

1969

Bruce O. Newton v. The State Of Utah And The Utah State Road Commission : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE O. NEWTON,

Plaintiff-Appellant,

vs.

THE STATE OF UTAH and THE
UTAH STATE ROAD COMMIS-
SION,

Defendant-Respondent.

Case No.
11465

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial
District Court, for Salt Lake County
the Honorable Aldon J. Anderson, Presiding

Paul N. Cotro-Manes of
COTRO-MANES, FANKHAUSER & BEASLEY
430 Judge Building
Salt Lake City, Utah
Attorneys for Appellant

GARY A. FRANK
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah
Attorney for Respondent

FILED

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION OF THE CASE BY LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
POINT I	4
<p>THE SUPREME COURT, IN REVIEW- ING THE JUDGMENT IN THIS CASE, MUST VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE AP- PELLANT AND ALL REASONABLE IN- TENDMENTS MUST BE INDULGED IN FAVOR OF REVERSING RATHER THAN AFFIRMING THE TRIAL COURT.</p>	
POINT II	7
<p>THE COURT ERRED IN FAILING TO FIND THE DRIVER OF APPELLEE'S VEHICLE NEGLIGENT AS A MATTER OF LAW, AND SUCH ERROR RESULTED IN PREJUDICE TO THE APPELLANT.</p>	
POINT III	11
<p>THERE IS NO EVIDENCE UPON WHICH THE COURT COULD BASE ITS</p>	

	Page
FINDINGS THAT THE PLAINTIFF WAS NEGLIGENT OR THAT ANY ACTION ON THE PART OF THE PLAINTIFF WAS THE PROXIMATE CAUSE OF THE AC- CIDENT.	
POINT IV	17
THE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS EN- TERED BY THE TRIAL COURT ARE NOT IN CONFORMITY WITH THE EVI- DENCE NOR WITH THE ORAL DECISION ANNOUNCED BY THE TRIAL COURT, AND AN OBVIOUS ERROR EX- ISTS IN THE RECORD IN THIS CASE.	
SUMMARY	20

CASES CITED

Alvarado v. Tucker, 2 U.2d 16, 268 P.2d 968	12
Bullock v. Luke, 98 U. 501, 98 P.2d 350	15
Edmunds v. Germer, 12 U.2d 215, 364 P.2d 1015 (1961)	10
Knox v. Snow, 119 U. 522, 229 P.2d 874 (1951)	5
Malstrom v. Olsen, 400 P.2d 209, 16 U.2d 316 (1965)	6
Martin v. Stephens, 121 U. 484, 243 P.2d 747	15
Moree vs. Moree, 371 P.2d 719 (Oklahoma)	18
Morris v. Christensen, 11 U.2d 140, 356 P.2d 34 (1960)	16

	Page
Peterson v. Neilson, 9 U.2d 302, 343 P.2d 731	13
Professional Fire Fighters, Inc. v. City of Los Angeles, 32 Cal Rptr 830, 384 P.2d 158 (1963) ..	18
Rasmussen, et al, v. Davis, 1 U.2d 96, 292 P.2d 488 (1953)	5
Raymond v. Union Pacific Railroad Co., 113 U. 26, 191 P.2d 137 (1958)	5
Reynolds v. National Gas Equipment, 7 Cal Rptr 879, (Cal, 1960)	5
Rich v. Eldridge, 106 N.J.L. 181, 147 A. 384	12
Smith v. Gallegos, 16 U.2d 344, 400 P.2d 570 (1965)	5, 8
Spackman v. Carson, 117 U. 390, 216 P.2d 640 (1950)	10
Sprague v. Boyles Bros. Drilling Co., 4 U.2d 344, 294 P.2d 689 (1956)	18
Taylor v. Secony Mible Oil Co., 51 Cal Rptr 765, (Cal, 1966)	6
Turner v. Ralph N. Parson Co., 117 Cal App 2nd 109, 254 P.2d 970 (1953)	6
Vacca v. Steer, 441 P.2d 523 (Wash, 1968)	18
Wightman v. Fuel Supply, 302 P.2d 471, 5 U.2d 373 (1956)	6
Wilkerson v. Stephens, 403 P.2d 31, 16 U.2d 424 (1965)	6
Williams v. Zions Cooperative Mercantile Inst., 6 U.2d 283, 312 P.2d 567 (1957)	16

STATUTES CITED

Section 41-6-61(a), Utah Code Annotated, 1953....	9
Section 41-6-66, Utah Code Annotated, 1953	9
Section 41-6-73, Utah Code Annotated, 1953.....	7, 8

AUTHORITIES CITED

C.J.S., Appeal and Error, Sect. 1786, Vol 5B page 47	18
C.J.S., Appeal and Error, Sect. 1789, Vol 5B, page 59	19

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SION,

Defendant-Respondent.

