

1963

# Harry S. Muhlback v. W. Lynn Hertig : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Mark, Johnson, Schoenhals & Roberts; Cotro-Manes & Cotro-Manes; Attorneys for Plaintiff-Respondent;

Raymond M. Berry; Attorney for Defendant-Appellant;

---

## Recommended Citation

Brief of Appellant, *Muhlback v. Hertig*, No. 9959 (Utah Supreme Court, 1963).

[https://digitalcommons.law.byu.edu/uofu\\_sc1/4355](https://digitalcommons.law.byu.edu/uofu_sc1/4355)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

APR 16 1964

IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

SEP 10 1963

HARRY S. MULBACH,

*Plaintiff-Respondent*, Supreme Court, Utah

vs.

Case 9959

W. LYNN HERTIG,

*Defendant-Appellant.*

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE  
THIRD DISTRICT COURT FOR  
SALT LAKE COUNTY  
HON. MERRILL C. FAUX, JUDGE

Attorney for Defendant-Appellant  
RAYMOND M. BERRY  
203 Executive Building  
455 East Fourth South  
Salt Lake City, Utah

MARK, JOHNSON, SCHOENHALS  
and ROBERTS

903 Kearns Building  
Salt Lake City, Utah  
and

COTRO-MANES & COTRO-MANES  
430 Judge Building  
Salt Lake City, Utah  
Attorneys for Plaintiff-Respondent

## TABLE OF CONTENTS

	Page
STATEMENT OF POINTS .....	1
STATEMENT OF THE NATURE OF THE CASE.....	2
DISPOSITION IN LOWER COURT .....	2
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF MATERIAL FACTS .....	2
ARGUMENT .....	11
POINT I. THE LOWER COURT ERRED IN INSTRUCT- ING ON THE SUDDEN EMERGENCY DOCTRINE....	11
POINT II. THE LOWER COURT ERRED IN FAILING TO DEFINE IN THE INSTRUCTIONS WHAT CON- STITUTED AN IMMEDIATE HAZARD .....	22
POINT III. THE LOWER COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT EACH DRIVER HAD A DUTY TO KEEP A LOOKOUT AND THAT IT WAS NEGLIGENCE TO FAIL TO SEE WHAT WAS PLAIN TO BE SEEN. ....	29
POINT IV. THE COURT ERRED IN FAILING TO DI- RECT A VERDICT FOR THE DEFENDANT BE- CAUSE THE EVIDENCE SHOWED AS A MATTER OF LAW THE PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT IN FAILING TO YIELD THE RIGHT OF WAY AND IN FAILING TO KEEP A PROPER LOOKOUT. ....	31
CONCLUSION .....	37

### CASES CITED

Alvarado vs. Tucker (1954), 2 Utah 2d 16, 268 P. 2 986.....	22
Andraski vs. Gormley (1958), 3 Wis. 2d 149, 87 N.S. 818.....	17
Bates vs. Burns (1955), 3 Utah 2d 180, 281 P. 2d 290.....	33
Benson vs. D. & R. G. W. Railroad Company (1955), 4 Utah 2d 39, 296 P. 2d 790.....	35
Bullock vs. Luke (1940)), 98 Utah 501, 98 P. 2d 350.....	33
Conklin vs. Walsh (1948), 113 Utah 276, 193 P. 2d 437.....	32
Cruse vs. Daniels (1956), Tex. Civ. App. 293 S.W. 2d 616.....	19
Dalley vs Mid-western Dairy Products Company (1932), 80 Utah 331, 15 P. 2d 309.....	30
Edgett vs. Fairchild (1957), Cal. App. 2d 734, 314 P. 2d 973.....	16
Ferguson vs. Jongsma (1960), 10 Utah 2d 179, 350 P. 2d 404..	13

# TABLE OF CONTENTS—Continued

	Page
Fowler vs. Pleasant Valley Coal Co. (1898), 16 Utah 348, 52 P. 594 .....	22
Fusco vs. Dauphin (1950), 8 Terr. 140, 47 Del. 140, 88 Atl. 2d 813 .....	26
Garvit vs. Krebs (1953), 338 Mich. 256, 61 N.M. 2d 58.....	18
Gittens vs. Lundberg (1955), 3 Utah 2d 392, 284 P. 2d 1115..	13
Hickok vs. Skinner (1948), 113 Utah 1, 190 P. 2d 514.....	24, 25
Hicks vs. B & B Distributors, Inc. (1958), 353 Mich. 488, 91 N.W. 2d 882 .....	18
Hirschbach vs. Dubuque Packing Company (1957), 7 Utah 2d 7, 316 P. 2d 319.....	35
Howard vs. Cincinnati Sheet Metal & Roofing Co. (1956), 7th C.C.A. 234 F. 2d 233 .....	19
Howard vs. Ringsby Truck Lines, Inc. (1954), 2 Utah 2d 65, 269 P. 2d 295.....	14
Johnson vs. Syme (1957), 6 Utah 2d 319, 313 P. 2d 468.....	31
Jones vs. Heinrich (1942), 49 Cal. App. 2d 702, 122 P. 2d 304 .....	15
Lentz vs. Northwestern National Casualty Co. (1961), 11 Wis. 2d 462, 105 N.W. 2d, 759.....	17
Martin vs. Ehlers (1962), 13 Utah 2d 236, 271 P. 2d 851.....	32
Montoya vs. Winchell (1961), 69 N.M. 1041, 364 P. 2d 1040....	16
Morris vs. Christensen (1960), 11 Utah 2d 141, 356 P. 2d 34....	33
Nijkoleropoulos vs. Ramsey (1923), 61 Utah 465, 214 P. 2d 304.....	12
Otero vs. Physicians & Surgeons Ambulance Service, Inc. (1959), 65 N.M. 319, 336 P. 2d 1070.....	16
Pullins vs. Nabors (1961), 240 Miss. 864, 128 So. 2d 117.....	17
Redd vs. Airway Motor Coach Lines (1943), 104 Utah 9, 137 P. 2d 374.....	14
Richards vs. Anderson (1959), 9 Utah 2d 17, 337 P. 2d 59....	22-27
Shiba vs. Weiss (1955), 3 Utah 2d 256, 282 P. 2d 341.....	36
Stose vs. Heinrich (1953), 199 Ore. 386, 261 P. 2d 675.....	18
Wolfsmith vs. Marsh (1955), 51 Cal. Rep. 28.832, 337 P. 2d 70 .....	26

## STATUTES CITED

Section 41-6-74, Utah Code Annotated 1953, as amended 1961.. 34

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

HARRY S. MULBACH,

*Plaintiff-Respondent,*

vs.

W. LYNN HERTIG,

*Defendant-Appellant.*

Case 9959

---

APPELLANT'S BRIEF

---

POINT I.

THE LOWER COURT ERRED IN INSTRUCTING ON  
THE SUDDEN EMERGENCY DOCTRINE.

POINT II.

