1964

Carol Ewan v. Ray Butters : Plaintiff and Brief of Appellant

Utah Supreme Court

Bell & Bell; Attorneys for Plaintiff-Appellant;
Hanson & Garrett; Attorneys for Defendant-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

CAROL EWAN,
Plaintiff-Appellant,

vs.

RAY BUTTERS,
Defendant-Respondent.

Case No.
10086

PLAINTIFF AND APPELLANT'S BRIEF

Appeal from the Judgment of the
District Court for Salt Lake County
Honorable Ray Van Cott, *Judge*

BELL & BELL
303 East 2100 South
Salt Lake City, Utah
Attorneys for Plaintiff-Appellant

HANSON & GARRETT,
520 Continental Bank Building
Salt Lake City, Utah
Attorneys for Defendant-Respondent

PRINTERS INC. - SUGAR HOUSE

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS (Continued)

STATUTES CITED

TEXTS CITED

ORDINANCE CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

CAROL EWAN,
Plaintiff-Appellant,

vs.

RAY BUTTERS,
Defendant-Respondent.

Case No. 10086

PLAINTIFF AND APPELLANT'S BRIEF

Appeal from the Judgment of the
District Court for Salt Lake County
Honorable Ray Van Cott, *Judge*

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries and property damage arising out of a collision between the plaintiff who was a pedestrian and the defendant who was driving his automobile.

DISPOSITION IN LOWER COURT

The case was tried with a jury. At the close of the first day of trial, it was agreed what the testimony would be from one additional witness. Thereupon, the Court granted Defendant's Motion to Dismiss and from which the plaintiff appeals.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks reversal of the Dismissal, and that the case be remanded for trial.

STATEMENT OF FACTS

The plaintiff, Carol Ewan, is employed by West Coast Air Lines as a passenger agent (T. 25, L. 17-19) and has been for approximately five years (T. 26, L. 15), and prior to January, 1964, had lived in Salt Lake a little over 3½ years (T. 26, L. 24). She is divorced (T. 27, L. 23), and has a 15 year old son (T. 27, L. 10), and in order to support her son she had a part time job after her working hours, employed by the Relaxercizor Company (T. 27, L. 26). It was the plaintiff's practice that when a person made inquiry about a Relaxercizor that the plaintiff would call them on the telephone, make an appointment if the inquiring person wanted to see the machine, and would go and demonstrate it to them (T. 28, L. 26-30). On the evening of November 21, 1962, the plaintiff had an appointment with a Mrs. Trudy Turner who lived on Duluth Street in Salt

Lake City (T. 29, L. 6 & 7). The plaintiff did not know where Duluth was and Mrs. Turner gave her directions to take Second West to Beck Street (T. 29, L. 8). As a matter of fact, Second West ends at a curve and the continuation of the same street becomes known as Beck Street. This, however, was unknown to the plaintiff (T. 29, L. 9-11). The plaintiff left her home at approximately 6:30 or 6:45 (T. 29, L. 23) to keep this appointment, and drove north on Second West Street (T. 30, L. 4-7). As she proceeded north on Second West Street she saw a sign across the street on the west hand side reading Beck Street (T. 30, L. 9-11), which was slightly turned, and plaintiff mistakenly thought that Beck Street went to the west off Second West. She proceeded on north past the Mars Service Station which is located on the east side of Second West or Beck Street, turned around and came back and turned at the sign she had seen, or to the west, into what she thought was Beck Street and found it was not a street at all and her automobile became stuck in the mud (T. 30, L. 15-30). The plaintiff walked east to Beck Street, to point "D," then North on Beck Street to Point "E" as shown on Plaintiff's Exhibit 1, a general reproduction of which is found in the back of this brief and is marked Plaintiff's Exhibit 1, along the west side of Beck Street until she was directly across from the driveway leading into the Mars Service Station (T. 30, L. 22-30). At the time a portion of Second West and a portion of Beck Street were under construction, but that portion of Beck Street shown in Plaintiff's Exhibit 1, had received the first coat of black top (T. 19, L. 3-13). As is shown on the plat in the back of this brief and marked "PLAT" which is an enlargement

of a portion of Exhibit 1, encompassing the crossing and impact area, at the point of the accident and both to the north and the south there is a six lane highway, three lanes for north bound traffic, three lanes for south bound traffic, with a painted island in the center (T. 60, L. 18-29); the so called "island" was not raised, but was outlined with paint. The nearest crosswalk was one south of Wall Street and Beck Street intersection (T. 17, L. 14-23). There were no cross walks north to Covey's Service Station which is north of Victory Road and Beck Street intersection (T. 17, L. 27-29). Victory Road and Wall Street intersection is shown on the map, plaintiff's Exhibit 1, which embraces a distance of 3000 feet.

