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Loene Nelson v. Earl Le Roy Hutchings : Brief of Respondent and Cross Appellant

Utah Supreme Court

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Lawrence L. Summerhays; Attorney for Appellant and Cross Respondent;

Kipp and Charlier and D. Gary Christian; Attorneys for Respondent and Cross Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

LOENE NELSON,
*Plaintiff, Appellant and
Respondent on Cross Appeal,*

— vs. —

EARL LE ROY HUTCHINGS,
*Defendant, Respondent and
Cross Appellant.*

FILED
T 3 6 1963
Supreme Court, Utah
Case
No. 9929

BRIEF OF RESPONDENT AND CROSS APPELLANT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

HONORABLE MERRILL C. FAUX, *Judge*

KIPP AND CHARLIER

D. GARY CHRISTIAN, Esq.

516 Boston Building
Salt Lake City, Utah

*Attorneys for Defendant,
Respondent and
Cross Appellant*

LAWRENCE L. SUMMERHAYS, Esq.

604 Boston Building
Salt Lake City, Utah

*Attorney for Plaintiff, Appellant
and Respondent on Cross Appeal*

TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE.....	1
DISPOSITION IN LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS	3
ARGUMENT:	
POINT I.	
THE LOWER COURT DID NOT COMMIT ERROR ON RULING THAT PLAINTIFF WAS GUILTY OF CON- TRIBUTORY NEGLIGENCE AS A MATTER OF LAW AND GRANTING DEFENDANT'S MOTION FOR JUDG- MENT NOTWITHSTANDING THE JURY'S VERDICT.....	6
POINT II.	
THE TRIAL COURT ERRED IN REFUSING TO IN- STRUCT THE JURY AT THE TRIAL OF THE MAT- TER IN ACCORDANCE WITH DEFENDANT'S RE- QUESTED INSTRUCTION NO. 4.....	23
CONCLUSION	27

Texts Cited

5 Am. Jur. 2d, Appeal and Error § 810.....	25
44 A. L. R. 1292.....	9
96 A. L. R. 782.....	10
106 A. L. R. 996.....	25
164 A. L. R. 117-124.....	10
166 A. L. R. 1.....	24
10 B Blashfield, Cyclopedia of Automobile Law and Practice, Perm. Ed. § 6618, p. 3.....	8
65 C. J. S. Negligence § 116.....	8
65 C. J. S. Negligence § 251.....	8

Cases Cited

Burton v. Z. C. M. I., 122 Utah 360, 249 P. 2d 514.....	7
Charvaz v. Cattrell, 12 Utah 2d 25, 361 P. 2d 516.....	2
Christensen v. Bergman, 148 Cal. App. 2d 176, 306 P. 2d 561.....	11

TABLE OF CONTENTS — (Continued)

	Page
Clark v. Smitson, 346 S.W. 2d 780 (Kentucky).....	8
Cioffari v. Blanchard, 320 Mich. 518, 47 N.W. 2d 718.....	9
Coombs v. Perry, 2 Utah 2d 381, 275 P. 2d 680 (1954).....	7-11
Figlia v. Wisner, 150 Cal. App. 2d 109, 309 P. 2d 832.....	10
Flanagan v. Slattery, 74 S. D. 92, 49 N.W. 2d 57.....	10
Good v. Behrendt, 321 Ill. App. 303, 52 N.E. 2d 826.....	9
Hartpence v. Grauleff, 15 N.J. 545, 105 A. 2d 514.....	7
Harwitz v. Eurove, 129 Ohio St. 8, 193 N.E. 644.....	10
Herter v. Herschfield, 205 Cal. 625, 271 P. 1051.....	9
Hickok v. Skinner, 113 Utah 1, 190 P. 2d 514.....	11
Kulbacki v. Sobchensky, 38 N. J. 435, 185 A. 835 (1962).....	7
Langlois v. Rees, 10 Utah 2d 272, 351 P. 2d 638 (1960).....	25
Mingus v. Olsson, 114 Utah 505, 201 P. 2d (1949).....	20
Ordeman v. Watkins, 114 Or. 581, 236 P. 488.....	10
Peck v. Guber, 154 Or. 126, 59 P. 2d 675, 106 A. L. R. 996.....	25
Peterson v. Schneider, 153 Neb. 815, 46 N.W. 2d 355.....	10
Prudential Insurance Company v. Foster, 197 Okla. 39, 168 P. 2d 295, 166 A. L. R. 1.....	24
Pueblo Transportation Co. v. Maylan, 123 Colo. 207, 226 P. 2d 806	9
Reiler v. Hart, 202 Minn. 154, 227 N.W. 405.....	9
Ruchewski v. Wisswessu, 355 Pa. 400, 50 A. 2d 291.....	10
Startin v. Madsen, 120 Utah 631, 237 P. 2d 834.....	24
Stewart v. Olson, 188 Wis. 487, 206 N.W. 909, 44 A. L. R. 1292....	9
Switzer v. Baker, 178 Iowa 1063, 160 N.W. 372.....	10
Toomer's Estate v. Union Pacific Railroad Company, 121 Utah 37, 239 P. 2d 163.....	7
Winkler v. Moore, 312 Ky. 235, 227 S.W. 2d 187.....	9