THE LOWER COURT ERRED IN FAILING TO DEFINE  
IN THE INSTRUCTIONS WHAT WAS AN IMMEDIATE  
HAZARD.

POINT III.

THE LOWER COURT ERRED IN FAILING TO IN-  
STRUCT THE JURY THAT EACH DRIVER HAD A DUTY TO  
KEEP A LOOKOUT AND THAT IT WAS NEGLIGENCE TO  
FAIL TO SEE WHAT WAS PLAIN TO BE SEEN.

POINT IV.

THE COURT ERRED IN FAILING TO DIRECT A VER-  
DICT FOR THE DEFENDANT BECAUSE THE EVIDENCE  
SHOWED AS A MATTER OF LAW THE PLAINTIFF WAS  
CONTRIBUTORILY NEGLIGENT IN FAILING TO YIELD  
THE RIGHT OF WAY AND IN FAILING TO KEEP A  
PROPER LOOKOUT.

## STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries and property damage arising out of a roll-over of plaintiff's truck without a collision between vehicles.

## DISPOSITION IN LOWER COURT

The Jury returned a verdict in favor of the plaintiff. The lower court denied the defendant's motions for (a) a directed verdict in favor of the defendant, (b) a new trial, and (c) a judgment in favor of the defendant "No Cause of Action" *non obstante veredicto*.

## RELIEF SOUGHT ON APPEAL

(1) The defendant seeks an order from this court directing the lower court to enter a judgment in favor on the defendant and against the plaintiff notwithstanding the jury verdict.

(2) Or, if this court does not direct the lower court to enter a judgment in favor of the defendant, then an order to the lower court granting the defendant a new trial on proper instructions.

## STATEMENT OF MATERIAL FACTS

The vehicles did not collide. This lawsuit involves an accident which occurred on March 15, 1962 (R. 184) at about 6:38 P.M. (R. 126). The accident happened at the X shaped intersection of Thirteenth East and the Cottonwood Diagonal in Salt Lake County (R. 126). The accident, according to Mr. Muhlbach, took place during the daylight when visibility was excellent (R. 161). Prior to the accident Mr. Muhlbach was driving

in a northwesterly direction on the Cottonwood Diagonal (R. 147) at an admitted speed of 40 m.p.h. (R. 148).

Mr. Hertig was driving north on Thirteenth East in a white and light green model Oldsmobile (R. 186). Immediately behind Mr. Hertig's car was a red convertible driven by James R. Cordell (R. 201 & R. 205). Visibility was unobstructed (Exhibits 6-D, 4-D, 3-D, 2-D & Officer Iba R. 180). Jed K. McMillan, a color-blind gentleman (R. 279), was going southeast on the Cottonwood Diagonal and when about ten car lengths northwest of the intersection observed Mr. Mulbach's truck approaching as a car entered the intersection. Mr. McMillan was unable to tell (R. 278) whether the car entering from the south stopped at the stop sign. Mr. Hertig testified he stopped at the stop sign facing south twenty-five to thirty seconds and that there was no other vehicle ahead of him going north at the stop sign (R. 219). Mr. McMillan, plaintiff's witness, failed to see any vehicle stopped at the stop sign ahead of Mr. Hertig going north (R. 275 & R. 278), but apparently did see Mr. Cordell drive into the intersection (R. 278).

Mr. Cordell in the car behind Mr. Hertig testified Mr. Hertig stopped at the stop sign facing north, and that he observed him stopped as he approached from the south, and that he sat behind Mr. Hertig's car for some twenty to twenty-five seconds (R. 202), and that there were no vehicles ahead of Mr. Hertig going north (R. 202).

Mr. Muhlbach, going northwest on the Cottonwood Diagonal, placed a phantom vehicle, or at least one not

seen by any other witness, ahead of Mr. Hertig's car (R. 148) entering the intersection ahead of Mr. Hertig's auto. Mr. Muhlbach said he was not positive of the color (R. 161) of the vehicle ahead of Mr. Hertig but believed it was an old model vehicle that was brown, green, or maybe black (R. 161). On one occasion Mr. Muhlbach claimed Mr. Hertig followed this vehicle into the intersection (R. 162) and that Mr. Hertig slowed down to maybe three miles per hour before entering the intersection. Mr. Muhlbach said, when he saw the vehicle which he identified as Mr. Hertig's, it was two or three hundred feet back from the stop sign (R. 166) to the south, and from that time he observed it and noted the driver did not look back over his shoulder to the southeast (R. 167). Mr. Muhlbach claims that he was watching this driver close enough so that if he had looked back toward him he would have observed this driver looking (R. 167).

But on cross examination (R. 168) Mr. Muhlbach admitted that the car he identified as Mr. Hertig's slowed up and stopped with the front of it right even with the stop sign facing the intersection (R. 168). The question asked Mr. Muhlbach was:

Q. "Will you say the spot he slowed up there and stopped was right even with the stop sign, with the front of the car?"

A. "Approximately right around there, yes."

Mr. Muhlbach could not identify any vehicle as being behind the vehicle he identified as belonging to Mr. Hertig (R. 168).



With regard to the speed of the vehicle which Mr. Muhlbach identified as Mr. Hertig's, he could not say whether it was going faster or slower than 15 m.p.h. at the time it turned to go northwest on the Cottonwood Diagonal, as he was not observing enough to judge the speed (R. 164).

Mr. Hertig testified (R. 219) he made a complete stop with the front of his car even with the stop sign, that he looked and saw nothing coming from the southeast on the Cottonwood Diagonal, and that after two cars going toward the southeast passed, he proceeded into the intersection (R. 220).

On exhibition 9-D (R. 220) Mr. Hertig placed a red crayon mark to show where his car was in the intersection when he turned to go northwest on the Cottonwood Diagonal. Mr. Hertig said at the time he made the turn indicated by the red mark in the intersection on exhibit 9-D, he was going 15 miles per hour or at the most 20 miles per hour at the time he began the turn.

Mr. Cordell, the independent witness in the car behind Mr. Hertig testified that Mr. Hertig made a complete stop at the stop sign for 20 to 25 seconds and then proceeded ahead to make a left turn in a normal manner (R. 202) and was going 15 to 20 miles per hour at the most when he started the left turn, and that Mr. Hertig's car was 150 feet west of the intersection when he observed the truck turned over. Mr. Hertig did not see plaintiff's truck until Mr. Cordell told him of the accident.

Exhibit 9-D was prepared by W. Y. Tipton and on the scale 1 inch equals 10 feet.