The plaintiff was standing at Point "E" which is directly across the street from point "A" as shown on Exhibit 1, point "A" being the middle of the south driveway of the Mars Service Station (T. 35, L. 10-23). Plaintiff had looked to the north for traffic from the Ogden area and there wasn't any traffic. South of the plaintiff by the swimming pool there were two pairs of car lights which the plaintiff saw and they were going at a slow speed. (T. 31, L. 13-17). The north corner of the area of the swimming pool is marked as point "C" on Exhibit 1 (T. 23, L.20-25). It is 1290 feet from point "A," the point directly across the street from where plaintiff was standing, to point "C," the cars, headlights being farther away than point "C." (T. 24, L. 16-17). The speed of the two cars just south of point "C," a distance in excess of 1290 feet from the plaintiff was 20 mph (T. 33, L. 29). There were construction zone speed limit signs posted setting the speed at 25 mph (T. 15, L.

4-8, L. 20-30; T. 16, L. 2-24; T. 19, L. 23-28; T. 34, L. 12-16; T. 55, L. 3-5). In her testimony plaintiff further stated that these cars were almost two blocks away (T. 32, L. 23), and the attorney for the defendant stipulated Salt Lake City blocks are 660 feet long (T. 34, L. 4-11). After checking the traffic and determining that there was no traffic to the north toward Ogden and that there were only the two cars at point "C," two blocks away to the south, the plaintiff started to cross the street (T. 35, L. 2-9). The plaintiff had decided there was no problem, no danger to herself (T. 35, L. 27-30; T. 61, L. 10).

The next thing plaintiff remembered was that she was lying in the middle of the street with somebody holding her head (T. 35, L. 30; T. 36, L. 1) asking who her doctor was. Plaintiff could not remember the name of her doctor and gave them the name of her dentist and upon being told she didn't need a dentist she said to her questioner to call West Coast Air Lines and she remembered nothing further until she was in the emergency room (T. 36, L. 18-24). The plaintiff had been hit by a car driven by the defendant Butters who, in the emergency room in the hospital, admitted he had hit her (T. 36, L. 25-30; T. 37, L. 2-9). Again, several days later in plaintiff's room at the hospital the defendant Butters, who plaintiff did not remember seeing in the emergency room, admitted he had hit her (T. 37, L. 11-30; T. 38, L. 3-11). In this conversation in plaintiff's hospital room the defendant stated to the plaintiff, with relation as to where plaintiff was on the street at the time he hit her that "two more steps and she would have been on the curb." (T. 38, L. 18-22).

Witness Jewell was present both times defendant Butters appeared at the hospital, and testified that Butters said "two or three more steps and she would have been off the road" (T. 99, L. 16-17). Defendant Butters never saw the plaintiff until her body hit his windshield (T. 38, L. 15-16).

Plaintiff does not remember the impact (T. 62, L. 11); she does not remember looking to the north again as she was crossing the street (T. 61, L. 22-24; T. 62, L. 4 & 5), and has no recollection of not looking again to the south (T. 62, L. 6-8). Plaintiff could not explain why her recollection was not good in connection with her looking (T. 63, L. 4-7). The last time plaintiff can swear she had looked to the south is when she was on the west side of the road. She may have looked afterwards; she may not have (T. 65, L. 4-8). She cannot recall whether she did or did not look (T. 65, L. 13-19). Plaintiff was almost across the street and it was a shock to her to wake up and find that she was any place but across the street (T. 36, L. 6-7).

Prior to the accident the plaintiff was in very good health (T. 57, L. 8-10). She received very serious injuries in the accident (T. 38, L. 26-30; T. 39, L. 2-9, L. 14-23; T. 71, L. 3-4; T. 72, L. 2-21, L. 25-26).

In talking with her doctor the plaintiff was unable to recall the actual event of the accident (T. 73, L. 9-13). The lapse of memory may continue for a long period of time, but usually does not (T. 74, L. 9-15).