} Case No.
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BRIEF OF APPELLANT

NATURE OF THE CASE

This matter arises out of a collision between a motor vehicle being driven by the appellant and a truck owned by the State of Utah, being driven by an employee of the State Highway Department.

DISPOSITION OF THE CASE BY LOWER COURT

The Third Judicial District Court in and for Salt Lake County, the Honorable Aldon J. Anderson, presiding, entered judgment in favor of the defendant and against the plaintiff no cause of action.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the judgment of the District Court for error of law, and the case remanded to the District Court for a new trial.

STATEMENT OF FACTS

On the 30th day of December, 1966, at approximately 1:10 a.m., at the intersection of 9th South and State Streets, Salt Lake City, Utah, a Ford Ranchero vehicle being driven by appellant collided with a 1965 International truck owned by the State of Utah and driven by one Chauncey Eugene Kennedy, an employee of the State Road Commission. Appellant's vehicle was travelling west on 9th South. The street was icy and slushy from an earlier snow fall. The appellee's vehicle was travelling east on 9th South and stopped at the semaphore at the intersection of 9th South and State Street in the middle lane of traffic and not in the left turn holding lane. The driver of appellee's

vehicle signaled for a left turn to go north on State Street. When the light changed to green he proceeded into the intersection and swung wide so that he would be in the outside lane of traffic when the turn was completed. According to his testimony there was a car waiting to turn left to go south on State Street which stopped to allow him to proceed. This driver, if he existed at all, was never found by either party nor any of the investigators. He further states that one or possibly two cars went through the intersection going west and he waited for them to clear the intersection. He then commenced his left turn and heard the collision. He testified that at no time did he see the appellant's vehicle before the collision (R-172), in fact, did not see it until he got out of his truck and walked to the right side of his vehicle (R-175). The appellant had been travelling west on 9th South from 485 East 9th South, had stopped for the light at 2nd East and 9th South and then proceeded west approaching the intersection of 9th South and State. He was travelling approximately 15, 16, or 17 miles per hour and had his car in second gear (R-188, 193). There was no evidence to the contrary. He first noticed the appellee's vehicle stopped at the intersection, he was approximately 225 feet from the intersection which was approximately the same time as the light changed from red to green for the east-west traffic on 9th South. As he approached the intersection he slowed down a bit and when he was approximately 20 feet from the intersection he next observed appellee's truck directly in

front of him. He immediately looked to his right and turned sharply while applying his brakes. The left front of his vehicle struck the right front fender of the truck. Appellant testified that there were no cars in front of him going through the intersection and no others going north or south. The appellant first testified that he estimated the distances from the intersection when the semaphore turned green at between 100 and 150 feet, right on the west edge of Don Carlos Drive-in parking lot. However, upon returned to the scene and measuring the distance to the parking lot he changed his testimony to the distance of approximately 225 feet from the intersection. Appellant lost one eye, suffered a broken ankle and other injuries, and brought suit under the governmental immunity act of Utah. Upon the above facts the court found appellant solely liable and absolved the driver of the state truck of any negligence, and denied appellant's motion for a new trial.

POINT I

THE SUPREME COURT, IN REVIEWING THE JUDGMENT IN THIS CASE, MUST VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE APPELLANT AND ALL REASONABLE INTENDMENTS MUST BE INDULGED IN FAVOR OF REVERSING RATHER THAN AFFIRMING THE TRIAL COURT.

It is well settled in the law that the Supreme Court when reviewing on appeal a judgment of the District Court will view the evidence in a light most favorable to the winning party and that the Supreme Court will affirm rather than deny if in doing so the conclusion can be based upon any logical reason. *Rasmussen, et al, v. Davis*, 1 U.2d 96, 262 P.2d 488 (1953); *Smith v. Gallegos*, 16 U.2d 344, 400 P.2d 570 (1965). However, in cases such as the instant case wherein the trial judge entered a verdict and judgment of non-suit or no cause of action, the courts have uniformly held that in reviewing a judgment of no cause of action the evidence must be viewed and reasonable inferences drawn therefrom in a light most favorable to the plaintiff. *Raymond v. Union Pac. Railroad Co.*, 113 U. 26, 191 P.2d 137 (1948); *Knox v. Snow*, 119 U. 522, 229 P.2d 874 (1951).