Sgt. E. M. Pitcher, Utah Highway Patrol, testified that it was  $12\frac{1}{2}$  inches on exhibit 9-D or 125 feet from the stop sign where Mr. Hertig stopped the front of his car to the place where the turn began. Mr. Hertig's turn is shown by the red mark on exhibit 9-D (R. 243 & R. 244). Further, Sgt. E. M. Pitcher stated (R. 244), assuming that Mr. Hertig stopped at the stop sign and then proceeded ahead and that the speed of his car did not exceed 20 miles per hour at the time he started the turn, it would have taken  $8\frac{1}{2}$  seconds for Mr. Hertig to reach the point in the intersection where he started the turn (R. 244). Sgt. E. M. Pitcher stated that at the time Mr. Hertig's auto left the stop sign, assuming that Mr. Muhlbach's truck was going 40 miles per hour, that the truck would have been going 58.8 feet per second and that the truck was 499.8 feet from the place where the turn was started at the time Mr. Hertig left the stop sign (R. 245). Further, Sgt. Pitcher said that if the truck of Mr. Muhlbach had been going 50 miles per hour, it would have been 624.75 feet from where the turn was started at the time Mr. Hertig left the stop sign.

Mr. Iba, one of the investigating officers, testified that the intersection was dry, hard and fairly level asphalt and that he did not observe any sand or gravel in the intersection when he arrived to investigate (R. 181). Mr. Iba also testified that at the scene of the accident

*"Mr. Muhlbach told him he did not observe the danger until he was 30 feet from the car he identified as being Mr. Hertig's" (R. 181).*

The testimony of Mr. Iba was as follows (R. 181):

Q. "And Mr. Muhlbach told you that he did not observe the danger of this thing until he was 30 feet from Mr. Hertig's automobile?"

A. "That's right, sir."

Q. "At the time he said he was going 35 or 40 miles an hour?"

A. "Yes."

Officer Iba also stated that at the scene of the accident Mr. Muhlbach did not tell him of any vehicle proceeding into the intersection ahead of Mr. Hertig (R. 181). Mr. Muhlbach did not deny his statement to Officer Iba.

Officer Morgan assisted Officer Iba with the investigation (R. 126). He made a free hand drawing, Exhibit 1-P and measured the roadways. Officer Morgan shows on Exhibit 1-P that east of the intersection the Cottonwood Diagonal was 36' 10" from one edge of the pavement to the other. He found that Thirteenth East was 25' wide from one pavement edge to another. He also found that the first stress mark left from the tires on Mr. Muhlbach's truck started 13' 3" east of the east edge of the pavement, and it was 140' to the rear of Mr. Muhlbach's truck to where the stress marks started 13' 3" east of the east edge of the pavement of Thirteenth East.

Officer Morgan said the stress marks indicated that Mr. Muhlbach's truck started to swerve to the north (R.

127). Mr. Morgan also stated that for all practical purposes the intersection was level (R. 129), both roads were in good condition, were straight, and there was no obstruction to visibility on the southeast corner (R. 130). Officer Morgan's drawing, Exhibit 1-P, was not drawn to scale (R. 132).

On cross-examination Officer Morgan identified exhibits 2-D to 6-D, inclusive, and said at the time of the investigation the road was dry, there was no condition on the roadway which would make braking difficult (R. 139), and the roadways were level and in good condition (R. 139 & R. 140).

Mr. Muhlbach testified that the brakes of his truck were good (R. 164) and that as soon as he saw the vehicle was in front of him, he reacted to avoid it (R. 165). Further, Mr. Muhlbach stated that in his opinion he had better than average reactions when he grabbed the wheel and swerved to miss the vehicle in front of him (R. 165).

Returning to Sgt. E. M. Pitcher, he testified that on the morning of the trial he ran a coefficient test of the friction of the roadway and found the lowest drag factor would be .84 on the Cottonwood Diagonal (R. 284 & R. 290). Further, Sgt. Pitcher stated (R. 291 & 292), assuming that Mr. Muhlbach's vehicle was going 40 miles per hour on the Cottonwood Diagonal, that the roadway was dry, there were no loose materials on it, and that the drag-factor was .84, that from his studies and tests he found it would be reasonable for the truck to stop

in 63½ feet of braking, and that if you assumed reaction time of ¾ of one second, during that period at 40 miles per hour the truck would have traveled 44.1 feet and the total stopping distance for reaction time and braking would be 107 feet.

Sgt. Pitcher also testified (R. 293) that a vehicle equipped with brakes having a braking efficiency of .435 would not have good brakes but that such brakes would meet minimum standards, and that with such brakes (R. 294) the total braking distance would be 122.6 feet and the total stopping distance with ¾ of one second for reaction time at 40 miles per hour would be 166.7 feet (R. 294).

At the request of plaintiff's counsel (R. 46) and over defendant's objection (R. 301), the court gave Instruction No. 16 (R. 94) on the emergency doctrine. Instruction No. 16 given was as follows:

#### No. 16

"One who, in a sudden emergency, acts according to his best judgment, or who, because of lack of time to form a judgment, omits to act in the most judicious manner, is not chargeable with contributory negligence, provided he exercises in the emergency the care of a reasonable prudent individual under like circumstances.

"In such a situation, his duty is to exercise only the degree of care which an ordinary prudent person would exercise under the same or similar circumstances. If, at that moment, he exercises such care, he does all the law requires of him, even though, in the light of after-events, it might

appear that a different choice and manner of action would have been better and safer.”

Counsel for Mr. Hertig requested that the court give an instruction defining “Immediate Hazard” to the jury (R. 65). Defendant’s requested Instruction No. 13 was not given (R. 65) and no place in the charge to the jury (R. 78 to R 106) did the court define immediate hazard. Requested Instruction No. 13 from the defendant, Mr. Hertig, read as follows (R. 65):

No. 13

“The driver of a vehicle entering a highway must stop and defer to all vehicles that would be required to brake sharply or suddenly to avoid a collision. If, however, the vehicle on a through highway is far enough away to have a clear margin to observe and make a smooth and safe stop, the driver on the through highway is not an immediate hazard, and the driver entering the through highway from a stop sign need not yield to the driver of a vehicle on a through highway, and the driver entering the through highway has the right of way.”

Likewise Defendant’s requested Instructions No. 14 and No. 16 were refused. (R. 66 and R. 68)

No. 14

“Where the driver of a truck has ample time to observe a motorist entering the through highway and fails to do so in time to avoid an accident, the driver of the truck is guilty of contributory negligence.”

No. 16

“You are instructed that the driver on an

arterial highway has the duty to remain reasonably alert to the possibility that a driver entering the arterial highway at an intersection may believe that he can enter in safety.

“The duty to keep a proper lookout applies to each driver, and neither driver can excuse his failure to observe the other driver because the other driver failed to observe him.

“Failure to see what is plain to be seen in ‘negligence’.”

There was no other traffic moving in or about to enter this unobstructed intersection.

## ARGUMENT

### POINT I.

THE LOWER COURT ERRED IN INSTRUCTING ON THE SUDDEN EMERGENCY DOCTRINE.