At the conclusion of the first day's trial and after the Court had recessed and excused the jury until "10:00

o'clock tomorrow morning" (T. 100, L. 3-4), there was a discussion between counsel and Court in the Court's chambers, in which defendant's counsel stated that he understood that plaintiff's counsel intended to produce a witness who, based upon certain physical evidence or other evidence, would testify that the speed of the defendant's automobile at the time of impast was 45 mph, to which plaintiff's counsel replied that this was true and this was all of plaintiff's evidence (T. 100, L. 9-19).

Based upon this, defendant's counsel moved "that the Court dismiss the plaintiff's cause of action on the grounds that the plaintiff's own evidence shows her to be guilty of contributory negligence as a matter of law, and that her own contributory negligence, failing to keep track of the defendant's automobile, which she admits she saw prior to the time of her crossing the street, was a proximate cause of her own injury and damage" (T. 100, L. 20-27). Defendant's counsel stated there was only one question, "Did she have the duty to look again and it is clear in this case she didn't look" (T. 101, L. 5-7), to which the Court replied, "Well, I think so, and the duty to look again is answered in this case down here at 33rd South and Second West. I Just do not see how you can avoid the consequences of this" (T. 101, L. 8-11), and in granting the motion the Court stated, ". . . this motion is purely upon the contributory negligence of the plaintiff as a matter of law." . . . "The motion will be granted" (T. 101, L. 18-21).

POINTS URGED FOR REVERSAL

1. That the evidence does not support the Court's conclusion that all reasonable minds must agree that plaintiff was contributorily negligent.

2. That the evidences does not support the conclusion of the Court that all reasonable minds must agree that the plaintiff' contributory negligence was a proximate cause of the collision.

ARGUMENT

Although there are two points of Appeal, the evidence and general law tend to apply to both, and for convenience and to avoid repetition they will not be set out in separate argument.

The evidence and all reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the plaintiff, *Cox v. Thompson,* 123 Utah 81, 254 P. 2 d 1047, *Mingus v. Olsson,* 114 Utah 505, 201 P. 2d, 495, and *Langlois v. Rees,* 10 Utah 2d 272, 274, 351 P.2d. 638.

The plaintiff was not in the crosswalk, either one that was painted or one designated by section 41-6-8 (b) U.C.A., 1953. As is shown on plaintiff's exhibit 1, there is one and perhaps more T intersections. However, in the absence of a marked crosswalk, there is no crosswalk created by the Statute as is clearly set out in the Langlois v. Rees case, supra.

As is set forth in the record, the Ordinances of Salt Lake City provide that a pedestrian may not cross other than in a crosswalk unless there is no crosswalk within 700 feet of desired point of crossing, and in such event the pedestrian may cross a highway by the shortest straight route to the opposite curb after exercising due care and caution and yielding to all vehicular traffic. The nearest crosswalk from the point which the plaintiff crossed the street is far in excess of 1200 feet.

Viewing the evidence in its most favorable light to the plaintiff, the point of impact was 4 to 5 feet west of the curb line at the Mars Service Station on the east side of Beck Street and which point is marked "I" on the Plat. The plaintiff, a woman, was in high heels and walking and was within 2 steps of the curb or driveway, and would be taking steps of approximately 2 feet per step. She had traveled east almost 100 feet, having crossed 3 lanes of southbound traffic, a painted island, 2 traffic lanes and almost the third traffic lane for north bound traffic on the east side. As is shown on the Plat, the outside lane is approximately 22 feet wide, almost double the size of the middle lone or the inside lane. The defendant had approximately 40 feet of unused highway to his left, including 18 feet within his own lane of traffic, but he chose to skim along the edge of the road, next to the gutter on that portion which is not normally used particularly, while travelling at 45 miles per hour, or he changed lanes or his prior position in the outside lane which was almost double the average size, perhaps for the purpose of turning into the Mars Gas Station. In either event, the defendant never

saw plaintiff until her body hit his windshielf. In view of the distance travelled by the plaintiff whether it be total distance or even the distance of approximately 40 feet over the north bound traffic lane and her nearness to the curb line or driveway, it cannot be concluded that the plaintiff, as a matter of law, is guilty of contributory negligence, and further that her contributory negligence, assuming the same, was a proximate cause of the accident. Quite to the contrary, reasonable men could differ upon the interpretation of the facts herein, and a jury might well find that the defendant's automobile was not "so near as to constitute an immediate hazard" and that the plaintiff did use the ordinary care that a reasonably prudent person, in a like position would have used in keeping with Section 20.8 of JURY INSTRUCTION FORMS FOR UTAH, citing Section 41-6-78, U.C.A. 1953, and *Sant v. Miller,* 115 Utah 559, 206 P.2d 719. Conceding for the sake of argument that this Court upholds the lower Court in holding that the plaintiff was guilty of contributory negligence, it does not follow automatically that her negligence was a proximate cause of the accident. Reasonable minds might differ and a jury might well find from the facts of this case and the presumptions hereinafter set forth that the assummed negligence of the plaintiff was not a proximate cause.

