1965

# Vernon J. Smith v. Wilmer Lee Barnett : Appellant's Brief

# In the Supreme Court of the State of Utah

VERNON J. SMITH,
Plaintiff and Appellant,

vs.

WILMER LEE BARNETT,
Defendant and Respondent.

## APPELLANT'S

Appeal from Judgment of the
Salt Lake County,
The Honorable

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**CASE NO. 10320**

## APPELLANT'S BRIEF

### STATEMENT OF NATURE OF CASE

Plaintiff seeks to recover damages for personal injuries sustained by him when he was walking south on State Street crossing Rainbow Drive in Murray, Utah, from the sidewalk on the north side of Rainbow Drive to the sidewalk on the south side of Rainbow Drive and was struck by defendant's car which was making a left turn to the east from State Street onto Rainbow Drive.

### DISPOSITION IN LOWER COURT

The case was tried to a jury which returned a verdict of no cause of action in favor of the defendant and against

the plaintiff, upon which a judgment of no cause of action was entered.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks an order remanding the case to the trial court for a new trial.

## STATEMENT OF FACTS

Plaintiff brought action against the defendant to recover damages sustained in an auto-pedestrian accident that occurred where Rainbow Drive intersects State Street in Murray, Utah, on December 29, 1962, at approximately 6:15 p. m. State Street at Rainbow Drive is a six lane highway and includes a left turn lane for south-bound traffic at Rainbow Drive. Rainbow Drive terminates at State Street. There is a sidewalk on the east side of State Street, both north and south of Rainbow Drive, which sidewalk is 12 feet 5 inches from the curb to the Montek Building, which building is situated on the south side of Rainbow Drive and the east side of State Street (R. 118). From the east curb on State Street to the first painted line for the east lane of north-bound traffic, and which includes a parking lane, is 20 feet 7 inches (R. 117). The inside lane is 11 feet 5 inches and the westerly most lane for north-bound traffic is 10 feet 11 inches to the center island (R. 117). From the southerly most point of the left turn island to the east edge of the sidewalk area entering Rainbow Drive is 86 feet 6 inches (R. 117). Rainbow Drive from curb to curb, excluding sidewalk, is 34 feet 8 inches (R. 116, 117). There is a street light approximately 100 feet south of Rainbow Drive on the east side of State

Street, a street light approximately 100 feet north of Rainbow Drive on State Street and a street light directly across State Street from Rainbow Drive on the west side of State Street approximately 100 feet (R. 115), (Exhibit 7P).

The plaintiff approached Rainbow Drive walking south on the east side of State Street (R. 194). When he arrived at Rainbow Drive he stopped, looked east on Rainbow Drive, looked for traffic coming north on State Street and looked to his right to see if any vehicles were in the left turn lane for south-bound traffic. There was no traffic in the left turn lane (R. 195). There was traffic moving north on State Street (R. 195). Plaintiff proceeded to walk across Rainbow Drive from the sidewalk on the north to the sidewalk on the south (R. 196, 197). Plaintiff traveled 24 feet 8 inches from the north curb of Rainbow Drive, or 2/3 of the way across Rainbow Drive (R. 196), when he was struck by defendant's vehicle (R. 116). The impact occurred 10 feet 11 inches from the south curb of Rainbow Drive (R. 115). Plaintiff saw defendant's car lights on him just prior to the impact. Plaintiff cried out to stop and attempted to get out of the way but could not (R. 196). Plaintiff was struck near the center of defendant's car toward the right side, denting the hood of defendant's car (R. 119) and knocking defendant a distance of 20 feet 7 inches (R. 116, 197) directly in front of defendant's car (R. 113).

The road surface was dry and it was dark (R. 119).

Defendant did not see the plaintiff until the impact, at which time he saw plaintiff go in the air (R. 120, 271, 276). Defendant could see the sidewalk area from the left turn lane, but he did not see the plaintiff crossing Rainbow Drive

(R. 279). Defendant turned left in front of a north-bound oncoming vehicle (R. 275, 280).