The plaintiff, Mr. Muhlbach, did not observe the danger of colliding with Mr. Hertig's automobile until he was 30 feet from it, and at a time when he was going 35 or 40 miles per hour (R. 181). Mr. Muhlbach never did apply his brakes but swerved to the north on seeing Mr. Hertig's automobile and left stress marks that started 13' 3" east of the east edge of the pavement on Thirteenth East. At the scene of the accident Mr. Muhlbach admitted to Officer Iba (R. 181) that he was going 40 miles per hour or 58.8 feet per second at the time he observed the danger. At that speed during  $\frac{3}{4}$  of a second reaction time he had traveled 44.1 feet, and because of his failure to keep a lookout for vehicles reasonably to be expected in the intersection, he did not have time to slow or stop his truck, and so he

stated he swerved to the north to go north on Thirteenth East, but Exhibit 1-P shows that he turned too late and turned off Thirteenth East on the west side of the roadway north of the intersection.

Mr. Hertig contends that *if the emergency or danger was created by Mr. Muhlbach that he can not claim the benefit of the emergency doctrine*, and further Mr. Hertig contends that the instruction given was not a proper statement of the law relating to "emergency doctrine" and its use or application.

In *Nikoleropoulos vs. Ramsey* (1923) 61 Utah 465. 214 P. 2d 304, where an action was brought for injuries sustained by a pedestrian who was overtaken and struck down on a dark rainy night by the defendant driver who was driving at a speed of 12 miles per hour when he could only see 6 feet ahead, and who admitted that at the speed he was driving there was not time to stop after he saw the pedestrian who was walking on the edge of the blacktop or next to the shoulder of the road, and where the court instructed on the "sudden emergency doctrine," and plaintiff's counsel objected to the instruction, and on appeal the objection to the instruction was upheld by the court, the court said:

"We are of the opinion the instruction was not applicable to the instant case. The presence of a pedestrian on the highway at the point in question was reasonably to be anticipated. Beside this, we are of the opinion, as a matter of law, under facts disclosed by the record that at the time of the injury, and immediately before, de-



defendant was not exercising reasonable care in the operation of his car, and if any emergency existed, it was entirely due to his own negligence.”

*Nikoleropoulos vs. Ramsey*, supra, involves the same type of situation from which defendant appeals. Because of Mr. Muhlbach’s speed of 40 miles per hour on the Cottonwood Diagonal, he could not stop when he observed the danger 30 feet ahead of him.

The instruction given did not caution the jury that the emergency must be one which arose without fault on the part of Mr. Muhlbach. The instruction given on the “emergency doctrine” took the question of contributory negligence completely out of the lawsuit.

In *Gittens vs. Lundberg* (1955) 3 Utah 2d 392, 284 P. 2d 1115, where on appeal the plaintiff complained of the trial court’s refusal to give a request of the instruction on “sudden emergency,” the court said there was no error committed. In *Gittens vs. Lundberg*, supra, the court said the request did not properly state the law because it did not state the requisite element of the emergency that is must be one which arose without fault on the part of the plaintiff, and said that when the plaintiff creates peril by his own fault, he may not thereafter urge sudden emergency doctrine to protect himself from the charge of contributory negligence.

Instruction No. 16 failed to caution the jury that the emergency doctrine did not apply unless the emergency arose without fault on the part of the plaintiff.

In *Ferguson vs. Jongsma* (1960) 10 Utah 2d 179, 350 P. 2d 404, where a proposed instruction copied from

Jury Instruction Forms for Utah, No. 15.4 charged that a person who, without negligence on his part is suddenly and unexpectedly confronted with apparent or imminent peril, is not required to use the same prudence or good judgment as would otherwise be expected. This court said Jury Instruction Forms for Utah, No. 15.4 was a correct statement of the law as applied to the facts of that case.

In *Howard vs. Ringsby Truck Lines, Inc.*, (1954) 2 Utah 2d 65, 269 P. 2d 295, the court said the emergency or sudden or unexpected happening must not be caused by fortious conduct by the party claiming the benefit of the emergency doctrine. And then on the facts of that case reasoned that the emergency was not caused by the negligence or tortious conduct of Mr. Byington.

In *Redd vs. Airway Motor Coach Lines* (1943) 104 Utah 9, 137 P. 2d 374, where the evidence showed that the decedent rode out onto the highway from the private driveway and that the bus driver swerved to his right across the curbing to avoid a collision but did not stop because the air-brakes were damaged crossing the curbing, the court gave an instruction on the sudden emergency doctrine, and this court said that where the emergency or condition was not caused by a party claiming benefit of doctrine and not caused by tortious conduct a party that requested instruction it was properly given.

Instruction No. 15.4 Jury Instruction Forms for Utah compares with the B.A.J.I. Instruction Form No. 137. It would appear Utah Instruction on Sudden Emergency may have been adopted from California.

In *Jones vs. Heinrich* (1942) 49 Cal. App. 2d 702, 122 P. 2d 304, when the trial judge granted a new trial, the District Court of Appeals for the Third District of California affirmed an order granting the new trial where the emergency instruction was given, and it is this decision which appears to have had the foundation for B.A.J.I. Instruction No. 137.

In *Jones vs. Heinrich* supra, the following instruction was given:

"If you find from the evidence in this case that the defendant Fred C. Heinrich, was suddenly confronted with unexpected and imminent danger, either to himself or to another, then he was not expected nor required to use the same judgment and prudence that would have been required of him in the exercise of ordinary care in calmer and more deliberate moments. His duty was to exercise only that amount of care which an ordinarily prudent person would exercise if confronted with the same unexpected danger under the same circumstances."

With regard to the forgoing instruction in *Jones vs. Heinrich*, supra, the court said:

"It will be observed that the instruction omits the qualification that the defendant, Heinrich, must not have been placed in a position of unexpected and imminent danger through any fault or negligence on his part. Plaintiff requested and the court gave an instruction with reference to the imminent peril doctrine as applied to the decedent which contained the limitation 'Without fault or negligence on her part.' Thus, it will be seen that the instruction complained of was

doubly prejudicial to the plaintiffs as the defendant was given the benefit of the rule, if confronted with sudden danger, while plaintiffs were not. Appellant contends that other instructions given on the question of negligence cure the error, if any, in the instruction complained of, citing authorities in support thereof. However, under the facts in the instant case, which disclose the main issue to be the question of negligence and contributory negligence, and to which the instruction was particularly applicable, the omission of the limitation was prejudicially erroneous to the plaintiff's case. *Gootar vs. Levin*, 109 Cal. App. 703, 293 P. 706; *Howard vs. Worthington*, 50 Cal. App. 556, 195 P. 709; *Stealey vs. Chessum*, 123 Cal. App. 446, 11 P. 2d 428.

In California in *Edgett vs. Fairchild* (1957) Cal. App. 2d 734, 314 P. 2d 973, where plaintiff sought to invoke doctrine of sudden emergency or imminent peril at the time they were passing an intersection, the court said that one invoking the doctrine must have been free from negligence placing him in the orbit of peril.

In New Mexico in *Otero vs. Physicians & Surgeons Ambulance Service, Inc.* (1959) 65 N.M. 319, 336 P. 2d 1070, the Supreme Court of New Mexico specifically approved of an instruction on unexpected peril, where the instruction began as our J.I.F.U. Form 15.4 does with the phrase, "a person, who without negligence on his part is suddenly and unexpectedly confronted with a peril." In the following case, *Montoya vs. Winchell* (1961), 69 N.M. 177, 364 P. 2d 104, the New Mexico Court held the trial court could properly refuse a requested

instruction on unexpected peril where the request failed to qualify its use and show that it was only a circumstance to be considered to determine if reasonable care was exercised.