The courts of the State of California have held, as the courts of Utah have, regarding the viewing of the evidence in a light most favorable to the plaintiff in cases such as this. In *Reynolds v. National Gas Equipment*, 7 Cal Rptr 879 (Cal, 1960) the court said:

“On appeal for non-suit all reasonable intentions must be indulged in favor of reversing, and judgment can be supported only if, giving plaintiff's evidence fully prima facie value and indulging in every reasonable inference that can be drawn therefrom and with all conflicts resolved in his favor, the result is a determination that there is no substantial evidence to support a judgment for the plaintiff.”

See also: *Turner v. Ralph N. Parson Co.*, 117 Cal App 2d 109, 254 P.2d 970 (1953).

The Utah Court in *Malstrom v. Olsen*, 400 P.2d 209, 16 U.2d 316 (1965), said:

“We reverse non-suit judgments if there is a reasonable basis in the evidence and the inferences therefrom when considered in a light most favorable to the losing party (plaintiff) for a judgment in her favor.”

See also: *Wilkerson v. Stephens*, 403 P.2d 31, 16 U.2d 424 (1965), and *Wightman v. Fuel Supply*, 302 P.2d 471, 5 U.2d 373 (1956).

The evidence shows that the appellant was not negligent in any manner whatsoever. The only testimony as to the speed of appellant was his own statement that he might have been going 16 or 17 miles per hour and slowed up prior to entering the intersection. (R-188, 193) There was likewise no evidence that the appellant was guilty of improper lookout. The evidence shows that the appellant observed the appellee's truck stopped at the intersection making a left turn, and proceeded into the intersection. Any conflicts in the evidence must be disregarded and the evidence must be viewed in a light most favorable to the appellant. In *Taylor v. Secony-Mobile Oil Co.*, 51 Cal Rptr, 764 (Calif, 1966), the court stated:

“In reviewing the record on appeal from judgment entered on order granting motion for non-

suit conflicts in evidence must be *disregarded*. Plaintiff's evidence must be given all value to which it is legally entitled, every legitimate inference which may be drawn from the evidence must be indulged in favor of the plaintiff, and to support the judgment the court must conclude there is evidence of substantiality to support a verdict in favor of plaintiff if such verdict were given." (Emphasis ours)

We submit in view of the foregoing authorities that this court must view the evidence in a light most favorable to the plaintiff and must engage in all inferences which may be drawn from the evidence in favor of the plaintiff.

POINT II

THE COURT ERRED IN FAILING TO FIND THE DRIVER OF APPELLEE'S VEHICLE NEGLIGENT AS A MATTER OF LAW, AND SUCH ERROR RESULTED IN PREJUDICE TO THE APPELLANT.

(A) The driver of appellee's truck, Mr. Chauncey Eugene Kennedy, testified that he started into the intersection at 9th South and State, observed at least one other car stopped, allowed several cars to pass in front of him, and then proceeded with his left turn. (R-124) The duty of a driver intending to make a left hand turn within an intersectoin is found in 41-6-73 Utah Code Annotated, 1953, as amended, which reads as follows:

“The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.”

The case of *Smith v. Gallegos*, 16 U.2d 344, 400 P.2d 570 (1965), amply shows that the foregoing section of the Utah Code places upon the person making the left turn a greater duty of care. The Court in *Smith*, said at page 571:

“The addition of the language just quoted clearly places a greater duty on the left turner in that he must yield not only to the approaching vehicles close enough to constitute a hazard prior to beginning his turn, but also to vehicles which will constitute a hazard ‘during the time he is moving within the intersection’ which includes the time it is necessary for him to complete his turn.”

In the instant case Mr. Kennedy had the duty to yield to all vehicles approaching close enough to constitute a hazard prior to beginning his turn. He likewise had the duty to yield to other vehicles which were so close as to constitute an immediate hazard. Mr. Newton's vehicle was so close as to constitute an immediate hazard as evidenced by the fact of the collision, thus Mr. Kennedy was guilty of statutory negligence in that he violated Section 41-6-73, Utah Code Annotated, 1953, as amended.