IN THE SUPREME COURT OF THE STATE OF UTAH

LOENE NELSON,
*Plaintiff, Appellant and
Respondent on Cross Appeal,*

— vs. —

EARL LE ROY HUTCHINGS,
*Defendant, Respondent and
Cross Appellant.*

} Case
No. 9929

BRIEF OF RESPONDENT AND CROSS APPELLANT

STATEMENT OF NATURE OF CASE

This appeal involves an automobile-pedestrian accident wherein plaintiff-pedestrian seeks to recover damages for injuries sustained by her, when struck by an automobile driven by defendant. The questions on appeal relate to the propriety of the trial judge in his refusal to give certain instructions to the jury and in granting defendant judgment notwithstanding a jury verdict in favor of plaintiff.

DISPOSITION IN LOWER COURT

This personal injury case was tried to a jury in the District Court of Salt Lake County, State of Utah, the Honorable Merrill C. Faux presiding. In defendant's requested instruction No. 4 the trial judge was requested to instruct the jury that plaintiff was negligent as a matter of law and that the jury should determine whether such negligence was a contributing proximate cause of the accident and plaintiff's injuries. The trial judge refused to do so and the jury returned a verdict in favor of plaintiff and against the defendant for the sum of \$3,550.00. After entry of the jury verdict, defendant's motion for judgment notwithstanding the verdict was granted. Plaintiff prosecutes this appeal from the trial court's granting of defendant's motion for judgment notwithstanding the verdict and defendant prosecutes his cross appeal from the trial court's failure to instruct the jury on negligence and proximate cause as he requested.

RELIEF SOUGHT ON APPEAL

The relief sought by defendant on this appeal is as follows:

1. Order affirming the Judgment Notwithstanding the Verdict entered by the lower Court.
2. In the alternative on the cross appeal an Order remanding the case to the trial court for re-trial, ordering the lower court to instruct the jury as requested by defendant on his Requested Instruction No. 4.

STATEMENT OF FACTS

The accident out of which this action arose occurred at approximately 7:20 p.m. (R 83) on June 28, 1962, at the intersection of Sixth South Street and Second East Street in Salt Lake City, Utah (R 83, 100). Sixth South Street runs east and west (R 84) and Second East runs north and south (R 85). At the time of the accident Sixth South was approximately 90 feet wide with an intermittent white center line. (R 85) The street had no other traffic lane markings but it was wide enough for two lanes of traffic in each direction (R. 85). The north half of Sixth South just west of its intersection with Second East was 45 feet 9 inches wide (R 85).

Second East Street was approximately 90 feet wide (R 85). South of the intersection it was marked with two lanes for southbound traffic, two lanes for northbound traffic plus a left turn storage lane for automobiles travelling from Second East left onto Sixth South (R. 122, 128). The east half of Second East Street was approximately 45 feet wide with the outside northbound lane being 21 feet wide, the inside northbound lane being 14 feet wide and the left turn storage lane being 9 feet 8 inches wide. The west half of Second East Street was approximately 44 feet wide, each lane being about 22 feet wide (R 178). There was a painted crosswalk across Second East and Sixth South on each side of the intersection (R 94). The crosswalk on Sixth South west of the intersection was 7 feet 5 inches wide (R 85) and from the east line of this crosswalk to the west curb line on Second East Street was 14 feet 3 inches

(R 87). A semaphore suspended at the center of the intersection controlled the movement of traffic in each direction (R 101).

On the day of the accident defendant was driving his automobile north on Second East Street in the inside lane. There were no cars in front of him (R 91, 169). When he arrived at the intersection of Second East Street and Sixth South Street the semaphore was red for traffic moving on Second East so he signaled his intention to turn left onto Sixth South Street (R 91, 170), pulled into the left turn storage lane and stopped in obedience to the red light (R. 91, 170). When the light turned green for him he negotiated his left turn west onto Sixth South Street at a speed of approximately 5-10 miles per hour (R 173). As he got into his turn so that he was facing in a westerly direction the sun struck him in the eyes and he reached up to pull down his sun visor. Just as he did so, his wife, who was with him in the car, shouted for him to stop. He applied the brakes and immediately thereafter struck plaintiff with his automobile (R. 91).