In Wisconsin in *Lentz vs. Northwestern National Casualty Co.* (1961) 11 Wis. 2d 462, 105 N.W. 2d 759, where evidence showed the driver was proceeding along the street in the dark during fog and did not see a truck which was parked with taillight illuminated until he was 25 to 30 feet away from it, and thereafter was unable to avoid striking it, the court said the driver was negligent as to lookout or speed, or both, and was not entitled to the benefit of "sudden emergency" doctrine, and that the court committed reversible error in instructing on doctrine of sudden emergency, and the court said any person whose negligence contributes to, or helps to create the emergency is not entitled to the benefit of the rule, and the jury in many cases should be so advised.

In *Andraski vs. Gormley* (1958), 3 Wis. 2d 149, 87 N.S. 818, the court said that where an emergency existed because of a driver's failure to keep a proper lookout, he did not come within the emergency rule and was not entitled to an instruction on emergency doctrine.

In *Andraski vs. Gormley*, supra, the defendant driver failed to see a stalled car and ran into a driver who was attempting to change a flat on the highway.

In Mississippi in *Pullin vs. Nabors* (1961), 240 Miss. 864, 128 So. 2d 117, in a situation where the defendant saw the danger or a red light while still a quarter of a

mile from the scene of the accident, but did nothing about slowing up, an instruction on the "sudden emergency" doctrine was given, and the Supreme Court reversed the judgment for the defendant driver, saying the sudden emergency was of the driver's own making in that he failed to slow his car or get it under control before arriving at the scene of the prior accident, and a new trial was granted for the plaintiff.

In Michigan in *Garvit vs. Krebs* (1953), 338 Mich. 256, 61 N.M. 2d 58, where an action was brought for personal injuries received in an intersection collision and where an instruction of doctrine of "sudden emergency" failed to state the qualifications on the use of that doctrine to the effect that the situation must be one not brought about by plaintiff's own negligence, the court held the giving of the instruction was prejudicial error and granted a reversal and a new trial to the defendant. Again in *Hicks vs. B & B Distributors, Inc.* (1958), 353 Mich. 488, 91 N.W. 2d 882, where action was brought for wrongful death when auto plaintiff was in was struck from the rear at stop light and the charge on sudden emergency failed to state to the jury that a party is entitled to the benefit of the rule only if the emergency occurs through no fault or negligence of his, the court said it was error to give the struction and granted a reversal.

In Oregon in *Stose vs. Heinrich* (1953), 199 Ore. 386, 261 P. 2d 675, the Oregon Court stated that the instruction on "sudden emergency" should show that it

would not be effective unless the driver who is claiming the sudden emergency was confronted with an emergency through no fault or negligence on his part.

In Texas in *Cruse vs. Daniels* (1956), Tex. Civ. App. 293 S.W. 2d 616, where a requested instruction by the automobile driver for emergency failed to state that an "emergency" was a condition arising suddenly and unexpectedly and not caused by any negligent act or omission by the person in question, the court held the instruction failed to meet the requirements of the emergency doctrine, and that it was not error to refuse to give the instruction.

In a case from the Seventh Circuit Court of Appeals, *Howard vs. Cincinnati Sheet Metal & Roofing Co.*, (1956) 7th C.C.A. 234 F. 2d 233, where an action was brought for injuries to a passenger in an auto colliding with the corporate defendant's automobile driven by defendant's employee, an instruction to the jury to the fact that defendant's driver had to act suddenly in emergency, without opportunity for deliberation, was a circumstance to be considered in determining what was ordinary care under the circumstances, was held to be error prejudicial to plaintiff where one of the most important questions to be resolved by the jury was whether emergency situation was created by such driver's acts or by the driver of the auto in which the plaintiff was riding.

A general discussion of the subject of the emergency doctrine is found in 80 A.L.R. 2d 6.

The lower court should not have permitted the plaintiff to invoke the doctrine of sudden emergency unless the court or the jury found Mr. Muhlbach was free from negligence placing him in the orbit of peril. Further, it is undisputed that the evidence in this case is to the effect that plaintiff's vehicle came into the intersection at a speed of 35 or 40 miles per hour (R. 181). As Mr. Muhlbach approached the intersection, he had an unobstructed view of the stop sign of the intersection that Mr. Hertig had to travel in proceeding to go northwest on the Cottonwood Diagonal. It is 125 feet from the stop sign to where Mr. Hertig turned to go northwest, and it took Mr. Hertig  $8\frac{1}{2}$  seconds to reach the place where he turned, starting at a zero speed and going up to a maximum of 20 miles an hour. Going from the stop sign to the place where the turn was started Mr. Hertig traveled an average speed of 10 miles per hour or 14.7 feet per second (R. 244). Sgt. Pitcher divided 14.7 into 125 feet and found that  $8\frac{1}{2}$  seconds were involved going from the stop that Mr. Hertig made (R. 168) to where the red crayon mark was made on Exhibit 9-D. In  $\frac{3}{4}$  of a second reaction time Mr. Muhlbach's vehicle would have traveled 44.1 feet at 40 miles per hour. Since Mr. Muhlbach admitted he did not see the danger until he was 30 feet from it, he surely was in an emergency situation and certainly the emergency was created for him by his own lack of lookout, and undoubtedly under the existing circumstances he should not have been permitted to evoke the emergency doctrine as stated by the court.

Mr. Muhlbach stated that he had good brakes and



that he had better than usual reaction time (R. 165) and that he swerved because he could not slow or stop. Sgt. Pitcher testified (R. 291 and R. 292), assuming that Mr. Muhlbach was going 40 miles per hour on the Cottonwood Diagonal, that the roadway was dry, and there were no loose materials on it, and that the drag-factor was .84, that from his studies and tests he found it would be reasonable to stop a truck in 63½ feet of braking and 44.1 feet of reaction time or in a total stopping distance of 107 feet. However, because of lack of lookout, Mr. Muhlbach allowed himself only 30 feet and could not stop or brake safely and control his truck, and he need a total of 107 feet in which to stop with good brakes, but he, through his own lack of observations, had allowed only 30 feet. Is it reasonable that under these circumstances he be permitted to invoke the emergency doctrine without it being stated that he is not entitled to the benefits of the doctrine unless he is without negligence on his part as the doctrine is stated in Jury Instructions Utah 15.4?

Mr. Hertig contends that the court erred in instructing on the doctrine of sudden emergency because the evidence shows that Mr. Muhlbach did not see the danger until he was 30 feet away, and that further the court erred in not stating the doctrine correctly, as a person may only invoke it who is without negligence on his part. The trial court, on giving Instruction No. 16, committed prejudicial error and this court in reviewing the matter should consider the case in the light most favorable for Mr. Hertig, the party objecting to the instruction.