Plaintiff suffered a large hematoma over his lumbar area, an egg-like lump on the back of his head, large abrasion over his buttocks with discoloration (R. 135) black and blue spots over his legs and his sides (R. 141) resulting in a subdural hydroma (R. 161) and ruptured discs in his neck that required fussion (R. 173).

Trial of the case was conducted Thursday, December 10, and Friday, December 11, 1965. Court was in recess over the weekend, December 12 and 13, 1965, and reconvened Monday, December 14, 1965, for instructing the jury, argument, and submission to the jury. During the weekend recess, one juror, Carl B. Fuller, visited the scene of the accident, stopped in the left turn lane, turned left onto Rainbow Drive, and made tests concerning his speed (R. 97). The tests made by Fuller and his visitation of the scene of the accident were discussed by Fuller in the jury room (R. 96, 95, 94) and influenced Fuller's verdict.

## STATEMENT OF POINTS

### POINT 1

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### POINT 2

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POINT 6

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## ARGUMENT

POINT 1

THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL BASED ON JURY MISCONDUCT.

There is no question but what there was misconduct on the part of the jury by juror Fuller making an unauthorized inspection of the premises and making tests concrening speed while he was at the premises and discussing the results of his inspection and tests in the jury room. The question here involved is whether the trial court abused its discretion in failing to grant a new trial.

The law generally is stated in Jones on Evidence, 5th Edition, Section 462, page 874, as follows:

"A proposition that a juror or individual jurors have no right to investigate or acquire information relating to the case outside of that which is presented to them in the course of the trial in accordance with regular trial procedure, is too elementary to require discussion. Similarly it is improper conduct on the part of the jury to view the locus in quo or to make an experiment which has a bearing on the issue of the case; they may not thus gain knowledge concerning matters in dispute except under the supervision of the court.

* * *

Misconduct of this character on the part of the jury furnishes grounds for a new trial * * *"

In the Oregon case of Schneider vs. Moe, 50 P 2d 577 one of the jurors without the consent of the court and without the knowledge of either the Plaintiff or the Defendant went to the scene of the accident to determine whether a witness standing at the place testified to could have seen the accident. The Oregon Court stated at page 579:

"We think that when the action of this juror had been disclosed to the trial court by the uncontradicted affidavits filed in support of the motion for a new trial and no explanation or denial of this unwarranted conduct upon the part of one of the jurors had been made, the motion should have been granted, and its refusal by the trial court was an abuse of discretion."

The Oregon Court goes on to quote from other jurisdictions, and particularly quotes Woodbury vs. City of Anoka, 52 Minn. 329, 54 N. W. 187, where two jurors had visited the scene of the accident. The court said:

"There can be no question that what was done by the two jurors may have had an influence on their minds unfavorable to the plaintiff. It is manifest, from their making the examination, that they thought that by making it they could learn something proper for them to consider in coming to a verdict. Perhaps they thought they could determine from it whether the witnesses for Plaintiff, testifying that at the time of and before the injury the sidewalk was in general bad condition, or the witnesses for Defendant, testifying to the contrary, were to be believed. It is impossible to say it did not influence their minds against the Plaintiff, and because of their misconduct there must be a new trial."

The Oregon Court further quotes the New York Court, page 580, the case of In re Vanderbilt, 127 App. Div. 408, 111 N.Y.S. 558 as follows:

"We cannot determine with certainty, nor is it necessary that we should, that the acts complained of did influence the verdict. It is sufficient cause for reversal if they are likely to do so."

And further, page 580, the court quotes Luquer vs. Bunnel, (Sup.) 170 N.Y.S. 665, 666, as follows:

"The inspection by certain of the jurors of the place of the accident was without the knowledge of the attorneys herein, and was no doubt made wthout the slightest intention of wrongdoing; but it remains that those of the jury who made the visit had ocular evidence which was denied to their associates. It is important that every possible safeguard should be thrown around the conduct of a trial, to the end that no question can arise as to the fairness thereof."

