REFUSED BY THE COURT.

Plaintiffs requested Instruction No. 3 was a request that the court instruct the jury, as a matter of law, that defendant had the last clear chance to avoid the accident. The instruction requested was:

“The defendant has admitted that she saw the lights of the wrecker at a time when she was a approximately one-half mile away and that she recognized that it was a wrecker at that time. She also has admitted that she continued toward the wrecker without materially slowing her car by application of brakes until she was within ——— feet of the car. She has also admitted that she could not see ahead of the lights that were on the wrecker and that it was her intention to go around that vehicle although she could not see ahead. She therefore had the last clear chance to avoid the accident. In these circumstances any act of negligence on the part of the plaintiffs’ decedent, that is on the part of Mr. James Warner Taylor, would not bar recovery by the plaintiffs.”

Under the facts of the case, the theory of last

clear chance was not applicable. In any event, the requested instruction fails to embody the proper elements of the theory of last clear chance, and is erroneous in that it requests the court to hold as a matter of law, that the defendant had the last clear chance to avoid the accident. Appellant relies upon the case of **Fox v. Taylor**, 10 Utah 2nd 174, 350 P.2d 154, as authority that his requested Instruction No. 3 should have been given. The **Fox v. Taylor** case is directly contrary to the appellant's position that the case should have been submitted to the jury upon the theory of last clear chance. As stated by the court in **Fox v. Taylor**:

"The cases where that doctrine is applicable fall into two distinct categories. The first we here consider, relates to situations where both the defendant and the plaintiff are guilty of continuing negligence, and where the plaintiff could, by exercising due care, avoid the peril at any time up to the moment of injury. In such case, the injury is the result of the concurring negligence of both the plaintiff and the defendant. Under those facts the defendant can be held responsible only if he actually knows of the plaintiff's situation of peril in time to have the last clear chance to avoid the harm, and fails to do so.

"The plaintiff insists, however, that the doctrine of last clear chance is applicable and the defendant should be held liable even if he did not see her, because in the exercise of due care he should have observed and avoided

striking her. This contention involves consideration of the other facet of the doctrine of last clear chance. Where the defendant does not actually know of the plaintiff's situation of peril, the doctrine can only be properly applied where the plaintiff has gotten into a **position of inextricable peril**. An illustration of this is where a person has caught his foot in a railroad switch, or is in some other similar predicament, so that he is thereafter unable to avert the injury. In such a situation, the plaintiff's negligence has come to rest."

The requested instruction by plaintiff does not encompass the legal principles necessary to properly instruct a jury on the theory of last clear chance, and as such principles are set forth in the case of **Fox v. Taylor**, *supra*, and the Utah cases cited therein.

The defendant Virginia Johnson did not know of the Mr. Taylor's situation, and therefore the situation did not come under the first category of last clear chance as set forth by the Utah Court in **Fox v. Taylor**, *supra*.

There is no claim or evidence in the record, that the James Warner Taylor was in an extricable peril situation. The oncoming vehicle was visible for one-half mile, from the south. Taylor was working between the trailer and Kester automobile with Mr. Milner and Mr. Kester. (T. 24-25) There were no flares, signs or warnings out. (T. 28) A look to the south would have indicated a vehicle approaching

and allowed him to move off the road. There is nothing in the record to indicate that Mr. Taylor was in a position of inextricable peril and allow the doctrine of last clear chance to be applied under the second category set forth in *Fox v. Taylor*, Supra. Plaintiff failed to present any evidence that would support a last clear chance instruction to be submitted to the jury in this case.

**B. INSTRUCTIONS NOS. 19, 20, 21, and 22
WERE PROPERLY SUBMITTED TO
THE JURY.**

Rule 51, Utah Rules of Civil Procedures provides:

“Instructions to Jury: Objections. No party may assign as error the giving or failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection.”

There was no exception by plaintiff to Instruction No. 22.

Plaintiff complains of Instruction No. 19. The instruction was:

“Everyone who has driven an automobile in the nighttime and every observant person who has ridde in an automobile in the nighttime and has met an oncoming automobile with burning lights, knows that the lights obscure objects behind it for a distance before the auotmobile is reached until a time after its lights are passed.”