Further, if the plaintiff argues that other testimony other than his own was more favorable to him than that came from himself on one occasion, the court should keep in mind that the trial court in reviewing a motion for a new trial or a motion for a directed verdict or a motion for a "Judgment of No Cause of Action" N.O.V. may consider such testimony true as bears most strongly against the interest of the plaintiff, and that merely because the plaintiff's own testimony presents a choice of probabilities that the plaintiff is not entitled to the most favorable probability, and as authority for this proposition the court's attention is called to the cases of *Fowler vs. Pleasant Valley Coal Co.* (1898), 16 Utah 348, 52 P. 594, *Alvarado vs. Tucker* (1954), 2 Utah 2d 16, 268 P. 2 986. It is submitted that one who is not keeping a lookout cannot claim a sudden emergency because of lack of time.

## POINT II.

THE LOWER COURT ERRED IN FAILING TO DEFINE IN THE INSTRUCTIONS WHAT WAS AN IMMEDIATE HAZARD.

No instruction was given by the court defining an "immediate hazard," and the jury had no guide to tell them or tests to use in determining what was or what was not an immediate hazard. Mr. Hertig requested the court to give an instruction defining immediate hazard (R. 65) and this request was refused (R. 65). Defendant's requested Instruction No. 13 set forth in R. 65 was taken from *Richards vs. Anderson* (1959) 9 Utah 2d 17, 337 P. 2d 59. In *Richards vs. Anderson* this court said:

"It is clear that the defendant entered the intersection considerably ahead of the plaintiff. The question then becomes whether plaintiff's automobile was so close to the intersection to constitute an 'immediate hazard' to defendant when the latter entered the intersection. There is, of course, no precise set of measurements by which an immediate hazard can be gauged. It must be judged on the basis of common sense in the light of existing circumstances. In reference to a similar situation the Supreme Court of Delaware has said that an 'immediate hazard' is created when a vehicle approaches an intersection on a favored street at a reasonable speed under such circumstances that, if the disfavored driver proceeds into the intersection it will force the favored driver to sharply and suddenly check his progress or stop in order to avoid collision. Conversely, if the disfavored driver has made his stop and deferred to all vehicles that would be required to go into a sharp or sudden braking to avoid collision, the cars far enough away have a clear margin to observe and make a smooth and safe stop are not an 'immediate hazard' and are required to yield to the driver already at the intersection.

"An analysis of the time, speed, and distance factors shows plainly that the plaintiff had more than ample time to observe the defendant and avoid collision with him. After defendant had waited at the entrance to the intersection and allowed others cars to go by, and cars in the outside and center lanes had stopped and deferred to him, he traveled 38 feet, reaching the speed of 5 to 10 m.p.h. Computing his average speed between zero at stop to his maximum acceleration

of 10 m.p.h., equals 5 m.p.h.; at which he would travel about  $7\frac{1}{2}$  feet per second, amounting to just about 5 seconds elapsed time in the intersection. During that time the plaintiff, even at the minimum speed of 15 m.p.h or 22.5 feet per second, would have traveled 112.5 feet. (He was actually traveling a good deal faster because his own statement says he was decelerating.) At the speed of 15 m.p.h., in his reaction time of three-fourths second, he would travel  $16\frac{1}{2}$  feet and require 18 feet for stopping with only passable brakes. This makes a total of stopping distance of 34.5 feet, leaving a margin of 78 feet. For any increase in plaintiff's speed, his distance away and his opportunity to stop increase proportionately.

"The plaintiff advances the excuse that the two cars stopped in the lanes to his right obscured his view of the defendant. The fact is that these cars are each about six feet wide. They thus occupied only two such spots in a total of 33 feet. While it was necessary for plaintiff to be watching his own lane ahead, his vision was not like looking through a pipe or a tunnel. His angle of vision would take in the moving objects in the adjacent lanes, particularly a moving object such as defendant's car, had he been looking."

In *Hickok vs. Skinner* (1948), 113 Utah 1, 190 P. 2d 514, where the plaintiff was traveling north on West Temple in Salt Lake City, at the intersection of 21st South and the defendant was going west on 21st South, and where the plaintiff admitted he saw the defendant's vehicle 400 or 500 feet east at the time he left the stop sign to cross 21st South, and proceeded without looking to the east again, and where 21st South was 63 feet wide, and the

block along 21st South along which the defendant was traveling was 660 feet long, and the point of impact was 18 feet south of the north curb of 21st South and 9 feet west of the east curb of West Temple and 65 feet north from the stop sign facing 21st South by which the plaintiff entered the intersection, and where the police officer testified the defendant was going 45 m.p.h. in a 35 m.p.h. zone, and where there were no skid marks, the court said if the distance were 400 feet, the defendant had to travel, going at a speed of 45 m.p.h., six seconds to reach the point of collision, and if it were 500 feet away, it would have taken  $7\frac{1}{2}$  seconds for the defendant's car to reach the point of impact from the time the plaintiff's car left the stop sign, and it cannot be said that the defendant's car could have been approaching so closely as to constitute an immediate hazard. Therefore, the defendant was required to yield the right-of-way to the plaintiff.

Obviously, *Hickok vs. Skinner*, supra, is authority to the effect that if a car on the arterial is between six or seven and one-half seconds away from the point of impact at the time the other vehicle leaves the stop sign, it is not so close as to constitute an immediate hazard. And *Richards vs. Anderson*, supra, is authority that if a vehicle on the arterial is five seconds away from the point of impact at the time the vehicle leaves the stop sign, the vehicle on the arterial is not so close as to constitute an immediate hazard. In reviewing a request for failure to give a requested instruction, it is

the duty of the court to view the evidence in the light most favorable to the party offering the requested instruction. *Wolfsmith vs. Marsh* (1959), 5- Cal. Repts. 2d 832, 337 P. 2d 70.

In *Richards vs. Anderson*, *supra*, in defining an immediate hazard this court adopted the rule of *Fusco vs. Dauphin* (1950), S Terr. 140, 47 Del. 140, SS Atl. 2d 813, where this court apparently recognized that a better definition of "immediate hazard" was required. In *Fusco vs. Dauphin* we have specific and accurate definition of "immediate hazard."

If the Supreme Court used the yardstick set forth in *Fusco vs. Dauphin* *supra*, to measure immediate hazard, why shouldn't the jury in this case have been permitted to use the same yardstick in measuring "immediate hazard"? I submit that the jury should have been entitled to use the same yardstick as a guide to what was an immediate hazard, and yet when the jury was not given a definition of "immediate hazard" it was left to guess as to what was and was not an "immediate hazard" and since the accident occurred immediately following the entry they assumed erroneously there was "immediate hazard" when in fact there was not.