The Oregon Court goes on to quote from Rhode Is-

land, P. 580, Garcide vs. Land Watch Case Co., 17 RI 691, 24 A. 470, 472:

> "The conduct of the jurors in thus obtaining evidence for themselves which, it may fairly be inferred, affected to a greater or less degree their verdict in the case, is wholly inexcusable and highly reprehensible. They were sworn to give a true verdict in the case, according to the law and the evidence given them. This means, as everybody knows, that the case is to be tried and decided solely upon the law and the evidence as given in the court, or under its immediate direction; and 'to permit them to take into consideration evidence not produced upon the trial, and without the knowledge or consent of either party, is subversive of all rules which govern the admissibility of testimony, and of the right of a fair and impartial trial by jury.' Stewart vs. Burlington & Missouri River R. R. Co., 11 Iowa 62, 64."

The Oregon Court further quotes from Ohio, Losey vs. Creamer, 45 Ohio App. 356, 187 N.E. 197, 198:

> "The situation invokes the rule that where the misconduct may have been prejudicial, and it cannot be ascertained that prejudice did not result, **prejudice will be presumed.** This rule is a salutary one. Verdicts ought not be tainted by wrongdoing where injury may have resulted."

Further, the Oregon Court quotes from Minnesota, page 581, the case of Twaddle vs. Mendenhall, 80 Minn. 177, 83 N.W. 135, 136:

> "It is settled that misconduct of this nature (viewing premises) can be shown by the affidavits of the jurors themselves, an exception to the general rule in respect

to jurors' affidavits. It is also settled in this court that where the gist of the action, as was the case here, is the character or condition of the locus in quo, or where a view of it will enable the jurors the better to determine the credibility of the witnesses, or any other disputed facts in the case, if in such a case the jurors, without the permission of the court or knowledge of the parties, visit the locality for the express purpose of acquiring such information, their verdict will be set aside, unless it is clear that their misconduct could not and did not influence their verdict."

In the case of Middleton vs. Kansas City Public Service Company, (Missouri) 152 S.W. 2nd 154, a jury verdict for $10,000 was returned in favor of the Plaintiff and against the Defendant. There was a showing of misconduct on the part of a juror in that he actively sought out a 1931 Chevrolet automobile to measure the fender. There was no finding by the court that the misconduct shown did not influence the verdict, nor that the Defendant was not prejudiced thereby. The Missouri Court, in reversing the lower court and ordering a new trial, stated as follows, Page 159:

"We think the record in the present case affirmatively shows the trial court did not exercise a sound judicial discretion in ruling the motion. In overruling the motion for a new trial, the trial court did not expressly or by implication determine prejudice or no prejudice to Defendant on account of the proven misconduct of the juror, because the records show the court ruled the motion upon the theory that the burden remained upon Defendant to show that the established misconduct of the juror influenced the verdict, even though the misconduct was established and it was such misconduct that prejudice would be presumed.

Although Defendant made a **prima facie** case of prejudice, the trial court did not rule that no prejudice resulted, but instead based its ruling on the theory that there must also be a showing the misconduct influenced the verdict. The court should have expressly determined the question of prejudice to Defendant or should have ruled the question as to whether or not the misconduct shown influenced the verdict. Since it did not do so, either expressly or by necessary implication, but placed its decision on other grounds, it cannot be said that the order overruling the motion represents the exercise of such a sound judicial discretion that it should not be disturbed on appeal."

The court goes on to state, page 160:

"In this case a verdict for $10,000 signed by juror Tudor as foreman, was returned against the Defendant. The only evidence in the record to overcome the prima facie case of influence and prejudice was the affidavits of the jurors themselves, which affidavits, as we have seen, have little probative value. In addition nine of the affidavits are written in the same form. Defendant was entitled to have its case tried by twelve impartial jurors (Lee vs. Baltimore Hotel Co., 345 Mo. 458, 136 S.W. 2nd 695, 69 8,127 A.L.R. 711); and to have a fair trial upon the evidence produced in court. In this case, the acts and conduct of juror Tudor definitely cast a shadow over the vedict. We cannot say, nor do we believe he could properly say, that his own interest, investigation, and measurements, admittedly made, did not influence his verdict. The affidavits of the other jurors do not say they did not learn of such measurements as made by juror Tudor, but state 'that if any mention was made * * * of measurements * * * not mentioned in evidence such measurements if any were mentioned, were not taken into consideration'.

