

1965

# Phillip Roy Smith v. Ignacio Theodore Gallegos et al : Brief of Respondents

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.

Hanson & Garrett; Attorneys for Defendants and Appellants;

Hanson & Baldwin; Attorneys for Defendants and Respondents;

---

## Recommended Citation

Brief of Respondent, *Smith v. Gallegos*, No. 10226 (Utah Supreme Court, 1965).

[https://digitalcommons.law.byu.edu/uofu\\_sc1/4713](https://digitalcommons.law.byu.edu/uofu_sc1/4713)

This Brief of Respondent 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).

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

PHILLIP ROY SMITH, an infant,  
by Andrew J. Smith, his  
Guardian Ad Litem,  
*Plaintiff,*

vs.

IGNACIO THEODORE GALLEGOS  
and WASATCH CONSTRUCTION  
COMPANY,

*Defendants, Third  
Party Plaintiffs and  
Appellants,*

Case No. 10226

WILLIAM JEWELL JONES and  
MILWHITE MUD SALES COMPANY,  
a corporation

*Defendants, Third  
Party Defendants and  
Respondents.*

---

## RESPONDENTS' BRIEF

---

Appeal from the Third District Court for  
Salt Lake County Honorable Ray Van Cott, Jr., Judge

HANSON & BALDWIN

Kearn Building  
Salt Lake City, Utah

*Attorneys for Defendants,  
Third Party Defendants and Respondents*

HANSON & GARRETT

Continental Bank Building  
Salt Lake City, Utah

*Attorneys for Defendants  
Third Party Plaintiffs and Appellants*

---

# CONTENTS

	Page
STATEMENT OF THE KIND OF CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
ARGUMENT .....	7
POINT I. THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO DIRECT A VER- DICT AGAINST RESPONDENT .....	7
CONCLUSION .....	20

## AUTHORITIES CITED

8 Am. Jur. 2d, <i>Automobiles and Highway Traffic</i> § 736 .....	16
---	----

## CASES CITED

Bates v. Burns, 3 Utah 2d 180, 281 P.2d 209 (1955) .....	10, 17
Cederloff v. Whited, 110 Utah 45, 169 P.2d 777 (1946) .....	13
Coombs v. Perry, 2 Utah 2d 381, 275 P.2d 680 (1954) .....	7
Covington v. Carpenter, 4 Utah 2d 378, 294 P.2d 788 (1956) .....	16
French v. Utah Oil Refining Co., 117 Utah 406, 216 P.2d 1002 (1950) .....	13
Hardman v. Thurman, 121 Utah 143, 239 P.2d 215 (1951) ....	13, 17
Jensen v. Dolen, 12 Utah 2d 404, 367 P.2d 191 (1962) .....	8
Kronish v. Provasoli, 179 A.2d 823 (Conn. 1962) .....	9, 10
Martin v. Stevens, 121 Utah 484, 243 P.2d 747 (1952) .....	10
Morrison v. Perry, 104 Utah 151, 140 P.2d 772 .....	16
Mulbach v. Hertig, 15 Utah 2d 121, 388 P.2d 414 (1964) .....	8
Richards v. Anderson, 9 Utah 2d 17, 337 P.2d 59 (1959) .....	11
Spackman v. Carson, 117 Utah 390, 216 P.2d 640 .....	16
Toomer's Estate v. Union Pacific R.R. Co., 121 Utah 37, 239 P.2d 163 .....	8
Walker v. Peterson, 3 Utah 2d 54, 278 P.2d 291 (1954) .....	12

## STATUTES CITED

41-6-73, U.C.A., 1953 .....	8
Laws of Utah 1961, Ch. 86 § 1 .....	8

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

PHILLIP ROY SMITH, an infant,  
by Andrew J. Smith, his  
Guardian Ad Litem, *Plaintiff,*

vs.

IGNACIO THEODORE GALLEGOS  
and WASATCH CONSTRUCTION  
COMPANY,

*Defendants, Third  
Party Plaintiffs and  
Appellants,*

Case No. 10226

WILLIAM JEWELL JONES and  
MILWHITE MUD SALES COMPANY,  
a corporation

*Defendants, Third  
Party Defendants and  
Respondents.*

---

## RESPONDENTS' BRIEF

---

### STATEMENT OF KIND OF CASE

The appellants appeal from a jury verdict finding them liable for damages and injuries sustained by the respondent William Jewel Jones arising out of a collision at the intersection of 3500 South and Redwood Road, Salt Lake County, Utah.