This instruction was proper. The wrecker operator left his vehicle in the center of the road, facing south, with headlights on. The fact that it was moving or stopped would not change the fact that headlights would obscure objects behind the headlights. This instruction was specifically approved by the Utah Supreme Court in the cases of **Fretz v. Anderson**, 5 Utah 2nd 290, 300 P.2d 642, and **Federated Milk Producers Association, etc. v. Statewide Plumbing and Heating Company**, 11 Utah 2nd 295, 358 P.2d 348.

Instruction No. 20 given by the court was:

“A driver of a motor vehicle is not expected to be capable of acting instantaneously upon seeing danger, as the law takes notice of the fact that it takes a certain time for the driver’s eyes, mind and muscular system to act, and for the brakes of the car to be applied thereafter. This period of time is known as reaction time. While it is generally recognized that the average time of the normal person to react at first recognizing and realizing danger in the daytime and under ordinary conditions is approximately $\frac{3}{4}$ of a second, you are entitled to consider the fact that such time may vary somewhat with the particular individual and with all the attendant circumstances and conditions at the time and place of the accident.”

It was a proper instruction and applicable to the general facts and situation in the case. It is not prejudicial to the plaintiff and is the reiteration of a well-established fact of which the court may

take judicial knowledge. **Howard v. Ringsby Truck Lines**, 2 Utah 2nd 65, 269 P.2d 295.

Instruction No. 21 was:

“You are hereby instructed that the law did not require the said Virginia Claire Johnson to anticipate or guard against anything which could not reasonably be expected and did not require her to regulate her conduct with reference to any conduct on the part of James W. Taylor, not reasonably to be expected, nor did the law require Virginia Clair Johnson to be extraordinarily alert or to foresee all that can be seen by looking backward after the accident happened. In other words, the said Virginia Johnson was not under a duty to foresee all that she might at this time be able to see or appreciate by looking back at the accident; nor was she required to use extraordinary caution for the avoidance of an accident that she could not have expected under the circumstances.

“In this connection, you are further instructed that if the said Virginia Johnson could not, in the exercise of ordinary care, under the circumstance avoided a collision, then plaintiffs cannot recover and if you so find, your verdict should be in favor of defendant and against the plaintiffs.”

This is a correct statement of the “hindsight rule” and was not prejudicial to the plaintiff.

This instruction is in substance from the Utah Supreme Court decision of *Olsen v. Warwood*, 123 Utah 111, 255 P.2d 725.

Instruction No. 22 was:

“If you find that the defendant was a person who, without negligence on her part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to herself or to others, then she is not expected, nor required, to use the same judgment and prudence that is required of her, in the exercise of ordinary care, in calmer and more deliberate moments. Her duty is to exercise only the care that ordinarily prudent persons would exercise in the same situation. If at the moment she does what appears to her to be the best thing to do, and if her choice and manner of action are the same as might have been followed by an ordinarily prudent person under the same conditions, she does all the law requires of her, although, in the light of after-events, it should appear that a different court would have been better and safer.”

This is the emergency doctrine set forth by the Utah Supreme Court in *Howard vs. Ringsby Truck Lines*, 2 Utah 2d 65, 269 P.2d 295.

This is a correct statement of the doctrine as set forth by the Utah Supreme Court. The instruction does not tell the jury that an emergency existed, but left it for the jury to determine from the facts, and the instruction was proper and correctly submitted to the jury.

The appellant has submitted no law to support the claim that the giving of Instruction Nos. 19, 20, 21 and 22 was erroneous, as to any, or all of said instructions. We assume that appellant, not sup-

porting his claim of error with any law, could find none to support his contentions that said instructions were erroneous.

C. INSTRUCTIONS NOS. 30, 33, and 34 AS GIVEN BY THE COURT WERE PROPER INSTRUCTIONS UNDER THE LAW AND FACTS OF THE CASE. PLAINTIFF DID NOT EXCEPT TO INSTRUCTION 34.

Plaintiff contends that Instruction Nos. 30, 33 and 34 given by the court were erroneous. A blanket charge of error is made to these instructions. No exception to instruction No. 34 appears in the record.