(B) Mr. Kennedy from his own testimony clearly

started his left turn from a position straddling the center lane and the left turn lane going east on 9th South. (R-170, 171)

There are two sections of the Utah Code which set out the lanes and the positions in lanes which drivers must assume before proceeding. Section 41-6-61(a), Utah Code Annotated, 1953, as amended, states:

“A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.”

and Section 41-6-66(b), Utah Code Annotated, 1953, as amended, reads as follows:

“At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, an approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the centerline of the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center line of the intersection.”

The evidence amply shows that Mr. Kennedy violated both of these provisions of the traffic rules and regulations and therefore was once again guilty of statutory negligence.

(C) A driver has a duty to see what there is to be seen. *Spackman v. Carson*, 117 U. 390, 216 P.2d 640 (1950); and *Edmunds v. Germer*, 12 U.2d 215, 364 P.2d 1015 (1961). From the record it is clear that Mr. Kennedy did not see the appellant's vehicle. (R-172) In fact he stated that he never saw the vehicle until he got out of the truck. (R-174)

Mr. Kennedy saw one car stopped at the intersection and allowed one more to pass in front of him before completing his turn. (R-169) It is apparent from the fact of the collision that Mr. Kennedy could have seen appellant's vehicle if he would have looked. The vehicle was there and so close as to constitute an immediate hazard. Further the appellant was not speeding but in fact was doing less than the posted limit. (R-188) There was testimony to the effect that Mr. Kennedy had worked many hours that day with little or no sleep. This writer can only surmise as one who has done this very thing that after many hours a person's vision is not as clear, his reflexes not as sharp, and his thinking less than what it should be when operating a vehicle.

A Fortiori that the record is resplendent with evidence to show that Mr. Kennedy failed to keep a proper lookout which is yet another basis for finding negligence on his part.

Appellant submits from the foregoing that there are at least three theories upon which the trial court could have and should have found negligence on the

part of Mr. Kennedy. All these factors when taken together can lead to but one conclusion, and that is that Mr. Kennedy was negligent and that this negligence was the sole and proximate cause of the accident.

POINT III

THERE IS NO EVIDENCE UPON WHICH THE COURT COULD BASE ITS FINDINGS THAT THE PLAINTIFF WAS NEGLIGENT OR THAT ANY ACTION ON THE PART OF THE PLAINTIFF WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

The Findings of Fact and Conclusions of Law signed by the trial judge and entered in the record state in effect that the appellant failed to maintain proper lookout and travelled at an excessive rate of speed. A reading of the transcript shows that without any doubt no one except the appellant was able to testify as to the approximate speed of the appellant. The driver of the State vehicle did not even see the appellant. Appellant testified that he had been going 15, 16 or 17 miles per hour prior to the intersection and even slowed upon approaching the intersection. (R-188 and 193) There is no other evidence in the record and none other was even offered which would show the speed of the appellant's vehicle. Appellant submits that on this evidence the court could not find excessive speed on the part of the appellant. The burden was upon the defendant to show the appellant's speed. A finding of fact as

entered in this case could not be based upon mere speculation or conjecture but only upon a preponderance of the evidence. In the case of *Rich v. Eldridge*, 106 N.J.L. 181, 147 A. 384, the court held in effect that a car travelling 12 to 15 miles per hour would only justify a finding of 12 miles per hour. Applying this principle to the case at hand from the evidence that appellant was travelling 15, 16 or 17 miles an hour, it follows that it is just as likely that he was going 15 miles per hour which is substantially under the posted speed limit and a speed which we would submit is reasonable and proper in light of the circumstances on the night in question. For the trial judge to make such a finding of speed upon mere speculation or conjecture is not proper.

The Utah Supreme Court stated in the case of *Alvarado v. Tucker*, 2 U.2d 16, 268 P.2d 968, at page 988:

“A choice of probabilities does not meet this requirement. It creates only a basis for conjecture on which a verdict of the jury cannot stand.”

Further there is nothing in the record which would show that the 15 miles per hour speed of the appellant's vehicle was the proximate cause of the accident. We submit that this is exactly what the trial judge found when he stated his findings orally in open court.

“THE COURT: Mr. Newton has been ably represented. The Court appreciates the help of counsel for the State in this matter. It is the find-

ing of the Court that the evidence clearly establishes negligence on the part of the plaintiff in failing to keep appropriate lookout under these circumstances and as a result it is the duty of the Court to find and return a judgment of no cause of action for the plaintiff."