### DISPOSITION IN LOWER COURT

The respondent accepts the statement in the appellants' brief as to the disposition in the trial court.

## RELIEF SOUGHT ON APPEAL

The respondent submits that the jury's verdict in his favor should be affirmed.

## STATEMENT OF FACTS

Respondents submit the following statement of facts as being more in accord with the principle of law that on appeal the facts will be reviewed in a light most favorable to the jury's verdict and in fact a more accurate statement of what actually occurred. The instant action was filed by Phillip Roy Smith against both the appellants and respondents and Milwhite Mud Sales Company for injuries Smith allegedly sustained as a result of a collision between the vehicle operated by the appellant Ignacio Theodore Gallegos and owned by Wasatch Construction Company and a vehicle owned and operated by the respondent William J. Jones. Subsequent to the filing of the action, the claim of Phillip R. Smith was dismissed. Gallegos and Wasatch Construction Company, the appellants, had cross-claimed against William J. Jones who in turn had cross-claimed for damages to his truck and injuries to his person. These latter claims were the subject of the trial which resulted in a verdict for the respondent in the sum of \$9,661.46 from which the appellants appeal.

The collision which is the subject of the instant action occurred on the 7th day of September, 1961 at 8:30 p.m. at the intersection of 3500 South and Redwood Road, Salt Lake County (R. 247). Redwood Road on the north side of 3500 South is a four lane highway with two lanes running each way. On the north side of Redwood Road, there is a collection lane for vehicles turning left. There was a signal semaphore at the time of the accident at the intersection

with three operating colors — red, green and caution (R. 259). The speed limit on Redwood Road is 40 m.p.h. (R. 264). At the time of the accident there was no collection lane for vehicles south of 3500 South (R. 265, 276). North of 3500 South, Redwood Road widens and is narrower south of the intersection. On the 7th day of September, 1961, Theodore Gallegos, an employee of Wasatch Construction Company, was hauling dirt from an area south of 3500 South Redwood Road to Rose Park (R. 304). He was paid on the basis of the number of trips he made (R. 311). William J. Jones had picked up a load of barite and was hauling the load south on Redwood Road (T. 333). Mr. Jones' vehicle consisted of a truck and trailer combination loaded with 25 tons of material. The truck weighed 26,000 pounds alone (T. 333). Wasatch Construction Company's truck, operated by Gallegos, was loaded with 21 tons of dirt (R. 309).

At approximately 8:30 p.m., the truck operated by Gallegos approached the intersection of 3500 South traveling 30 to 40 m.p.h. (T. 294, 306). As he approached the intersection, the light was red and at a point approximately 200 to 300 feet from the intersection turned green (R. 307). According to Gallegos, he had been following an old Pontiac which at the intersection pulled over to make a left turn (T. 296, 306). Jones had heretofore approached the intersection at 3500 South, pulled into the left turn lane and signaled to make a left turn east onto 3500 South (T. 332, 335). As he was stopped at the light, he noticed cars lined up across the intersection headed north on Redwood Road and in the left hand lane facing north (T. 336). Gallegos testified that he saw no such vehicles (T. 312). However, Marcus F. Richardson, who was parked on the east side of the intersection of 3500 South and Redwood Road, testi-

fied there were four vehicles on the south side of the intersection on Redwood Road waiting to turn left and west onto 3500 South (T. 322).

Jones testified that as the light changed, there was no oncoming traffic and vehicles across the road started to turn west. He pulled onto the intersection to turn east and saw no obstructions to his making a left turn onto 3500 South. He testified:

“A. Well, when the light changed to green the car that was sitting at an angle started to make a turn to the west, this was the left hand turn for it and I checked and everything was clear as far as I could see. I started my left hand turn and I glanced back in my mirror, my rear view mirror on the left to check my trailer to see if it was clearing the island in the center and at that time I was pretty well in my turn. I was pretty well across Redwood Road into the other road going east, that would be 3500. And when I looked back why those lights to the extreme east of the road, to my south, was bearing down on me.”