Just prior to the accident plaintiff was walking south on the west side of Second East Street (R 101) and when she got to the intersection the light was green for traffic moving on Second East. Not knowing how long it had been green she waited while the semaphore completed its green cycle and waited through the red exposure so she could proceed when it turned green again (R 104). Before proceeding south across Sixth South on the west crosswalk, plaintiff made an observation for traffic to

the east, west, behind her to the north and to the south (R 102). She observed no automobiles coming from any direction except one car which was coming from the south on Second East. This vehicle was stopped at the intersection in obedience to the semaphore but plaintiff observed no left turn signal being given (R 102), and cannot say whether or not a signal was being given (R 105). When the light changed green for traffic on Second East plaintiff made an observation for traffic on the roadway in each direction again, and saw none except the automobile across the intersection from her on Second East. She saw the automobile start into the intersection (R 128) and she then began to walk at a normal gait in the crosswalk south across Sixth South. As plaintiff proceeded across the street with the sun to her back (R 133) she was looking "mostly" in front of her and to the southeast (R 130).

Plaintiff looked to the west to make sure no cars were coming from that direction (R 132) but did not look to the south (R 132) and did not see the automobile being driven by Mr. Hutchings, either directly or through her peripheral vision (R 132). She never did see the car from her first observation of it until just "a fraction of a second" before the impact (R 130) during which time she walked approximately 40 feet across the street. The impact on the car occurred on the right-hand side of the front bumper of the automobile below the light and was merely a brushing off of the foreign material and dust and dirt from the surface of the bumper (R 88).

The collision probably occurred in the west crosswalk on Sixth South, 39 feet 6 inches south of the north curb line of Sixth South and 17 feet 11 inches west of the west curb line of Second East (R 87).

Both streets are straight and level (R 97) and at the time of the accident the road surfaces were dry, the weather clear (R 89) and there were no obstructions to the vision of either party (R 90). The sun was low in the western sky, making it bright and “quite glary” outside (R 126).

At the time of the accident there was no other vehicular traffic on Sixth South or Second East other than defendant’s car; there was no other pedestrian traffic nor were there any holes, obstructions or detours in the crosswalk in which plaintiff was walking.

ARGUMENT

POINT I

THE LOWER COURT DID NOT COMMIT ERROR ON RULING THAT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW AND GRANTING DEFENDANT’S MOTION FOR JUDGMENT NOTWITHSTANDING THE JURY VERDICT.

In considering matters on appeal, appellate courts abide by certain rules which have been laid down dealing with the scope of review in matters before them. One of these rules is to the effect that the judgment and proceedings in the lower court are presumptively correct and

the burden is upon the losing party to show error. *Coombs v. Perry*, 2 Utah 2d 381, 275 P. 2d 680 (1954), *Burton v. Z. C. M. I.*, 122 Utah 360, 249 P. 2d 514. Another is that were a trial judge has passed upon a question and has made a finding, while such is not controlling, it is at least entitled to some consideration and should not be wholly ignored in reviewing the situation and attempting to see, as objectively as possible, whether reasonable minds might differ. *Toomer's Estate v. Union Pacific Railroad Company*, 121 Utah 37, 239 P. 2d 163. In discussing this problem in *Kulbacki v. Sobchensky*, 38 N. J. 435, 185 A. 2d 835 (1962) the Supreme Court of New Jersey said:

What the trial judge must do is canvas the record, not to balance the persuasiveness of the evidence on the one side as against the other, but to determine whether reasonable minds might accept the evidence as adequate to support the jury verdict.

And in *Hartpence v. Grauleff*, 15 N. J. 545, 105 A. 2d 514, the same court in discussing the same problem declared:

A trial judge is in a better position than an appellate court to decide whether justice has been done under the particular circumstances and the weight of the credible evidence. He sees and hears the witnesses, observes their demeanor and reactions, none of which has life in the record on appeal. He is in a position to know and equate all the factors, including any error he may have made, and establish a basis which leads to the conclusion that the verdict was the result of passion, mistake or prejudice. His action should not be disturbed unless it clearly and unequivocally appears there was a manifest denial of justice under the law.

In the instant case, after canvassing the record and after seeing and hearing the witnesses and observing their demeanor the lower court held that plaintiff was guilty of contributory negligence as a matter of law which contributed to the accident and her injuries. The guidelines set up for the scope of review on appeal should be applied here and the action of the lower court presumed to be correct and it should not be disturbed unless clearly and unequivocally shown by appellants that the lower court's action was error and that there was a manifest denial of justice under the law.