Record 247

The only evidence of the record on the point of improper lookout is the statement of the appellant that he had observed the truck stopped at the intersection preparing to make a left turn and then he had proceeded into the intersection. He at first had testified that he had observed this vehicle approximately 150 feet from the intersection, but later had changed his testimony to approximately 225 feet from the intersection which would be approximately the same time the semaphore changed from red to green for the east-west traffic on 9th South. He did not keep a direct eye on the appellee's vehicle, but rather watched the other traffic in the area. He did not directly see the appellee's vehicle until he was approximately 20 feet from him, and directly in his line of travel. The appellant was aware of the presence of the appellee's vehicle but the appellant likewise had to give some attention to the management of his own vehicle and to other traffic on the highway. He could not become absorbed in the detail of what the appellee's vehicle was doing. The standard of care to be exacted from a plaintiff in regards to observance is set forth in a case of *Peterson v. Neilson*, 9 U.2d 302, 343 P.2d 731, wherein the court at page 733 said:

“It is not to be regarded as within the standard of due care to require her (plaintiff), from the distance she was away, to observe where the defendant was looking as he sat inside the cab of his truck; nor was she bound to suspect that he had not looked to the north and had seen her approach; nor to anticipate that he would proceed upon the highway without again looking north.”

The plaintiff in this case was not required to ascertain from his own senses what the driver of the appellee's vehicle was thinking about doing; he was not required to anticipate that the driver of defendant's vehicle would without any prior warning make a left turn in front of the appellant's vehicle. The appellant was at least within 225 feet from the intersection when the light changed, travelling through an intersection with a semaphore that was green, thus appellant could assume that he had the right of way and that the driver of the appellee's vehicle would remain stopped and afford him the right of way. There is nothing in the record which would indicate that the driver of the appellee's vehicle did anything that would warn the appellant of his intention to commence his left turn in front of the appellant's vehicle.

We must remember that as the appellant approached this intersection in addition to the street upon which he was travelling there were three other streets intersecting at this point. He must give attention to each of these streets as well as to the intersection. All of his attention could not very well or very safely have been focused on

any one at any given instance. In the case of *Martin v. Stephens*, 121 U. 484, 243 P.2d 747, the Utah Supreme Court, in quoting from the concurring opinion in the case of *Bullock v. Luke*, 98 U. 501, 98 P.2d 350, stated the following which we submit is the controlling law in this case.

“ . . . We must be careful not to stretch contributory negligence to the point where we make it encumbant upon one not only to drive carefully himself, but to drive so carefully as always to be prepared for some sudden burst of negligence of another and be able to avoid it.”

The Court further stated:

“If a driver has to drive his car under the assumption that everyone else is apt to be negligent, the next step would be for him to conclude that he better get off the streets entirely or someone is likely to hit him, and abandon the streets to those who were just willing to take the chances. If, under the circumstances such as present in this case, where the plaintiff's right of way is so clear no reasonable person would have any doubt about it, he could not assume that he would be afforded his right of way, the only way drivers could safely proceed at an intersection would be to resort to: ‘You first my dear Gaston — no, after you, my dear Alphonse’, procedure or get out and hold a conference before either could safely proceed.” *Id.* at p. 750.

The appellant had the right of way in this case and he did not have the duty to anticipate that the driver of the appellee's vehicle would negligently make the

left turn, and as the court in the *Martin v. Stephens* (supra) case suggested, we must avoid measuring the plaintiff's duty and charging him with negligence because he may have failed to anticipate and avert negligence on the part of the appellee.

We submit that the situation in the instant case is similar to the situation facing the court in the case of *Williams v. Zions Cooperative Mercantile Inst.*, 6 U.2d 283, 312 P.2d 567 (1957) in which the court, in concluding its opinion, stated:

"If one dare not go through a green light or along a through street if a car is stopped at the intersecting streets until he is sure the said car is not going to move, his right to proceed will have been forfeited while he waits.

Common sense and fair play have their proper place, and the standard of care under existing circumstances must still be the rule."

The appellant was the favored driver and as such could proceed into the intersection without anticipating any danger. As the court stated in *Morris v. Christensen*, 11 U.2d 140, 356 P.2d 34 (1960):

"It is the duty of a driver to observe and to see what there is to see so as to be able to exercise ordinary precaution to prevent collisions such as this. This duty extends to the favored driver with the right of way as well as to the disfavored driver. But he who has the right of way need not anticipate sudden outbursts of negligence on the part of another driver. In-

deed it may be said that the failure to observe is negligence proximately contributing to the harm only where by observing the driver could have avoided or lessened the resulting harm."