In argument that Instruction Nos. 30, 33 and 34 were erroneous and prejudicial, appellant states no law to aid the court or respondent in determining in what particulars said instructions are claimed to be erroneous and prejudicial.

Instruction No. 30 stated:

“One who places himself in a dangerous position has the duty to use his faculties for hearing and seeing to avoid being struck by vehicles upon the highway. If you find from a preponderance of the evidence that James W. Taylor was working in a dangerous position between the Milner trailer and the Kester automobile and further find from a preponderance of the evidence that James W. Taylor did not use reasonable care to watch for the approach of vehicles on the highway, and there were no flares or other warning signals placed on the highway to warn motorists approaching from the south, then you

may find James W. Taylor was negligent, and plaintiffs cannot recover if such lack of reasonable care was a proximate cause of the collision."

This instruction is a correct statement of the law, as to one who is in a dangerous situation being required to use his faculties to avoid injury. Taylor was working between an automobile and a trailer, on the main traveled highway. His wrecker was facing south, with the headlights obscuring the highway behind the wrecker. It is undisputed that there were no flares or signals on the highway. The wrecker operator on the scene for one-half hour or more, and his wrecker equipped with flares, fuses, and reflectorized stands, failed to use these warning devices to protect himself and others on the highway. The defendant did not strike the wrecker on the highway, but defendant passed to the side of it, with sufficient room on the east side for passage, but the east portion of the highway, behind the headlights, was blocked.

Instruction No. 33 was a correct statement of the law for the jury under the facts of this case. The instruction is proper and supported by the evidence and law. This instruction was as follows:

"Although the driver of a wrecker may be excused for stopping on the highway while actively engaged in removing wrecked or disabled vehicles, the wrecker operator must use reasonable care and diligence in moving his wrecker from the highway if he has sufficient

opportunity to do so. You are instructed that a wrecker truck being used to pick up or restore a damaged vehicle on the highway may stand on the traveled portion of the highway only for the reasonable length of time necessary to do the work, but must not occupy more of the highway than is reasonably necessary and approaching traffic must be fully warned of the obstruction by the use of lights, flags, guards or any other practical means. Remaining on the traveled portion of the highway for a period of time longer than reasonably necessary to remove a wrecked or damaged vehicle may constitute negligence and the failure to warn approaching traffic of the obstruction by lights, flags, guards or any other practical means may also constitute negligence on the part of the wrecker operator."

Plaintiff complains that this instruction does not take into consideration proximate cause. The instruction only went to the duty of the wrecker operator remaining on the highway and as to the use of flares or signals when he remained on the highway. The matter of whether or not such negligence, if any the jury found, was a proximate cause of the accident, was covered in other instructions of the court, particularly Instruction Nos. 17 and 18. Proximate cause is properly covered in those instructions and it is not necessary that the instruction as to negligence contains the element of proximate cause. Instruction No. 33 does not tell the jury that if they find the wrecker driver negligent, then plaintiff could not recover. The instruction covers

negligent conduct, and not conclusions or effect of negligence on the part of the wrecker operator.

Instruction No. 23 was as follows:

“The operator of a vehicle stopped on the highway at night time owes a duty to oncoming motorists to exercise reasonable care to warn them of the peril and the obstruction of the highway. If you find from a preponderance of the evidence that James W. Taylor did not use ordinary care and diligence to warn oncoming motorists of the obstruction on the east half of the highway where the collision occurred, and if you further find that such negligence was a proximate cause of the collision, then you may find James W. Taylor was negligent and you may return a verdict for the defendant and against the plaintiffs, no cause of action.”

This instruction with all the instructions is a correct instruction on defendant's theory that James W. Taylor failed to exercise reasonable care to warn oncoming motorists of the obstruction on the highway, and that such failure, if found to be a proximate cause of the accident, would bar plaintiff's recovery.

Instructions 30, 33 and 34 are separate instructions, and different defenses and theories of the defendant's case. Instruction No. 33 covers the situation of the wrecker operator being in a dangerous situation on the highway, with no flares or signals to warn oncoming motorists, and covers his duty to use his faculties for hearing and seeing to avoid

being struck by automobiles approaching.