The Wasatch Construction Company truck, traveling at a high rate of speed (Exhibit 23), struck the Jones vehicle on the right hand side of the cab door knocking the vehicle 7 to 8 feet to the north and east (T. 268, Exhibit 10) and knocking Mr. Smith, who was a passenger in the Jones vehicle, into the street. The appellant's vehicle then continued to the east where it collided with three other vehicles on 3500 South.

Mr. Marcus Richardson, a Superintendent at Hercules Powder Company (T. 319), was waiting at the intersection of 3500 South Redwood Road facing west. He observed Gallegos' vehicle at 175 to 200 feet south of the inter-



section. He stated that he heard a blast on an air horn and when he looked, Jones had started his left turn because there was no other traffic on the outside lane going north (T. 319). He stated that the Gallegos vehicle pulled out to the right of the vehicles waiting to make a left turn west onto 3500 South and passed these vehicles and entered the intersection. He estimated that the Gallegos vehicle was going 40 to 45 m.p.h. when it entered the intersection (T. 319). He stated that the engine was roaring as if it was under power and that he felt there was no reduction in speed up to the time of impact (T. 319– 320). He testified definitely that at the time he first observed the Gallegos vehicle that it was not in the outside lane but that it pulled into the outside lane and passed stopped cars as it entered the intersection (T. 325). Mr. Gene Matthews, a witness who was called by the appellants, testified that he was waiting for the light on 3500 South facing east; that he saw the Jones vehicle parked on the inner left hand lane. He testified: (R-290)

“A. As he was observed I was just sitting waiting for the light and I said to my wife, “Why don’t that light change?” I figured, there was no traffic coming, and I figured he should make a turn and I looked up and it looked to me like it changed to yellow and this car in front of me made the turn and about the same time Mr. Jones started his turn.

“Q. Which way was he turning?

“A. He was turning to the east off of Redwood Road. And about that time my wife said—there is going to be an accident—and I heard the truck that Mr. Gallegos was driving, being a diesel, I heard him pick up like they was going to make the light. \* \* \*



There were no skid marks from the Gallegos vehicle at the intersection (T. 278). The appellant Gallegos testified that it was doubtful if you could skid a vehicle with a 21 ton load (T. 309). The respondent Jones who had had long experience as a truck driver (T. 329), testified that applying brakes on a heavily loaded truck will cause the wheels to lock and cause the wheels to slide (T. 330).

The testimony of appellant Gallegos was that as he approached the intersection, he remained in the same lane that he had been traveling (T. 306–307). He had been following an old Pontiac which pulled over for a left hand turn (T. 306). As the light turned green, he saw the Jones vehicle in the left hand turn lane (T. 307). When he first saw the vehicle, it was moving slow to turn to the left (T. 307). He testified he was approximately 150 feet from the vehicle, traveling 15 to 20 m.p.h. (T. 308). He stated he stepped on the brakes, blew the horn and turned to the right to avoid the accident (T. 308). He was unable to avoid the accident and his left bumper collided with the Jones vehicle.

The appellants offered in evidence Exhibit 23 which was a statement not in the handwriting of the respondent, but the statement was signed by him (T. 341, 342). The respondent did not recall giving the statement (T. 341) or making statements to police as were contained in the statement (T. 341–345).

Based upon the above evidence, the jury returned a verdict for respondent.

## ARGUMENT

## POINT I

THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO DIRECT A VERDICT AGAINST RESPONDENT.

The appellants' sole contention on appeal is that the trial court erred in not ruling that the respondent was contributorily negligent as a matter of law. The trial court denied the appellants' request for such a ruling and submitted the issue of the negligence of appellants and respondent to the jury.