It would appear from the statements made by the Court in granting defendant's motion to dismiss that the Court agreed with the statement made by defense counsel:

"MR. HANSON: The only question is—did she have the duty to look again, and it is clear in this case that she didn't look."

"THE COURT: Well, I think so, and the duty to look again is answered in this case down here at 33rd South and Second West. I just don't see how you can avoid the consequences of this. I guess there is no reason not to grant it now and call the jury." (T. 101, L. 5-12).

We submit that the record does not bear out the statement of defendant's counsel when he says, "it is clear in this case that she didn't look." The record uncontradictorily reveals that when plaintiff was on the west side of Second Avenue West or Beck Street directly across the street from the entrance to the Mars Service Station she looked north to see if traffic was coming from Ogden, as well as south (T. 31, L. 9-17; T. 35, L. 2-24; T. 59, L. 5-16; T. 63, L. 23-24). There was no traffic coming from the north and two cars coming from the south and these two cars were approximately two blocks away going at a speed of 20 mph (T. 32, L. 22-30). The record shows that it was over 1290 feet from plaintiff's position to the point where the cars were (T. 24, L. 16-17). Plaintiff decided there was no problem at all, there was no danger to herself (T. 35, L. 29-20), and started to cross the street. The last thing plaintiff remembers is she was just plain walking (T. 61, L. 10) and then the next thing she remembers was that she was in the middle of the street with somebody holding her head and asking who her doctor was (T. 35, L. 30; T. 36, L. 2, L. 19-20). Plaintiff could not even remember the name of her doctor (T. 36, L. 20-21).

Both on direct and on cross-examination plaintiff testified repeatedly that she could not remember anything after she had started to cross the street, or what she did or did not do after she left the west side of the street (T. 61, L. 16-17, L. 24; T. 62, L. 4-5; L. 8, L. 11, L. 29-30; T. 63, L. 2-7, L. 16, L. 23-26; T. 65, L. 4-8, L. 16-19; T. 92, L. 12). The plaintiff was struck by the defendant (T. 37, L. 8-10), but has no recollection whatever of the impact (T. 62, L. 11). When Dr. Morrow talked with the plaintiff she was unable to remember the actual event of the accident (T. 73, L. 9-13). The plaintiff received very severe and substantial injuries (T. 38, L. 26-30; T. 39, L. 2-9, L. 14-23; T. 71, L. 3-4; T. 72, L. 2-21, L. 25-26).

It is abundantly clear and absolutely uncontradicted that the plaintiff has no recollection of what she did and as to whether or not she looked again to see where the cars to her south were after she left the west sides of the highway. Plaintiff's contention is that she had a lapse of memory. This is supported by the testimony of Dr. Morrow. In fact, Dr. Morrow testified that this lapse of memory can exist or may continue for a long period of time (T. 74, L. 9-15). Dr. Morrow's testimony, we believe, is clear that because of the severe nature of the injuries there can be a lapse of time when the plaintiff will not remember what she did or what happened. Therefore, we must accept the plaintiff's testimony that she could not remember and conclude that she did suffer a lapse of memory for a matter of seconds immediately prior to the accident.

A lapse of memory during which the events that took place still cannot be recalled to her mind is a question of

fact for the triers of the facts, it is a jury question. *Napoli v. Hunt*, 297 P.2d 653; *Kumlauskes v. Cozzi*, Cal., 343 P.2d 6D5; *Schalow v. Oakley*, Wash., 139, P2d 296. Since this is a jury question, the Court was not permitted to conclude as a matter of law that the testimony of the plaintiff was not true, but on the other hand, the Court must accept that testimony as being true. Since we must then accept this testimony as being true, we must then proceed with the law and the presumptions that are raised by the law. We respectfully submit to this Court that logically there is utterly no difference in the following hypothetical statement: A person is involved in an accident and is killed. The law presumes that person exercised due care and caution, the presumption being based upon the instinct of self-preservation and arises in the absence of other witnesses or evidence. A person crosses a highway, is struck by a car and has no recollection of the events between the time they started to cross the highway and when they were struck. For all intents and purposes as to what happened in that short interval, that person may as well have been dead. The law of self-preservation is a law exercised by a living person and it makes no difference whether the person was killed or severely injured in the subsequent mishap, the law is just as strong. It is completely illogical that a person would walk into the path of a rapidly moving automobile anticipating that they would only be injured, not killed, and that they would lose their memory. We, therefore, submit there is no logical reason why the pre-