> We are unable to say from the whole record that the active interest and evident attitude of juror Tudor, and his independent search for and acquisition of facts outside the record did not influence the verdict or that Defendant was not prejudiced by the misconduct of this juror."

In another Oregon case, Wolfe vs. Union Pacfic Railroad Company, 366 P. 2nd 622, the jury returned a verdict for Plaintiff. Defendant moved for a new trial on the grounds one of the jurors had visited the scene of the accident. The court granted the motion, stating as follows, Page 624:

> "It is the rule in this state that an unauthorized inspection of the locus in quo by a juror is ground for setting aside a verdict and granting a new trial unless it is clear that the misconduct could not have influenced the verdict."

In a Colorado case of Butters vs. Dewan, 363 P. 2nd 494, Plaintiff sought damages for the wrongful death of her husband and personal injuries to herself. The case was tried to a jury that returned a verdict of no cause of action. Plaintiff's motion for a new trial based upon jury misconduct was denied. The Colorado Appellate Court reversed the trial court and ordered a new trial. During the course of the trial and without the knowledge of either party or their counsel, one of the jurors made inquiry of the former employer of the deceased concerning the deceased's drinking habits. There was no evidence that the inquiry made influenced the jurors' verdict. The court stated, page 496:

> "It is not the province of the court to speculate, conjecture or determine what or how much effect upon a

verdict the gross misconduct of a juror or jurors may in fact have in a particular case. While a correct determinatoin might be possible in some cases, the inquiry would be impractical and useless in many cases and in all cases contain an element of speculation.

"The proper function of the court is to hear the facts of the alleged misconduct and to determine as a matter of law the effect reasonably calculated to be produced upon the minds of the jury by such misconduct. McClean vs. People, 66 Colo. 486, 180 P. 676.

"The law is well stated in Panko vs. Flintkote Co., 7 N.J. 55, 80 A. 2nd 602, 305, from which case we quote with approval:

'it is well settled that the test for determining whether a new trial will be granted because of the misconduct of jurors or the intrusion of irregular influences is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge. If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. **The test is not whether the irregular matter acually influenced the result, but whether it had the capacity of doing so.** The stringency of this rule is grounded upon the necessity of keeping the administration of justice pure and free from all suspicion of corrupting practices. It is said to be imparatively required to secure verdicts based on proofs taken openly at the trial, free from all danger by extraneous influences' * * *" (Emphasis supplied)

Page 497:

"As was stated in Scott vs. Tubbs, 43 Colo. 221, 95 P. 540, 541, 19 L.R.A., N.S., 733: '* * * * nor should

the court consider whether the verdict was or was not influenced by the petitioner. The conduct complained of is so manifestly improper that there is but one course open * * * .*'

"Trial courts are ever vigilant in seeking to prevent extraneous matters from being presented and possibly influencing the minds of jurors. Jury verdicts must be based upon evidentiary facts properly before the jury for its consideration and determination. To condone this juror's misconduct and to assume that his mind was uninfluenced by the extra-judicial investigation of incompetent, inadmissible matters, finds no sanction in the law. Such conduct deprives plaintiff of the fair and impartial trial to which every litigant under our law is entitled."

Plaintiff adopts the sound reasoning of the courts herein quoted. Plaintiff strongly feels that he was deprived of a fair and impartial trial due to the misconduct of the juror. The juror himself in his affidavit states that his inspection and test could have influenced his verdict. The test was made under conditions dissimilar to that existing in the case. The juror stated in making the test that he came to a stop, then made the turn, whereas the testimony in the case was that the Defendant merely slowed down, rather than stopped. There is no evidence as to the type of vehicle used by the juror in making the test, and as to whether it was daylight or dark; or how the accelleration was attempted by the said juror; the condition of traffic, if any, as well as other matters all making the inspection and test unreliable and prejudicial as far as the Plaintiff is concerned.