In *Coombs v. Perry*, 2 Utah 2d 381, 275 P.2d 680 (1954), this Court observed with reference to the rule regarding its review of a trial court's decision to submit a matter of fact to the jury's determination, and the subsequent verdict:

"The basis of defendant's appeal is that the evidence so conclusively supports his views as to these two points that the court was required to so rule as a matter of law and should not have submitted the matter to the jury. The plaintiff having won a judgment below, the verdict is protected by a bulwark of rules firmly established in our law. First, by the general proposition that the judgment and proceedings in the lower court are presumptively correct with the burden upon defendant to show error. Second, where a trial judge has passed upon a question and a jury, presumably fair and impartial, has made a finding, while such is not controlling, it is at least entitled to some consideration and should not be wholly ignored in reviewing the situation and attempting to see, as objectively as possible, whether reasonable minds might so conclude. Third, that the court must review the evidence, together with every inference fairly arising therefrom, in the light most favorable to the plaintiff, and similarly, must consider any lack or failure of evidence in the same light, which we do in reviewing the facts here."

It has long been the rule in this state that a decision of a trial court in refusing to rule that a party was negligent as a matter of law will not be disturbed on appeal, unless, under the facts taken in a light most favorable to the trial court's determination, it appears no reasonable man could but conclude otherwise. *Jensen v. Dolen*, 12 Utah 2d 404, 367 P.2d 191 (1962) ; *Mulbach v. Hertig*, 15 Utah 2d 121, 388 P.2d 414 (1964) ; *Toomer's Estate v. Union Pacific R.R. Co.*, 121 Utah 37, 239 P.2d 163.

It is submitted that when the evidence is viewed in light of the above rules it is manifestly clear that the trial court's decision and the verdict of the jury are not contrary to law.

The appellants contend that in two ways the evidence as a matter of law demands a finding of the respondent's negligence. First, it is contended the respondent was negligent as a matter of law in failing to yield the right of way. Second, it is contended the respondent failed to keep a proper lookout.

As to the appellants' contention that respondent was negligent in failing to yield the right of way reliance is placed on 41-6-73, U.C.A., 1953 (Laws of Utah 1961, Ch. 86, § 1). This statute provides:

“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, during the time when such driver is moving within the intersection.”

It is submitted this provision makes very little change over the previous provision. A vehicle making a left turn need only yield the right of way to an approaching vehicle if (1) the approaching vehicle has entered the intersection

or (2) is so close as to constitute an immediate hazard. In *Kronish v. Provasoli*, 179 A.2d 823 (Conn., 1962), the Connecticut Supreme Court stated with reference to the same statute and in holding the plaintiff who was making a left turn not to have been contributorily negligent as a matter of law:

“If, however, the defendant’s approaching car was neither within the intersection nor so close thereto as to constitute an immediate hazard, and the plaintiff’s car was within the intersection, the plaintiff would have the right of way to make a left turn . . .”

The facts in the instant case when viewed in a light most favorable to the jury’s verdict show that the question of negligence was properly a question for the triers of fact.

The respondent approached the intersection at Redwood Road and 3500 South from the north. He stopped his vehicle at the red light and was in the far left hand collection lane. He had his left turn signals in operation (R. 333) as well as his lights on (R. 334). As the light changed, according to Jones, “I checked and everything was clear as far as I could see” (R. 336). He started his left turn. According to Mr. Marcus Richardson, “Mr. Jones’ vehicle had started his left turn because there was no other traffic on the outside lane going north” (R. 319). Even the appellants’ own witness, Mr. Gene Matthews, testified that the intersection appeared clear, and the appellant’s vehicle picked up speed like it was trying to clear the intersection before the light changed (R. 290). According to Jones, when he entered the intersection, the only vehicles were those directly south lined up to make left turns west onto 3500 South. This was corroborated by the other witnesses. Further, the point of impact on the diagram shows that the

Jones vehicle was well across both opposite lanes of traffic and that the collision occurred almost on a line with the edge of the road of the southeast side of Redwood Road. The appellant Gallegos' testimony was that when the light at the intersection turned from red to green he was some 200 to 250 feet from the intersection (R. 307). This was the time Jones said he started to make his turn. Gallegos was 150 feet from the intersection when he observed the respondent who was making a left turn (R. 308). Clearly, therefore, the evidence supports a view that at the time the respondent started to make his left turn, the intersection was free of any vehicle that could be called an "immediate hazard." Further, according to both Mr. Matthews and Mr. Marcus Richardson, the appellant Gallegos seemed to accelerate into the intersection under power. Mr. Richardson testified that the appellant's vehicle was in the left hand lane behind several cars, and that it pulled out behind the cars to the right, was under full power, 40 to 45 m.p.h., bearing down on the intersection. The jury could well conclude that Jones entered the intersection without there being any immediate hazard but because the appellant pulled into another lane, passed vehicles and approached at a high rate of speed, the sole negligence and proximate cause of the accident was the appellant's.