Contributory negligence is conduct for which plaintiff is responsible amounting to a breach of the duty which the law imposes on persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which the defendant is responsible, contributed to the injury complained of as a proximate cause. 65 CJS, Negligence § 116; 10 B. Blashfield, Cyclopedia of Automobile Law and Practice, Perm Ed. § 6618, p. 3. A case should not be submitted to the jury where the facts pertaining to an issue are neither contradicted nor permissive of conflicting inferences but are clearly settled and permit only a single inference. 65 C.J.S., Negligence, § 251.

Ordinarily, questions of negligence and contributory negligence are for the jury, but a pedestrian who has failed to exercise ordinary care for his own safety and is injured by an automobile is guilty of contributory negligence as a matter of law. *Clark v. Smitson*, 346 S.W. 2d 780 (Kentucky).

Among the cases in which the question of the negligence of a pedestrian in safeguarding himself from the movements of motorists has been decided as a matter of law are the following:

Good v. Behrendt, 321 Ill. App. 303, 52 N.E. 2d 826, where the pedestrian failed to look again after seeing the automobile. *Cioffari v. Blanchard*, 320 Mich. 518, 47 N.W. 2d 718, where the pedestrian failed to continue to look. *Winkler v. Moore*, 312 Ky. 235, 227 S.W. 2d 187, where the pedestrian apparently walked into the side of the automobile.

In *Stewart v. Olson*, 188 Wis. 487, 206 N.W. 909, 44 ALR 1292, a pedestrian who saw an automobile coming along the same street in which he was running, and who was struck when it turned onto a street which he was crossing, and who could have stopped before he reached the place of danger, was held negligent as a matter of law; he having testified that he thought the car might turn into the cross street.

See also *Herter v. Herschfield*, 205 Cal. 625, 271 P. 1051.

While the law does not view a pedestrian as contributorily negligent because he has not looked a certain number of times before crossing a street or highway, *Pueblo Transportation Company v. Maylan*, 123 Colo. 207, 226 P. 2d 806; *Reiler v. Hart*, 202 Minn. 154, 227 N.W. 405, yet a pedestrian crossing a street must not only look before he enters but must continue to look as

he proceeds and he will not be heard to say that he looked without seeing what was approaching and plainly visible. *Ruchewski v. Wisswessu*, 355 Pa. 400, 50 A. 2d 291. And even though there is an ordinance or statute giving the pedestrian the right of way at street crossings, such statutes and ordinances create a preferential but not an absolute right in their favor, *Charvoz v. Cottrell*, 12 Utah 2d 25, 361 P. 2d 516; *Switzer v. Baker*, 178 Iowa 1063, 160 N.W. 372; *Harwitz v. Eurove*, 129 Ohio St. 8, 193 N.E. 644, 96 ALR 782, and it is still the pedestrian's duty to make diligent use of available means to avoid a known or apprehended danger, or one that under the circumstances he should have apprehended. *Ordeman v. Watkins*, 114 Or. 581, 236 P. 488. See also the Annotation in 164 ALR 117-124.

A pedestrian intending to cross a traveled street not only has the duty to maintain a diligent lookout for approaching cars and to take notice of the condition of traffic, but as the operators of motor vehicles must do, the pedestrian is bound to make his observations at such times and places that his lookout will be effective. *Peterson v. Schneider*, 153 Neb. 815, 46 N.W. 2d 355; *Flanagan v. Slattery*, 74 S.D. 92, 49 N.W. 2d 57.

A pedestrian is not required to keep looking right and left as he crosses the street but is required to exercise reasonable care while crossing the street in a marked crosswalk and to continue to be alert and to safeguard against injury, throughout his passage. *Figlia v. Wisner*, 150 Cal. App. 2d 109, 309 P. 2d 832.

One about to cross a highway on which motor vehicular traffic is to be expected must make reasonable observations to learn traffic conditions confronting him, look to the vicinity from which, were a vehicle approaching, it would be an immediate danger to his passage, try to make a sensible decision as to safety and generally exercise ordinary care, including reasonable use of his senses to avoid the accident. *Christensen v. Bergmann*, 148 Cal. App. 2d 176, 306 P. 2d 561.

The rights of pedestrians in Utah to the use of the public streets are the same as those of motorists, and hence, the same general duties devolve upon both of them. In the case of *Hickok v. Skinner*, 113 Utah 1, 190 P. 2d 514 the Supreme Court held that a motorist who has the right of way across an intersection had a duty to observe for traffic as he proceeded across the intersection. Inherent in the duty of continuing observation is, of course, the duty to continually re-appraise the situation and to take whatever action is necessary, reasonable and prudent to protect oneself and others from harm, injury or danger based upon the change in circumstances, situations and conditions brought to the attention, by continuing re-appraisal, of the person crossing the street.