Instruction No. 33 covers the situation of the driver removing his wrecker from the highway after his work is completed, and if leaving it on the highway, of the exercise of ordinary care in using flares or lights, flags or other warning devices.

Instruction No. 34 is a general instruction of the duty to exercise reasonable care, and proximate cause.

Plaintiff complains that Instruction No. 25 is in conflict with Instruction Nos. 30 and 33. Instruction No. 25, requested by plaintiff, is not in conflict, as the evidence in the case clearly indicates that at the time of the accident, the wrecker was not being used to remove a stalled vehicle from the highway. The wrecker operator had completed his work of attaching the Milner car to the wrecker and then, rather than moving off the highway, he went over to work on the trailer hitch. At the time of the accident, the wrecker was parked on the highway and was not being used to remove a stalled vehicle from the highway.

Cases are many that it is negligence for a person to work on the highway at night without placing flares or warning devices to warn oncoming motorists, and that one working on a highway at night must keep a lookout for oncoming vehicles.

Callison v. Dondero, California 124 P.2d 852, held that a defendant truck driver who stopped his

truck on the paved portion of the highway, and the truck equipped with flame pots, the failure of the defendant to use the flame pots to warn oncoming drivers, might properly be considered in determining if the defendant exercised ordinary care, although defendant may not have violated any statute by failing to place flame pots or other warning signals on the highway.

Frame v. Arrow Towing Service, 64 P.2d 1312, Oregon, held that the failure of the operator of a tow car to place signs or signal on the roadway warning of the highway obstruction, would establish a prima facie case of negligence against the operator. See also **Ashe v. Hughes**, Mississippi, 69 So. 2d 210; **Gonyo v. Hewson**, New York, 162 N.Y.S. Supp. 2d 304; **Gaber v. Wienberg**, Penn., 188 A. 187; **Vandenack v. Crosby**, Wisconsin, 82 N.E. 2d 307; **Smith v. Litton**, La., 47 So. 2d 411; **Cooper v. Teter**, 15 S.E. 2d 152, West Virginia; **Robinson v. Briggs Transportation Co.**, Wisconsin, 76 N.W. 2d 294.

Many cases held that where a man is working on the highway, on a stalled or disabled automobile, that the worker has the duty to pay attention to oncoming traffic. **Descombaz v. Klock**, South Dakota, 240 N.W. 495, involved a motorist stopped on the highway because of a flat tire. His car lights were on and another vehicle hit him from the rear. The plaintiff was found negligent as a matter of law in

failing to keep a proper lookout to avoid injury from moving traffic. The court said:

“Had plaintiff given any lookout for defendant’s car approaching with headlights plainly visible, there we would have plenty of time for him to step out from in front of his car after it became apparent that a collision from the rear would occur.”

The court in that decision set out that if plaintiff saw and failed to act prudently, he was negligent, and if he failed to look he was negligent for failure to keep any lookout. The following cases hold that one working on a disabled vehicle on the highway at night, has the duty to keep a proper lookout for oncoming vehicles. **Binette, Admd. v. LePage**, Maine, 123 A. 2nd 711; **Underwriters v. Employers Liability Ins. Co.**, 28 So. 2d 118; **Fortman v. McBride**, 263 N.W. 345; **Dragotis v. Kennedy**, Minnesota, 250 N.W. 804.

There was a factual question presented for the jury as to whether or not the decedent James Warner Taylor left his wrecker unnecessarily long on the highway blocking a portion of the east lane and obstructing the vision of oncoming traffic. After Taylor had hooked onto the Milner vehicle, he had sufficient time to move the wrecker off the highway, place out flares to warn oncoming traffic, and put his wrecker in such a position that the headlights did not blind oncoming traffic. In the case of **Harry Holder Motor Co. v. Davidson**, Kenutcky, 243 S.W.

2d 926, it has held that the driver of a wrecker should not stop upon the traveled portion of the highway longer than a reasonable length of time, or occupy more of the highway than is reasonably necessary. He should reasonably warn approaching traffic of the obstruction by lights, flares, or other practical means available under the circumstances.