It is well settled that a motorist who enters an intersection to make a left turn prior to another vehicle and under circumstances that do not manifest an immediate hazard has the right of way and subsequent approaching vehicles must yield. *Martin v. Stevens*, 121 Utah 484, 243 P.2d 747 (1952); *Kronish v. Provasoli*, 179 A.2d 823 (Conn., 1962); *Bates v. Burns*, 3 Utah 2d 180, 281 P.2d 209 (1955). In the latter case, this Court observed:

“Plaintiff not only entered the intersection first, he had nearly passed over it before defendant entered. Plaintiff was the disfavored driver until he had entered the intersection at a time when no car traveling the through highway had entered the intersection or was approaching so closely on said through highway 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.”

In *Richards v. Anderson*, 9 Utah 2d 17, 337 P.2d 59 (1959), this Court observed:

“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.”



Clearly, the facts presented in the instant case raised issues that could only be resolved by the jury. The facts clearly will support a finding that the appellant's vehicle pulled out of its regular lane of traffic after the respondent had entered the intersection and commenced his turn, and thereafter proceeded at a high rate of speed into the intersection. Further, since there were no skid marks and respondent testified that a vehicle such as appellant's could be skidded, it may be inferred that no effort to brake was made. In *Walker v. Peterson*, 3 Utah 2d 54, 278 P.2d 291 (1954), this Court was faced with a claim similar to that now before the Court. It observed:

“The driver going straight through the intersection does have the right of way. This means that where the circumstances are such that if the two continued their course there would be danger of collision, the left turner must give way. It is recognized that right of way, based on direction of travel, is the best and most easily applied rule as to driver preference at intersections. But in the very nature of things, it cannot be absolute. If it were, in any situation where there was considerable traffic, it would be a practical impossibility to safely make a left turn, no matter how long one waited, nor with what care he proceeded; the driver proceeding directly through would have complete license to commit any kind of negligence and claim the right of way under all circumstances, regardless of speed, lookout, distance away when he observed the left turner, and notwithstanding his own lack of care, always lay the responsibility upon the person making the left turn. It is so plain as to hardly warrant expression that one cannot, consistent with reason and justice, determine beforehand that in every case involving such an intersection collision, the driver making the left turn is solely responsible for the mishap. As in all cases of collision, both drivers are re-



quired to exercise that degree of care which a reasonably prudent person under the circumstances would exercise for his own and others' safety, and where the failure of a party to meet this standard is a contributing cause of the accident, no relief can be had on his behalf. Under the circumstances here, where the defendant was in the intersection substantially ahead of plaintiff in time, and was making the left turn when the plaintiff was far enough away that ordinary reasonable care would require that he not insist upon claiming the right of way, plaintiff cannot race on into the intersection and rely on it to exculpate himself from wrong."

The appellants cite *Cederloff v. Whited*, 110 Utah 45, 169 P.2d 777 (1946) and *French v. Utah Oil Refining Co.*, 117 Utah 406, 216 P.2d 1002 (1950) for the proposition that the respondent was negligent as a matter of law. The facts in both those cases are materially different than those in the instant case. The facts in this case when viewed most favorably to the jury's verdict are substantially at variance with the facts of the above mentioned cases. It is submitted that this case is more within the rule of *Hardman v. Thurman*, 121 Utah 143, 239 P.2d 215 (1951) where the facts closely parallel the claims of the respondent in this case. There, the Court observed that the *French* and *Cederloff* cases were not applicable and stated:

"In the instant case, the jury might reasonably conclude that when the tanker truck stopped in the first lane east of the center of State Street and another motor vehicle stopped in the second lane, Mrs. Hardman was in the exercise of reasonable care in assuming that it was safe to proceed eastwardly. In view of the street plan at the intersection, it might reasonably be found that it was not unreasonable for her to not expect any through

traffic on lane 3 in which defendants' vehicle was proceeding, since there are only two lanes for north bound traffic north of the intersection. She proceeded cautiously, and while she was crossing the first two traffic lanes she might well have been unable to see the defendants' vehicle since it would have been some distance south of the intersection when she first started to turn. Facing headlights of the two vehicles which were stopped to permit her to turn safely to the left she might not have been able to see the top of the trailer-truck 13 feet above the pavement. Under the circumstances, the jury could reasonably find that she exercised due care. The evidence was such as to warrant a finding that she and not the defendants' driver had the right of way.