sumption which arises when a person is killed does not also arise when a person's memory fails.

We respectfully submit that the presumption does arise and that the plaintiff is afforded all the benefits based on the instinct of self-preservation that a deceased or a person from a loss of memory as in this case, was exercising due care for her own safety and which may take the place of evidence sufficient to make for positive findings in favor of the plaintiff in absence of the preponderance of the evidence to the contrary. *Compton v. Ogden Union Ry. and Dep. Co.,* 120 Utah 453, 235 P.2d515, *Mecham v. Allen,* 1 Utah 2d 29, 262 Pac. 2d 285, *Tuttle v. P.I.E.* 121 Utah 420, 242 Pac., 2d 764. The mere fact that the plaintiff was hit in the highway in no way rebuts that presumption. That presumption can only be rebutted by the preponderance of the evidence to the contrary. The foregoing is recognized in Section 16.8 of JURY INSTRUCTION FORMS FOR UTAH.

Therefore, plaintiff contends that when she left the west side of the highway she had ample time to safely cross the highway prior to the arrival of the car being driven by the defendant, which car was at least 1290 feet away when first observed, driving at an estimated speed of 20 miles per hour. The plaintiff had an absolute right to rely upon the fact that the defendant would comply with the posted speed limit which was 25 miles per hour (T. 15, L. 4-8, L. 20-30; T. 16 L. 2-24), and that the defendant would not speed up or otherwise recklessly drive into the plaintiff. Section 41-6-79(a), Utah Code Annotated, 1953, *Fox v. Taylor* 10 Utah 2d, 174, 350 Pac. 2d, 154.

Since the duty and care imposed upon the plaintiff is to look and continue to look in the absence of evidence to the contrary, it is presumed that the plaintiff discharged that duty. *Mingos vs. Olson, supra.* We further submit that the factual situation in this case as afforded by this record as to the events after the plaintiff left the west side of the highway and up to the time of impact, is almost a perfect example to apply the reasoning of the Honorable Justice Wade in the case of *Mingus vs. Olsson, supra:*

> "If there were a complete absence of evidence as to whether he took any precautions to avoid the accident, then the law creates a presumption that he took reasonable precautions for his own safety and that he was injured in spite of such pretions."

In upholding the defendant's Motion the Court had to find, from the facts, that reasonable men could draw *but one* inference and that inference would point *unerringly* (emphasis is added) to the plaintiff's negligence which contributed to her inqury. *Cox v. Thompson*, 123 Utah 2d 272, 254 P.2d 1047. It is clear from the evidence that there is more than one inference that can be drawn from facts and such inferences would not point unerringly to the plaintiff's negligence which contributed to her injury. It was agreed that defendant's automobile was travelling 45 miles per hour at the time of the impact. (T. 100 L. 11-16). The only way, as we see it, that this inference could not be construed to be beneficial to the plaintiff, and even then

it is doubtful whether such construction would not be beneficial to the plaintiff, is by assuming that there was a gradual increase of speed by the defendant over a distance in excess of 1290 feet. The Court is not at liberty to construe this inference against the plaintiff, but to the contrary must construe in favor of the plaintiff. Therefore, the construction must be that the defendant's increase of speed must have been sudden and immediate before the impact. The plaintiff having once entered the street was entitled to rely upon the fact that the defendant would not suddenly increase his seed in violation of the Statute, and further the plaintiff was entitled to the presumption that a person who is exercising due care has a right to rely and assume that others will also perform their duties under the law, i.e. that the defendant would not speed up, and that the defendant would not exceed the speed limit. *Ferguson v. Reynolds,* 52 Utah 583, 176 Pac. 267.