Several cases involving automobile-pedestrian accidents have been decided in this State by the Supreme Court. Although no case is exactly the same on its facts, a few are similar though distinguishable from the instant case. *Coombs v. Perry*, 2 Utah 2d 381, 275 P. 2d 680 (1954) was an action by a pedestrian against the driver of an automobile for personal injuries sustained

when struck by the automobile in a mid-block crosswalk. In that case, plaintiff and a friend were walking southward on the east side of Washington Boulevard, Ogden's main street, between 26th and 27th Streets, in the evening about twilight. As they reached the mid-block crosswalk, plaintiff looked north and saw a bus about one and one-half blocks away and she decided to cross the street to see if it was her bus. She walked west to the middle of the street, stopped and looked north and seeing no vehicles between herself and the corner, she took a few steps westward when she suddenly became aware of headlights to the north and was suddenly thereafter struck by defendant's automobile.

Plaintiff's friend, who waited on the east side of the street, testified that she did not observe any automobile between plaintiff and the corner. There was also testimony from an independent witness that defendant was cutting across from the outside southbound lane to the inside southbound lane, to where plaintiff was, as he proceeded along Washington Boulevard.

The Trial Court entered judgment for the pedestrian upon a jury verdict. Upon defendant's appeal the Supreme Court held that the questions of the driver's negligence and the pedestrian's contributory negligence were for the jury.

It should be noted in the *Coombs* case that (1) neither plaintiff nor her friend saw defendant's car, (2) defendant traveled east on 26th Street and turned south onto Washington Boulevard about one-half block north

of plaintiff, (3) there was a conflict in the testimony as to whether there were any other cars on the street near defendant's car, (4) there was a conflict in the testimony as to what lane defendant was traveling in and whether he was cutting across to the inside lane and, (5) there was a conflict as to where the impact occurred on the automobile. Such conflicts alone are sufficient reason to give the matter to the jury for decision. No such conflicts in testimony exist in the case on appeal herein. In the instant case there is not even a question as to whether defendant signaled for a left turn because he emphatically testified that he did so, and plaintiff testified only that she did not observe a signal and that she couldn't say whether one was given or not.

In *Coombs v. Perry*, the Supreme Court held that the question of plaintiff's contributory negligence was one for the jury because the evidence was susceptible of many findings, viz. (1) that defendant's automobile was not on Washington Boulevard when plaintiff looked to the north, (2) that defendant was so far away from plaintiff when she looked that had she seen him she could have assumed that he would stop because at the speed he was traveling he could have stopped his car several times over before reaching the spot where she was and at the speed defendant was traveling when she realized that he wasn't going to stop it was too late, (3) inasmuch as plaintiff's friend looked and didn't see defendant's car the jury could have found that a reasonably prudent and careful person in plaintiff's position may also have looked and failed to have seen, (4) there is a

possibility that since plaintiff became aware of defendant's automobile all of a sudden that he may have been driving without his lights on until he reached plaintiff, and (5) plaintiff could have looked and seen defendant and assumed he would stay in the outside lane of travel where the jury could have found he was traveling.

Mr. Justice Henriod in his dissenting opinion, however, thought that there was no question but that plaintiff was guilty of contributory negligence as a matter of law. 2 Utah 2d 381, 390-391.

In deciding the *Coombs case* the Court had the following things to say about its reasons for disposing of the case as it did:

The salient point is that the plaintiff as a pedestrian in a marked crosswalk, had the right of way. The right of way rule simply means this: that if two persons are so proceeding that if they continued their course there would be danger of collision, the disfavored one (defendant) must give way, and the favored one (plaintiff) may proceed; and the favored one (plaintiff) may assume that this will be done. It is, of course, recognized that the right of way rule would not apply if, when the favored one (plaintiff) *approached the crossing point* (emphasis added) the disfavored one (defendant) was so close that in due care he could not, or should not reasonably be expected to give way. pp. 387-388.

Discussing this aspect of the case further at page 388 the Court went on to say:

In determining whether it must be ruled as a matter of law that plaintiff herself was negligent

which contributed to cause her injury, consideration must be given, not only the fact that she had the right of way upon which she could place some reliance, but also that a pedestrian crossing a busy street **must** be constantly vigilant for her own safety with respect to all of the conditions around her.