Sgt. Pitcher, in calculating the time from the stop sign to the point where Mr. Hertig began his left turn, used the same method as this court in *Richards vs. Anderson*, *supra*. He found that starting from the zero speed and reaching a maximum of 20 m.p.h. the most unfavorable speed to Mr. Hertig, the average speed would

have been 10 miles per hour, or that the average speed per second of Mr. Hertig's vehicle would have been 14.7 feet per second or that  $8\frac{1}{2}$  seconds were required to travel the 125 feet from the stop sign to where the turn began as shown on Exhibit 9-D. Mr. Muhlbach admitted that he was going 40 miles per hour as he approached the intersection (R. 148). He also stated that he had better than average reactions (R. 165). Therefore, Sgt. Pitcher stated that assuming Mr. Muhlbach was going 40 miles per hour on the Cottonwood Diagonal, that the roadway was dry, and that there were no loose materials on it and the the drag-factor was .84, from his studies and tests he had found a truck could stop in  $63\frac{1}{2}$  feet of braking and 44.1 feet of reaction time during  $\frac{3}{4}$  of a second reaction time and that the total stopping distance was 107 feet. Sgt. Pitcher also said that a truck going 40 miles per hour would be going 58.8 feet per second and that in  $8\frac{1}{2}$  seconds the truck would have been 499.8 feet from the place where the turn was started by Mr. Hertig at the time Mr. Hertig left the stop sign (R. 245). Subtracting the stopping distance of 107 feet or the total distance the truck was from where Mr. Hertig turned or fram the 499.8 feet, Sgt. Pitcher found that there was a difference of 392 feet or that there was margin of safety in stopping on the part of Mr. Muhlbach, if he had been looking, of 392 feet. In *Richards vs. Anderson*, supra, the plaintiff was found contributorily negligent as a matter of law in not stopping in a margin of safety of 78 feet. If you divide 78 feet into 392 feet, you will find it will go 5

times with a slight remainder and it would appear that Mr. Muhlbach was five times as negligent as Mr. Richards who was found to be contributorily negligent as a matter of law in *Richards vs. Anderson, supra*. Section 41-6-144 Utah Code Annotated as amended 1961, declares a minimum standard for braking efficiency. Using this factor Sgt. Pitcher computed Mr. Muhlbach's required stopping distance on the theory that he had only minimum standard brakes, and not good brakes, and found that even with a minimum of 40 miles per hour using  $\frac{3}{4}$  of a second for reaction time that he could have braked to a complete stop in 166.7 feet. Subtracting this distance from 499.8 feet gave Mr. Muhlbach a margin of safety in stopping of 333.1 feet at Mr. Muhlbach's most favorable speed of 40 miles per hour.

It is submitted that if Mr. Muhlbach had been keeping a lookout and had seen what was plain to be seen, he could have safely slowed or stopped and that Mr. Hertig's vehicle was not an "immediate hazard" at the time Mr. Muhlbach was approaching the intersection. Further, it is submitted that in actuality, Mr. Muhlbach did not have to stop his truck, but merely had to slow it to a speed of 15 miles per hour, that in fact he had a margin of safety in avoiding an upset in his truck of much greater than 333 feet. Since Mr. Hertig had turned and was proceeding down the diagonal in the same direction that Mr. Muhlbach was going at a speed of at least 15 miles per hour at the time of the turn, to avoid danger the truck needed to be slowed only to 15 miles per hour to avoid danger. If Mr. Muhlbach's truck was an imme-



diate hazard at the time Mr. Hertig left the stop sign to go to the intersection, it is submitted all drivers entering intersections from stop signs do so at their peril and that the driver on the arterial has no duty to keep a lookout or see what is plain to be seen at an unobstructed intersection and that the driver on the arterial in fact has an absolute right of way.

### POINT III.

THE LOWER COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT EACH DRIVER HAD A DUTY TO KEEP A LOOKOUT AND THAT IT WAS NEGLIGENCE TO FAIL TO SEE WHAT WAS PLAIN TO BE SEEN.

In requested Instruction No. 16 Mr. Hertig requested the court as follows: (R. 68)

### INSTRUCTION NO. 16

“You are instructed that the driver on an arterial highway has the duty to remain reasonably alert to the possibility that a driver entering the arterial highway at an intersection may believe that he can enter in safety.

“The duty to keep a proper lookout applies to each driver, and neither driver can excuse his failure to observe the other driver because that other driver failed to observe him.

“Failure to see what is plain to be seen is ‘negligence’.”

Requested Instruction No. 14 which was refused (R. 66) is as follows:

### INSTRUCTION NO. 14

“Where the driver of a truck has ample time

to observe a motorist entering the through highway and fails to do so in time to avoid an accident, the driver of the truck is guilty of contributory negligence."

In this case Mr. Muhlbach admitted to Officer Iba and did not deny his statement in court that he did not see the danger of the vehicle ahead until he was 30 feet from Mr. Hertig's automobile (R. 181). At the time he made his observation Mr. Muhlbach said he was going 35 or 40 miles per hour. Sgt. Pitcher's testimony shows that in 30 feet at 40 miles per hour Mr. Muhlbach could not stop. The pictorial Exhibits 2-D, 4-D and 6-D and all of the testimony showed the intersection was unobstructed. Visibility was good according to Mr. Muhlbach and it is apparent that if he had been observing Mr. Hertig's vehicle he would have had an ample margin of safety in which to slow or stop his truck. It seems reasonable that when requested Instructions 14 and 16, and they were not given, that the jurors assumed that the driver on the arterial had no duty to see what was plain to be seen or to keep a lookout and that the jury, in view of the emergency doctrine instruction given, assumed that Mr. Hertig entered the intersection at his peril.

The requested instructions were based on the principles set forth in *Dalley vs. Mid-Western Dairy Products Company* (1932), 80 Utah 331, 15 P. 2d 309. In *Dalley vs. Mid-Western Dairy Products Company*, the court said:

"In this jurisdiction the doctrine is established that it is negligence as a matter of law

for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile can not be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him.”

The evidence is clear that Mr. Muhlbach was nearly in the intersection before he took evasive action, and in fact he said he did not see the danger of Mr. Hertig's automobile until he was 30 feet from it.

From the instructions given it appears the jury did not believe Mr. Muhlbach was required to slow to stop his vehicle within the distance he could see objects in the intersection, and in fact it seems that the jury thought he was excused from looking until he was 30 feet away from Mr. Hertig.

#### POINT IV.

THE COURT ERRED IN FAILING TO DIRECT A VERDICT FOR THE DEFENDANT BECAUSE THE EVIDENCE SHOWED AS A MATTER OF LAW THE PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT IN FAILING TO KEEP THE RIGHT OF WAY AND IN FAILING TO KEEP A PROPER LOOKOUT.

In *Johnson vs. Syme* (1957), 6 Utah 2d 319, 313 P. 2d 468, where the plaintiff was traveling north in the inside lane on U.S. 91, a four-lane highway, at a speed of 50 miles per hour, at 11:00 p.m. and was acquainted with the area, and where, as she approached the intersection, the plaintiff had an unobstructed view to the east, and where the defendant's vehicle was traveling west at a speed of 40 miles per hour and did not slow down for the stop sign facing east at the South Draper

road, and where the plaintiff failed to see the decedent's vehicle until it was directly in front of her at a distance of 20 or 30 feet, a summary judgment in favor of the defendant against the plaintiff on the arterial was affirmed, our court saying that the plaintiff either failed to look or failed to look and see the obvious, and as such, was contributorily negligent.