We not only strongly disagree with counsel for defendant's statement when he stated, ". . . did she have the duty to look again and it is clear in this case that she didn't look," but we contend that every shred of the evidence contained in this record where there is positive testimony as to what happened is that the plaintiff was without negligence. Plaintiff was not trying to beat them across the Street (T. 59, L. 19). Having looked, determined defendant's distance, defendant's rate of travel, plaintiff concluded that she was absolutely safe in starting across that street. Not remembering whether or not she looked after leaving the west side of the street, having been rendered unconscious, the plaintiff is entitled to the presumption of the

law, that she did look, that she discharged the duty of reasonable care and the further presumption that she was injured in spite of such precautions.

We believe that the lower Court was relying on *Smith vs. Bennett*, 1 Utah 2d 224, 265 P.2d 401. The facts in that case are far different and easily distinguishable from the facts of this case. There the pedestrian left a marked crosswalk in the middle of the road, walked up the middle of the street, and there was evidence that she suddenly ran from a place of safety in front of the defendant's automobile. She rather obviously had mislead the defendant by turning her back to him and moving away from him in a safety zone. None of these facts are present in the case before you. The Smith case is in keeping with the Langlois case; in each case there was an available marked crosswalk.

There was neither a marked crosswalk nor an unmarked crosswalk anywhere near the vicinity for Mrs. Evans to use.