Going further the Court declared:

Even if a car is seen approaching, unless it is so positioned as to constitute an immediate hazard to her, she is not necessarily obliged to focus full and undivided attention *on that particular car* and so calculate her entire conduct as to avoid being struck by it. She need not anticipate that the driver will speed, fail to observe, or to control his car, or fail to afford her the right of way, or otherwise be negligent *unless in due care she observes or should observe something to warn her of such improper conduct* (Emphasis added).

And in summing up on the lookout and right of way questions the Court said at page 388:

This is not to say that a pedestrian may claim the right of way in face of danger. She must, of course, be watching for automobiles or other vehicles on the street, particularly from the north where traffic was most likely to come. But due care requires that she also keep a lookout ahead for other pedestrians, possible holes or obstructions in the street and at least remain aware of the possibility of other traffic, lest she be guilty of failing to use reasonable care for her own safety in regard to other dangers.

Upon all the evidence produced at the trial of the matter and upon the record before it the Supreme Court

then gave its reason for holding that the contributory negligence of plaintiff was a question for the jury:

Under the evidence here the jury may well have found that when plaintiff looked to the north there was no car approaching within a distance of immediate hazard to her, and in view of the considerations above discussed as to her right of way and the necessity of remaining aware of other conditions around her, that her conduct in placing some reliance upon the observation she made and proceeding westward across the street was consistent with her duty of ordinary and reasonable care for her safety.

Respondent herein earnestly urges the Court that the *Coombs case* and the case on appeal herein are distinguishable on their facts and the factual circumstances and conditions demanding the negligence of plaintiff be submitted to the jury in the former case are not present in the latter case and that the facts as revealed by the record on appeal require that plaintiff be found guilty of contributory negligence as a matter of law.

In *Coombs v. Perry* the essential facts are as follows:

- (1) The accident happened at dusk or twilight making it difficult to see.
- (2) It was dark enough for cars to be using their headlights.
- (3) Conflicting testimony as to defendant's position on the road and the point of impact on the vehicle.

(4) Others failed to see defendant's car besides plaintiff.

(5) Plaintiff's attention may have been directed to other conditions and hazards on the roadway and in the crosswalk.

(6) Defendant was traveling about ten times as fast as plaintiff was walking so that it was more difficult to extricate herself from the position of peril.

(7) Plaintiff had to make her observations as to hazards over an area of 90°, i.e., from due west, directly ahead of her, to due north, directly over her right shoulder, the direction from which defendant was coming.

In the case on appeal herein the essential facts are as follows :

(1) The accident occurred in the daytime when it was not difficult for plaintiff to see because she had her back to the sun, but when it was difficult for defendant to see because he was coming directly into the sun.

(2) Plaintiff observed defendant's automobile but failed to observe the left turn signal being given by him.

(3) Because of the direction that plaintiff was walking and by reason the direction from which defendant was coming, plaintiff merely had to

hold her head erect and look where she was going and she would have seen defendant's automobile approaching her.

(4) There was no other vehicular traffic on the roadway with the exception of defendant's automobile and since plaintiff had a red semaphore protecting her from east-west traffic on Sixth South she did not need to anticipate that traffic would come from either of those directions and harm her.

(5) Plaintiff did not need to concern herself about traffic turning right from Second East onto Sixth South because she had passed the point where such cars could be expected to travel on the roadway before the accident occurred.

(6) There were no other hazards or objects that plaintiff needed to give her attention to because (a) there were no other pedestrians in the crosswalk she was occupying, (b) there were no obstructions in the crosswalk, (c) there were no holes in the pavement.

(7) Defendant's automobile was the only object on the road that created a hazard for plaintiff and the direction from which it came and the only direction from which a hazard could come was the only direction to which she did not give her attention.

(8) Defendant's car which was traveling about three times as fast as plaintiff was walking creat-

ed an immediate hazard to plaintiff as she approached the crossing point.

(9) Plaintiff walked approximately 40 feet without ever having seen defendant's car as it approached her without slowing down.

Had plaintiff been in the exercise of due care for her own safety as she crossed the street she could have seen or should have seen that defendant was not decreasing his speed of travel and that he was reaching for the sun visor in his car as he approached her. This would have put her on notice that defendant was unaware of her presence and she should take the simple precaution for her own safety of merely slowing her gait or even stopping while determining whether defendant was going to yield her the right of way.

If it is true that plaintiff had the right of way which she could rely on and which she could assume that defendant would give her until in the exercise of due care she observed something to warn her to the contrary, defendant asserts that no individual can be put on notice by observing some action to the contrary unless such individual is making an observation and is in fact seeing what is there to be seen. Plaintiff was not in the exercise of due care because no action taken by defendant or failed to be taken by him could have put plaintiff on notice that an accident was imminent because plaintiff was not watching for the dangers around her or at least not watching for any from the only direction that danger would conceivably come.