Appellant complains of the court's instruction to the jury No. 22 concerning the emergency rule. Instruction No. 23 given by the court, is a further instruction on the emergency rule doctrine, and this is a requested instruction by plaintiff. Plaintiff cannot request the court to instruct on a theory of law, and then complain that such theory was presented to the jury. This court has many times held that a party cannot complain of error, invited by him. *Mann v. Fairbourn*, 12 Utah 2d 342, 366 P.2d 603; *Alvarez v. Paulus*, 333 P.2d 633, 8 Utah 2d 283; *Pettingill v. Perkins*, 2 Utah 2nd 266, 272 P.2d 185.

In Point III, appellant complains of the number of instructions given by the court. Of the 46 instructions given, 12 are form instructions concerning the duty of the jury, basic definitions, etc. Eleven of the instructions are instructions on damages plaintiff was seeking. Any overweight of number of instructions was on the side of damage instructions. Instructions were numerous, but rather than

long complicated instruction, the court gave short, concise instructions. The fact that the total number was 47 is no indication of the length of instructions.

Appellant complains of Instruction No. 33. The theories in that instruction were in part in Instruction No. 26 given by the court, and which was plaintiff's request.

Instruction No. 26, being plaintiff's request, refers to the display of flares, lights, or other practical means, if a vehicle is not equipped with lights designated by the Utah State Road Commission. The record fails to reveal any evidence or fact that the wrecker operated by James Warner Taylor was equipped, in any manner, by lights designated by the Utah State Road Commission. There is no evidence that the Utah State Road Commission designated any lights for wreckers or any other vehicles. No evidence being before the court or jury as to what lights designated by the Utah State Road Commission were required, plaintiff then requested the court to instruct the jury that Mr. Taylor had the duty to reasonably warn approaching traffic, etc., by displaying lights, flares or other practical means. Plaintiff cannot now complain that the jury was instructed as to the duty to put out lights and flares, etc., when that was the request of plaintiff to instruct the jury.

CONCLUSION

The trial court did not err in refusing to direct a verdict for the plaintiff. The court correctly submitted to the jury the questions of negligence of plaintiff's decedent and of defendant, and the court did not commit prejudicial error in the instructions to the jury.

The Judgment on the Verdict should be sustained and plaintiff's appeal denied.

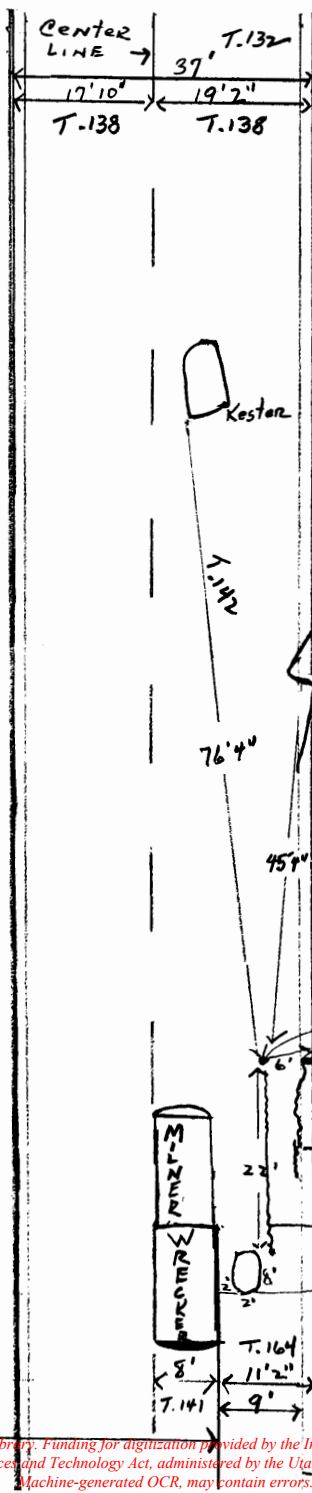
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APPENDIX I

TIRE MARK
To Rear wheel
MILNER CAR

158' 9" Long. T.141