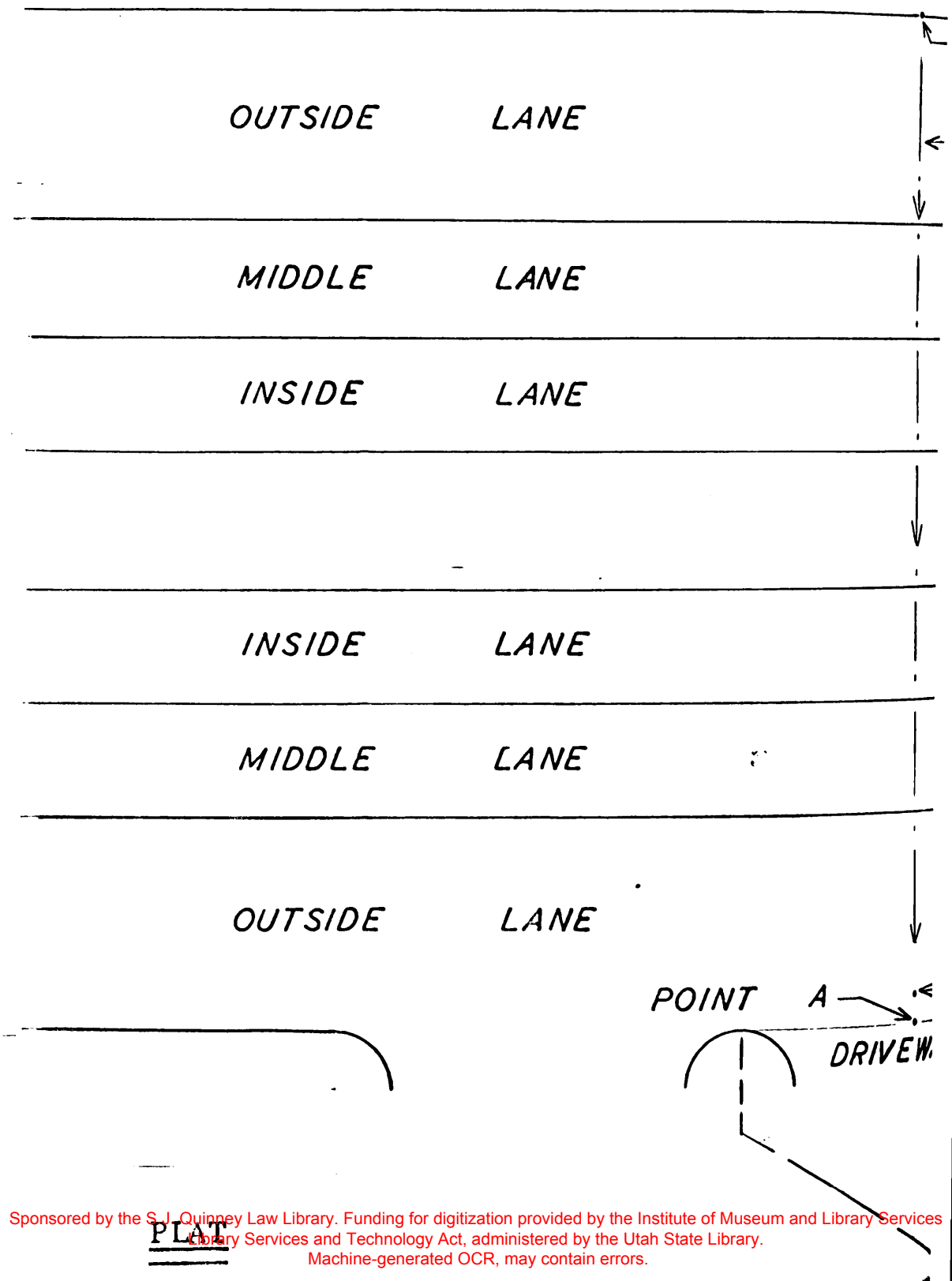
CONCLUSIONS

We respectfully submit that the lower Court erred in granting Defendant's Motion to Dismiss and that judgment should be reversed and the cast remanded for trial.

Respectfully submitted,
BELL & BELL
by J. RICHARD BELL,
Attorneys for Plaintiff-Appellant