Based on this discussion defendant asserts that *Coombs v. Perry* and the instant case are different on their facts and if from all the facts and circumstances therein, the *Coombs case* presented a question for the jury on plaintiff's contributory negligence, on the same basis the case on appeal herein does not.

Mingus v. Olsson, 114 Utah 505, 201 P. 2d (1949) involved an automobile-pedestrian accident wherein the pedestrian was struck by defendant's automobile and killed. At the trial the lower Court granted defendant a directed verdict on the ground that the decedent pedestrian was negligent as a matter of law. The case was affirmed on appeal. On February 23, 1945, at about 8:15 p.m. the decedent and his wife attempted to cross Thirteenth East Street in an unmarked crosswalk at its intersection with Westminister Avenue in Salt Lake City. As they stepped from the curb and started easterly across Thirteenth East the decedent neither looked to his left nor right, but looked straight ahead as he proceeded across the street. He said nothing to her about approaching traffic; she did not see or hear defendant's automobile until it struck. The pedestrians proceeded about ten feet across the street when they were hit.

The cross walk did not run due east and west but slightly southeasterly and northwesterly, so that if the deceased were walking within and parallel to the unmarked lines of the crosswalk, and was facing straight ahead in his course, his face would be turned slightly away and his back slightly toward the traffic approach-

ing from the north. Defendant's automobile coming from the north on Thirteenth East collided with the pedestrians.

Utah's Supreme Court held that decedent was guilty of negligence as a matter of law for his failure to observe for vehicular traffic before undertaking to cross a roadway. Relating to the lookout question the Court said:

More convincing that direct testimony that deceased did not look, is the further evidence that deceased neither said nor did anything to indicate that he was aware of the danger presented by defendant's approaching automobile. He seems to have been wholly unaware of its approach. *Certainly he did nothing to warn his wife, nor to rescue either himself or her from their position of peril* (Emphasis added). On this evidence, it must be said as a matter of law that deceased either failed to look, or having looked, failed to see what he should have seen. 201 P. 2d 495, 498.

Discussing the matter further at page 498-499 the Court said:

There can be no doubt that a pedestrian who undertakes to cross a busy street in a large city, without first observing for vehicular traffic is guilty of contributory negligence. And this is true, even though he may be crossing in a crosswalk and have the right of way. . . . A pedestrian crossing a public street in a crosswalk or pedestrian lane, although he may have the right of way over vehicular traffic, nonetheless has the duty to observe for such traffic. . . . Of course we do not mean to imply that a mere glance in the direction of the approaching automobile would suffice. The

duty to look has inherence in it the duty to see what is there to be seen, and to pay heed to it.

At page 499, Justice Wade, concurring, had this to say:

Even had decedent looked to see if there was an automobile approaching, this would not have exonerated him from negligence. As long as he walked directly into the course of an approaching automobile without taking any precaution for his safety, it would make no difference whether he looked or failed to look for approaching traffic. If he looked and inattentively failed to see the approaching car or absentmindedly failed to realize his danger, or should realize his danger but still continued on into the course of the car he would be in the same situation as to contributory negligence as though he failed to look at all.

The *Mingus case* has been cited for the proposition that one undertaking to cross a street in a cross walk and with the right of way must initially make an observation for traffic before proceeding across the roadway and if this is not done he will be guilty of negligence as a matter of law. However, that the case also stands for the proposition that such a man must maintain a proper lookout as he crosses the street by making continuing reappraisals and gauging his actions accordingly is born out by the quotations given above.

In the instant case plaintiff was not faced with the problem of multiple appraisement as the Court indicates Mrs. Coombs was in *Coombs v. Perry*, but her situation is more analogous to that of Mr. Mingus be-

cause they were both faced with a single appraisement situation, i.e., there was only one object creating a hazard to them and that is the only thing they had to watch at that time to keep themselves from injury. However, there is one difference in the latter case and that is that Mr. Mingus, whose back was to the hazardous traffic, had to look back over his left shoulder to observe traffic and act accordingly, while plaintiff herein merely had to watch where she was going and she could have seen defendant's automobile, constantly have re-appraised her situation without any inconvenience or hazard to herself and gauged her conduct accordingly.

It is inconceivable that defendant's automobile with its left turn signal light flashing, proceeding into the intersection in the process of making its turn would not have been seen by plaintiff who was looking almost directly down the street and across the intersection toward it, as plaintiff would have looked due to the angle of her vision by reason of the direction of her travel and that of defendant. It follows, that either plaintiff did not look, as she said she did, or if she looked, she did not see what was there plainly to be seen. Her failure in either respect was negligent.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AT THE TRIAL OF THE MATTER IN ACCORDANCE WITH DEFENDANT'S REQUESTED INSTRUCTION NO. 4.