"The evidence was such as to require submission of the case to the jury, consequently the court did not err in denying the motion for the directed verdict."

It is submitted therefore that there is no basis for the appellants' claim that respondent was contributorily negligent as a matter of law in failing to yield the right of way.

The jury was instructed on the right of way issue, no exceptions were taken by the appellants and the jury determined the facts against the appellants. That verdict should stand.

The appellants contend that the respondent was negligent as a matter of law in failing to keep a proper lookout. The record reflects that the jury was full instructed and advised on that issue. They apparently felt that (1) the respondent maintained an adequate lookout under the circumstances, and/or (2) that any failure to maintain an adequate lookout was not the proximate cause of the accident.

The major basis for the appellants' position is the testimony of the respondent (R. 336-337) to the effect that as he started his turn, and after checking to see everything "was clear," he thereafter "glanced back" in his mirror to check to see if his trailer was clearing the island. When he looked back, the appellant's vehicle was "bearing down." The appellants further contend that the respondent's statement made to the police that he thought he had a green turn light with him supports their contention. The respondent denied making such a statement, and the statement was not in his handwriting. The jury might well believe the respondent's testimony that he did not so state, nor did he misunderstand the semaphore. Therefore, this allegation of the appellants could have been properly disregarded by the jury, and therefore in viewing the facts most favorable to the respondent, the appellants may only rely upon the respondent's testimony.

The facts concerning the accident clearly reveal that the jury was properly allowed to decide the matter. When the respondent was starting his turn the appellant's vehicle was far down the road behind several other cars. The respondent's view of both approaching lanes would show no danger. The respondent merely "glanced backward." This would be a reasonable and prudent action, since if the trailer did not clear the island, the vehicle would be a serious hazard to oncoming traffic. The respondent then looked forward, and appellant's vehicle had moved out of the lane it was in and was speeding forward possibly to make the light. Nothing the respondent could have done would have prevented the accident for the sole and proximate cause was the speed and action of the appellant's vehicle. The respondent had a right to rely upon nonfavored drivers slowing down at the intersection and yielding the right of way. 8 Am. Jur. 2d,

*Automobiles and Highway Traffic*, § 736. Generally, the question of whether a proper lookout was maintained under the circumstances is a jury question. In *Covington v. Carpenter*, 4 Utah 2d 378, 294 P.2d 788 (1956), this Court observed on the lookout question:

“Rarely do two motor vehicles collide without a claim and counterclaim by the drivers that failure to keep a proper lookout has at least contributed to cause the misfortune. As a consequence this court has many times considered the duty of a driver to keep such lookout under varying circumstances and conditions. Modern traffic complexities make it impossible to lay down by judicial rule what will always be, or fail to be, reasonable care in the operation of motor vehicles. The duty to keep a proper lookout is manifest but the obedience to or violation of that duty must be determined according to particular circumstances and in full accord with the constantly varying exigencies occasioning each accident. As to what constitutes a proper lookout is usually, therefore, a latter-day classic question for jury determination, and each trial and appellate court must determine the question as a matter of law only when convinced that reasonable persons could not disagree upon the question when conscientiously applying fact to law.”

See also *Spackman v. Carson*, 117 Utah 390, 216 P.2d 640; *Morrison v. Perry*, 104 Utah 151, 140 P.2d 772.