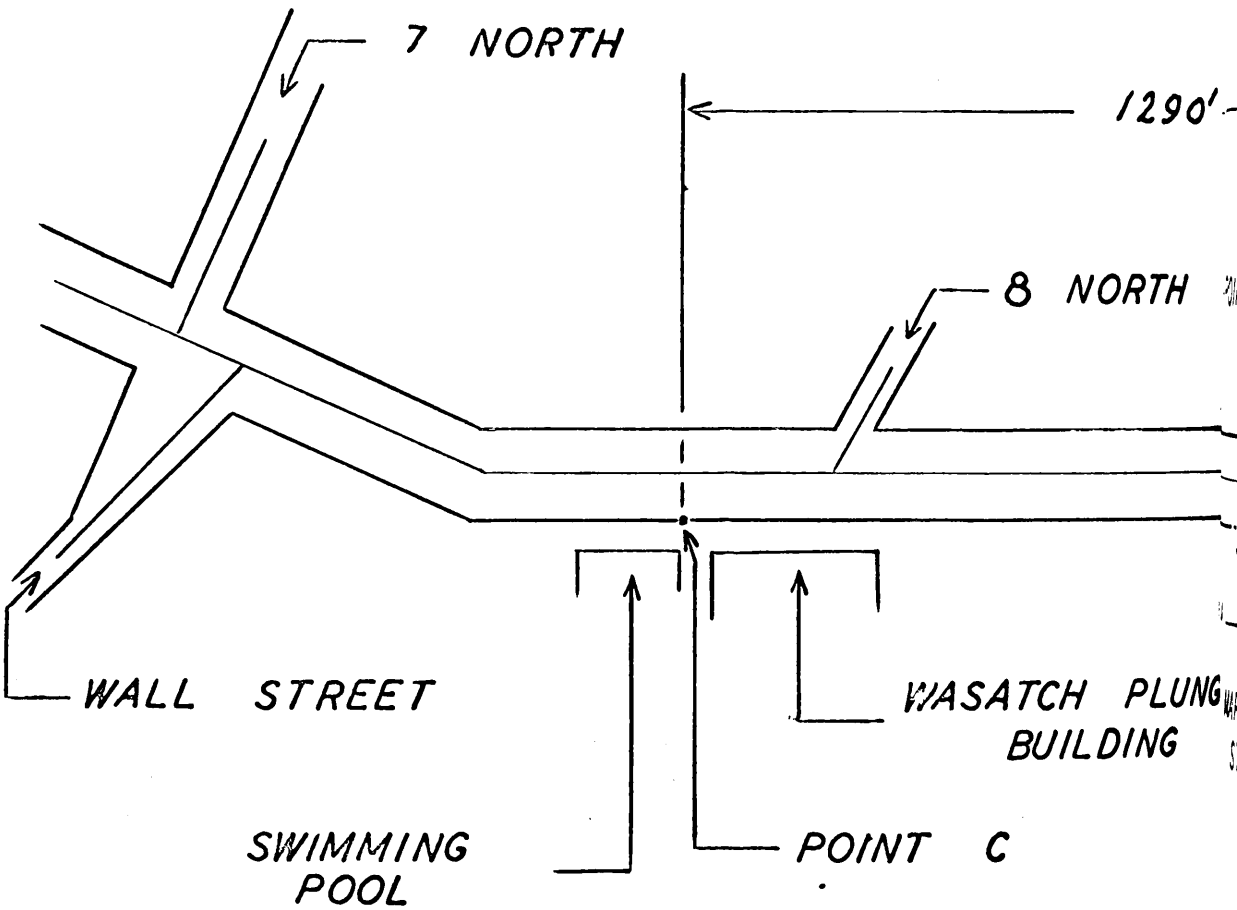
PLAT BECK S

SCALE 1 INCH = 20 FEET

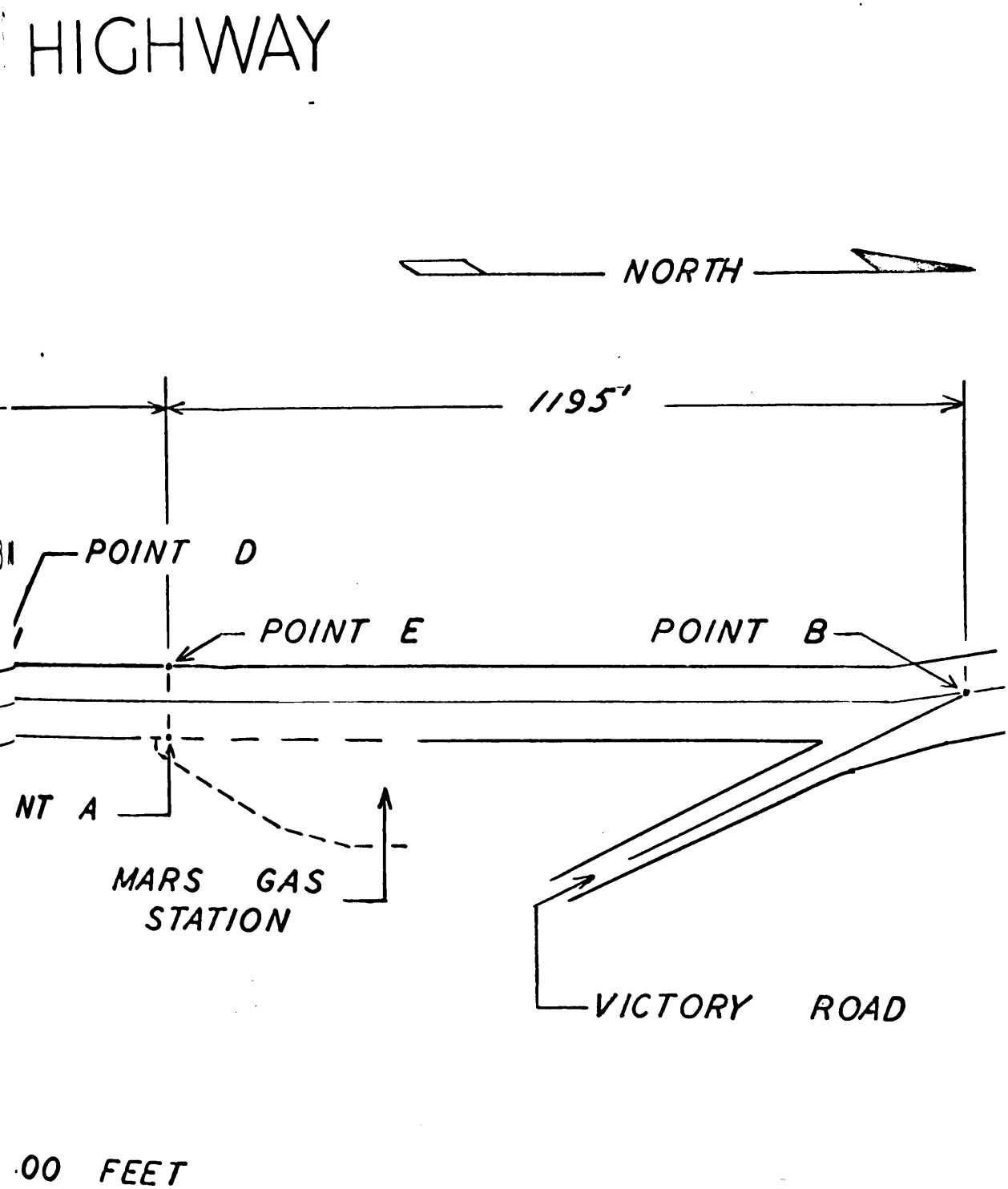


PLAT

BECK STRE



SCALE 1 INC



PLAINTIFF'S EXHIBIT 1