In *Conklin vs. Walsh* (1948), 113 Utah 276, 193 P. 2d 437, our court said that a driver traveling on the arterial had a duty to remain reasonably alert to the possibility that the disfavored driver may believe he can cross safely, and if the favored driver entering an arterial intersection does not look, he is negligent as a matter of law.

In *Martin vs. Ehlers* (1962), 13 Utah 2d 236, 271 P. 2d 851, in a case involving an intersection collision in Salt Lake City, where the plaintiff failed to hear a plainly audible siren, according to the testimony of other witnesses, and where he also failed to see the lights on the police vehicle, and where the plaintiff did not reduce his speed as he approached the intersection, and neither driver saw the other except momentarily before collision, this court held the plaintiff contributorily negligent as a matter of law, saying when he does not hear what is plainly audible to others, he is not immune from his actions simply because he asserts that he did not hear anything as audible as a police siren, and if he fails to hear the siren or see what was plain to be seen, he is contributorily negligent.

In *Bullock vs. Luke* (1940), 98 Utah 501, 98 P. 2d 350, this court said that where there was unobstructed intersection and where a motorcyclist did not observe for a distance of 800 to 1200 feet, he is negligent as a matter of law for failing to look and realize that the driver on the left was not going to yield the right-of-way.

In *Morris vs. Christensen* (1960), 11 Utah 2d 141, 356 P. 2d 34, this court said it was the duty of a driver to observe and to see what there is to see so as to exercise ordinary precaution for his own safety. This duty extends to the favored driver with the right-of-way, but he who has the right-of-way need not anticipate negligence on the part of another driver.

In *Bates vs. Burns* (1955), 3 Utah 2d 180, 281 P. 2d 290, where the evidence showed the plaintiff stopped at a stop sign 125 feet south of the point of impact and then proceeded northward into the intersection and thereafter collided with a west bound vehicle on Highway 91 at the intersection of Highway 114 in Pleasant Grove, Utah and where the evidence showed the plaintiff proceeded at a speed of 5 to 6 miles per hour from the stop sign to the center of the highway, and where, in fact the plaintiff not only entered the intersection first but nearly had passed over it before the defendant entered, the court said the plaintiff was a disfavored driver until he had entered the intersection at a time when no car on the through highway had entered the intersection or was so close as to constitute an immediate hazard, but having entered as authorized, he became the favored driver, and all other vehicles approaching the intersection on said

through highway were obliged to yield the right of way to him.

Section 41-6-74 as amended in 1961 is as follows:

“VEHICLE ENTERING A THROUGH HIGHWAY. The driver of a vehicle shall stop as required by this act at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to the vehicle so proceeding into or across the through highway.

“(b) The driver of a vehicle shall likewise stop in obedience to a stop sign as required herein at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yielding right of way to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed.”

The 1961 amendment substituted the words “yield right of way” for the word “yielding” in Sub Section (b), and except for this change there has been no modifications in Sections 41-6-74 since *Bates vs. Burns*, supra, was decided. In 1961 Section 41-6-74.10 was added, but the rules set forth in that statute seemed to have no application, as in this case there was no collision between the vehicles involved, and further it would appear Sub-

Section (b) of Section 41-6-74.10 has no application as the evidence in this case shows that there is a margin of safety in stopping of over 333 feet in which Mr. Muhlbach could have stopped or slowed his truck and as such, unless the driver entering from the stop sign enters an intersection entirely at his peril, under section 41-6-74.10, Mr. Hertig had the right of way as did Mr. Bates in *Bates vs. Burns*, supra.

In *Benson vs. D.&R.G.W. Railroad Company* (1955), 4 Utah 2d 39, 296 P. 2d 790, a case where an action was brought by a motorist in a train-auto collision which occurred in November 1948 during the night in a bad snow storm at a railroad crossing at 2nd South and 6th West in Salt Lake City, Utah, where the plaintiff testified he was going west at 15 to 20 miles per hour, and that his visibility was 25 to 30 feet, and that the train was going south at 5 to 6 miles per hour and where the engine was struck on the left center by the plaintiff's vehicle and where at 15 miles per hour the plaintiff would have traveled  $16\frac{1}{2}$  feet during  $\frac{3}{4}$  second reaction time, and 18 feet after brakes were applied, and thus a total stopping distance of  $34\frac{1}{2}$  feet would have been required, the plaintiff was held contributorily negligent as a matter of law in driving at a speed that he could not stop within the distance he could see objects on the highway.

In *Hirschbach vs. Dubuque Packing Company* (1957), 7 Utah 2d 7, 316 P. 2d 319, where a collision occurred four miles west of Knolls, Utah on Highway 40 on a straight and level stretch and where just prior to

the collision the plaintiff driver was traveling west 4 miles per hour with good visibility and where his headlights would disclose vehicles at a distance of 350 feet and where his brakes were working properly and when he observed defendant's vehicle in sufficient time to have stopped but did not do so because he was under the impression it was moving in the same direction as he was traveling, and that after he discovered it was stopped it was too late to stop, this court followed *Dalley vs. Mid-Western Dairy Products Company*, supra, and, affirmed a summary judgment granted by the trial court in favor of the defendant.

In *Shiba vs. Weiss* (1958) 3 Utah 2d 256, 282 P. 2d 341, the court found as a matter of law the driver of the plaintiff's vehicle was negligent in being able to stop within the range of his vision where the accident happened on a stretch of Highway 40 a few miles west of Strawberry Reservoir and where there was no evidence of any obstruction to the view of the driver, where the facts were very similar to *Dalley vs. Mid-Western Dairy Products Company*, supra.

In summary it is submitted Mr. Muhlbach having admitted to Mr. Iba (R. 181) that he did not observe the danger of this thing until he was 30 feet from Mr. Hertig's automobile, that he is negligent as a matter of law in not keeping a proper lookout. Further as the evidence shows Mr. Muhlbach's vehicle was 499.8 feet at his most favorable speed from the place where Mr. Hertig started his left turn to go northwest on the diagonal and



the time Mr. Hertig left the stop sign. Mr. Muhlbach was negligent as a matter of law in failing to yield the right of way.

## CONCLUSION

The judgment in the lower court in favor of the plaintiff should be vacated and the lower court should be directed to enter a judgment of "No Cause of Action" in favor of the defendant and against the plaintiff N.O.V., or if this court does not direct the lower court to enter a judgment in favor of the defendant then the lower court should be instructed to grant the defendant a new trial on proper instructions.

Respectfully submitted,

RAYMOND M. BERRY,  
203 Executive Building  
455 East Fourth South  
Salt Lake City, Utah  
Attorney for Defendant, Appellant