Certainly the facts in this case raise a jury question. The jury might well have decided that the appellant's speed and operation of his vehicle was the sole proximate cause. That in view of the way appellant's vehicle pulled out of the lane it was in, over into the far hand lane which was narrow and approached at a high rate of speed, that any momentary glance by the respondent was of little concern, see

*Hardman v. Thurman*, supra, and that the proximate cause of the collision was appellant's speed. A similar situation existed in *Bates v. Burns*, 3 Utah 2d 180, 281 P.2d 209 (1955) where in an excellent opinion by Justice Worthen, this Court observed:

"There is no question that plaintiff, under the most favorable evidence, was careful and free from negligence as he began to move from the stop sign. It is urged that plaintiff was looking west and continued to do so as he entered the intersection when he should have been looking for traffic from the east. But until plaintiff reached the center of the intersection he was concerned only with traffic coming from the west.

"The evidence discloses that plaintiff looked to the east when he was about 10 feet north of the center line — at that time defendant was about 150 feet east of the point of impact."

\* \* \*

"To say that a person is negligent as a matter of law for traveling across a through highway at 5 or 6 miles an hour is to say that many people with truck, tractor, farm equipment and wagon have no rights, and cross such highway at their risk.

"We are not ready to say that as a matter of law plaintiff was guilty of negligence in traversing said intersection at that speed. It was a proper question to be answered by the jury under proper instructions. The jury answered it in the negative.

"Let it be assumed that the plaintiff was negligent in not looking as he crossed over the center line and into the northbound lanes of traffic, still, that negligence, if any, was not shown to be the proximate cause or a proximately contributory cause of the collision. Plaintiff's position and defendant's position were still as safe at the time plaintiff crossed the center line and until

he was 10 feet beyond as if he had diligently surveyed the highway.

“Had plaintiff looked just prior to, or at the time of, crossing the center line, defendant’s position would not have alerted plaintiff to any danger — then defendant would have been further away from the intersection than at the time he did look. Had plaintiff looked it would not have affected defendant’s driving or speed. Defendant testified that he never saw plaintiff till defendant was within 100 feet of the intersection. Unless plaintiff had been able to cast some hypnotic spell over defendant his looking earlier would have had no effect on the collision.

“It is suggested that if plaintiff had looked before he crossed the center line he could have stopped or speeded up or turned to the left. However, had plaintiff looked as he was about to start across the center line, there would have been nothing to alert plaintiff to any danger or occasion for a changed course. Defendant was then still further away. Any sense of danger would have been less then, than 2 seconds later. He had the right of way. He was in the intersection while defendant was from 200 to 300 feet away. Plaintiff would not have been called upon to do anything different to protect himself or defendant.

“How then is the situation when plaintiff (10 feet over into the northbound traffic lanes) sees defendant in a 40 mile zone 150 feet away? What did plaintiff do then that he should not have done or what did he fail to do that he should have done?

“Plaintiff testified that he speeded up a little. That would seem to have been prudent. His pick-up truck pretty well obstructed the inside lane of the northbound road. Had he stopped then as quickly as possible, his truck would have pretty well obstructed the highway. Had plaintiff’s truck been so stopped it

would have required defendant to go off the highway on the north side or to cut in behind the pick-up and cross over onto the southbound lanes of traffic.

“We believe the question of plaintiff’s contributory negligence was a jury question which they resolved in plaintiff’s favor. We are likewise satisfied that they correctly found that issue in favor of plaintiff.”

It is submitted the trial court acted properly in leaving the matter to the jury under proper instructions.

The appellants’ claim of error has no basis in law.



## CONCLUSION

The facts of the instant case show that the appellants' contention that the trial court should have directed a verdict in favor of appellants as a matter of law is without merit. The evidence discloses that the facts that had been found by the jury would justify the jury's verdict. The instant situation is one where viewing the facts in a light most favorable to the trial court's decision, it would appear that the appellant's vehicle traveling at a high rate of speed, in apparent effort to make the light at the intersection, and with the pressure of additional money for additional trips, was responsible for the collision. The legal principles relied on by the appellants when viewed against the facts discloses that they are not entitled to relief on appeal. The jury had the chance to view the witnesses, to examine the exhibits and photographs, to determine the candor of the witnesses and concluded that judgment should be awarded to respondent. The trial court, having heard the evidence first hand, determined that there was a jury question. The record on appeal does not demonstrate that these nine reasonable minds were completely unreasonable.

This Court should affirm.

Respectfully submitted,

HANSON & BALDWIN

*Attorneys for Defendants,  
Third Party Defendants  
and Respondents*