It is apparent from the foregoing authorities and discussion that there is no basis in the record upon which the court could have found the plaintiff guilty of travelling at an excessive speed or of failing to maintain a proper lookout, and that from the foregoing it is equally apparent that the court erred in making these findings.

POINT IV

THE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS ENTERED BY THE TRIAL COURT ARE NOT IN CONFORMITY WITH THE EVIDENCE NOR WITH THE ORAL DECISION ANNOUNCED BY THE TRIAL COURT, AND AN OBVIOUS ERROR EXISTS IN THE RECORD IN THIS CASE.

As mentioned earlier, the oral pronouncement of the trial judge concluded that the appellee should be granted judgment no cause of action because of improper lookout on the part of the appellant. The written findings of fact and conclusions of law as entered by the trial court state not only had the appellant been guilty of improper lookout, but likewise guilty of trav-

elling at an excessive speed. Further there was no finding either oral or written that the alleged acts of speeding or improper lookout on the part of the appellant was the sole and proximate cause of the accident. The trial court's findings and conclusions should be read in conjunction with the oral decision where it appeared from the oral decision that the finding of liability was based upon findings not expressed in the written findings of fact. See: *Vacca v. Steer*, 441 P.2d 523 (Wash. 1968). This is likewise the rule in the State of California as found in *Professional Fire Fighters, Inc. v. City of Los Angeles*, 32 Cal Rptr 830, 384 P.2d 158 (1963).

We submit that although the oral pronouncements of the trial court in announcing the judgment may not constitute findings of fact in and of themselves, they should be considered by the appellate court in reviewing the entire record and when properly incorporated in the record they should be examined to determine the correctness of the conclusions upon which the judgment is based. See: *Moree v. Moree*, 371 P.2d 719 (Oklahoma). In *Sprague v. Boyles Bros. Drilling Co.*, 4 U.2d 344, 294 P.2d 689 (1956) the Utah court held that the opinion or memorandum of decision could be consulted in construing findings of fact.

The general rule in regard to erroneous findings is set forth in C.J.S., Appeal and Error, Sect 1786, Vol 5B, at page 47:

“An erroneous finding on a material fact is ordinarily ground for reversal and thus the finding of a material fact contrary to the admission of the parties or the undisputed evidence is prejudicial error and ground for reversal. This has been held to be so even though the trial court would not have been required to make findings of fact.”

And in C.J.S., Appeal and Error, Sect. 1789, Vol 5B, at page 59, it is stated:

“Where it is apparent that there is an erroneous conclusion of law influencing the judgment, a reversal may be required, but error in a conclusion of law is no grounds for reversal where no prejudice results to the party complaining.”

Thus it appears that the general law is to the effect that unless this erroneous finding of fact and conclusion of law is prejudicial, it is generally harmless error. In looking for prejudicial error in this case it is apparent that the appellant has been adversely affected. If the court had not made the erroneous finding of fact and conclusion of law and had based his decision solely upon his oral pronouncement, the points upon which the appellant would now be appealing would be somewhat fewer, and we would be entitled to seek a remand of the case for a new trial upon the basis of the erroneous conclusion of the court as to the improper lookout. As it is, we are now confronted with the burden of overcoming not only the erroneous finding of improper lookout, but a finding of excessive speed

on the part of the appellant, and lack of negligence on the part of the driver of the appellee's vehicle.

On at least one occasion, the court has reversed a trial court for inconsistencies between findings and conclusions. We refer to the case of *Peterson v. Nielsen*, (supra) where the court said at p.:

“In view of the inconsistency between the findings made and the conclusions reached by the trial court the case is remanded for a new trial on the issue as to plaintiff's right to recover.”

There is no evidence from which it can be said that had the appellant continued to observe the truck, he could have avoided the accident. In fact, the contrary appears; that is that the driver of the truck, Mr. Kennedy, claims to have allowed one or more cars to pass through the intersection, thus it would seem only he could have avoided the accident.

SUMMARY

It is respectfully submitted that the trial court erred in finding appellant negligent under the facts of this case, and of rendering a decision of no cause of action. The court further erred in refusing to grant appellant a new trial.

It is respectfully submitted that the appellant is entitled to a reversal of the trial court's decision and

the remanding of this matter back to the District Court
for a new trial on its merits.

Respectfully submitted,

Paul N. Cotro-Manes of
COTRO-MANES, FANKHAUSER & BEASLEY

430 Judge Building
Salt Lake City, Utah
Attorneys for Appellant