Defendant has filed a cross appeal in this matter and Point I of his Statement of Points on Cross Appeal will be considered in his brief as Point II.

Instruction No. 4 of defendant's requested instructions is as follows:

You are instructed that the plaintiff, Loene Nelson, was guilty of negligence as a matter of law, and the only question for you to determine is whether or not this negligence was a proximate or contributing cause of the accident which occurred.

If you find that it was such a cause, you should return a verdict of no cause of action. If you find it was not such a cause, and you further find that the defendant, Earl LeRoy Hutchings, was negligent, which negligence was a proximate cause of the accident, you should then consider the damages to be awarded to plaintiff.

The trial judge refused to give the instruction to the jury.

Instructions in an action are to be regarded as a connected series and if considered as a whole they fairly present the issues to the jury and state the governing law, error in individual instructions may be disregarded as harmless. *Startin v. Madsen*, 120 Utah 631, 237 P. 2d 834. Error in regard to instructions will not be held reversible unless it results in prejudice to appellant by injuriously affecting his material or substantive rights. *Prudential Insurance Company v. Foster*, 197 Okla. 39, 168 P. 2d 295, 166 ALR 1, *Peck v. Guber*,

154 Or. 126, 59 P. 2d 675, 106 ALR 996. However, error generally results from instructions which tend to mislead the jury so that they reach a different result than they would have reached but for the error, 5 Am. Jur. 2d, Appeal and Error, § 810, and in such a case the verdict should be set aside or the matter re-tried and the jury properly instructed.

As to the contributory negligence of plaintiff, cross-appellant adopts and includes under Point II by reference, the argument and authorities cited and discussed in Point I of this brief, and urges upon the Court that the negligence of plaintiff is manifest. It is the contention of cross-appellant that the trial court should have instructed the jury that plaintiff was negligent in her conduct and, as a matter of law, should have taken from the jury consideration of that aspect of the case. Whether or not plaintiff's conduct proximately contributed to the accident and its resulting injury should have been given to them to consider.

The case of *Langlois v. Rees*, 10 Utah 2d 272, 351 P. 2d 638 (1960) was an automobile pedestrian accident which occurred on a street at a place other than a cross-walk. At the trial, the lower court instructed the jury that the plaintiff pedestrian was guilty of negligence as a matter of law for her conduct in crossing the street where she did but it left the question of causation for the jury's consideration. On appeal, the Supreme Court held that to be proper in that case. Cross appellant feels that plaintiff's conduct in the instant case was as obviously negligent as was that of the pedestrian in *Langlois v.*

Rees and that the question of negligence and causation should have been handled in the same way.

It is urged by cross appellant that the trial court's failure to instruct the jury that plaintiff was negligent and to leave causation for their consideration was error for the following reasons: (1) If plaintiff was, in fact, negligent as cross appellant asserts, then the Court gave an unnecessary and misleading instruction to the jury when it instructed them to consider the question of her negligence. Since negligence and causation were directed against defendant, the fact that the Court permitted the jury to consider the question of plaintiff's negligence created an inference that plaintiff was not or may not have been negligent and this merely cluttered the issues and confused the jury, (2) if plaintiff was in fact negligent, then the jury had no right to consider the question, (3) if plaintiff was negligent as a matter of law, and the question of her negligence was given to the jury for determination, they could and may erroneously have found that plaintiff was not negligent at the time and place of the accident, and if they erroneously found that plaintiff was not negligent, then they would not have considered the question of causation, nor would they have been required to do so since the Court had directed negligence and causation against defendant. Hence, the one important question that the jury should consider would be the one question that they would not consider, causing them to reach a different result than they would have reached except for the error by the Court in not having instructed them properly.

This being the case, permitting the jury verdict to stand would be injurious to defendant affecting his material and substantive rights.

To prevent a miscarriage of justice the jury verdict should be set aside or the matter re-tried with the jury properly instructed the second time to assist them in their duties.

CONCLUSION

On the basis of the facts as revealed in the record and the law as discussed herein, the negligence of plaintiff is amply demonstrated and the action of the trial court in granting defendant's motion for judgment notwithstanding the verdict wholly justified. The judgment of the lower court should remain undisturbed and in no event should the jury verdict be reinstated.

Respectfully submitted,

KIPP AND CHARLIER

D. GARY CHRISTIAN, Esq.

516 Boston Building

Salt Lake City, Utah

*Attorneys for Defendant,
Respondent and
Cross Appellant*