## POINT 2

## THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON UNAVOIDABLE ACCIDENT.

There is no dispute but what this was a case of an automobile making a left hand turn and colliding with a pedestrian. There is no evidence in the case of a sudden illness, such as insulin shock, sudden and unpredicted mechanical failure or any evidence that the accident happened from an unknown or unforeseen cause or in an unexplainable manner. Defendant testified that Plaintiff loomed in head of him on the hood of his car; however, we can find no cases wherein courts have given credence to the apparition theory.

Though this Court has subscribed to the theory that an unavoidable accident instruction in the case of sudden and unanticipated or unpredicted insulin shock is a proper case for an instruction on unavoidable accident, Porter vs. Price, 11 Utah 2nd 80; nevertheless, it is clear by an abundance of cases that the instruction should not be given in an ordinary accident case that could be avoided by the exercise of proper care. It is expressly urged upon this Court that the instruction given in this particular case was completely improper, prejudicial and a basis for a new trial.

It is further urged to this Court that it should reconsider its prior rulings concerning an instruction covering unavoidable accident and that this Court should subscribe to the now extant California rule that an instruction as to unavoidable accident accomplishes nothing and lends undue emphasis to the defense. This Court in the case of

Porter vs. Price (Supra) considered the California case of Butigan vs. Yellow Cab Co., 49 Cal 2nd 652, 320 P. 2d. 500, 65 ALR 2nd 1.

Plaintiff is of the opinion that Chief Justice Gibson in the Butigan case properly states the law and its progress wherein Chief Justice Gibson states:

> "In the modern negligence action the plaintiff must prove that the injury complained of was proximately caused by the defendant's negligence, and the defendant under a general denial may show any circumstance which militates against his negligence or its causal effect. The so called defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury * * * *"

> "The statement in the quoted instruction on 'unavoidable or inevitable accident' that these terms 'simply denote an accident that occurred without having been proximately caused by negligence' informs the jury that the question of unavoidability or inevitability of an accident arises only where the plaintiff fails to sustain his burden of proving that the defendant's negligence caused the accident. Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose.

> "It is particularly significant that no decision in this state, either prior or subsequent to Parker vs. Womack, 37 Cal 2nd 116, 230 P2d 823, has held that refusal to give the instruction was reversible error. In

several cases in which error had been claimed because of such a refusal, it was held that the instruction was superfluous."

" * * * The instruction is not only unnecessary, but it is also confusing. When the jurors are told that 'in law we recognize what is termed an unavoidable or inevitable accident' they may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus, they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation. The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand. The further complication resulting from the unnecessary concept of unavoidability or inevitability and its problematic relation to negligence and proximate cause can lead only to misunderstanding. * * * *"

"The giving of the confusing or misleading instruction is, of course, error, and we are of the view that, in the absence of a special situation * * * the use of unavoidable accident instructions should be disapproved * * * "

"* * * In addition, the giving of the instruction obviously over-emphasized defendant's case, and, as we have said, the instruction sugested to the jury that they should consider unavoidability as an issue or ground of defense separate and apart from the questions of negligence and proximate causation."

We believe the law in Utah closely parallels the law in the State of California in that we have been unable to find any cases in the State of Utah wherein it has been held error to fail to give an instruction on unavoidable accident.

In the recent case of Wellman vs. Noble, 12 Utah 2nd 350, 366 P.2d 701, a vehicle driven by the defendant had followed a combination of vehicles some 5 miles, came over the crest of a hill and rammed the Cadillac in which the plaintiff was situated, causing plaintiff to suffer a whiplash injury. The driver stated he did not see the parked car until approximately 100 feet away and was unable to stop to avoid the collision. One of the basis for appeal was the court's failure to instruct on unavoidable accident. This court stated, P. 352:

> "Here the issue of unavoidable accident is not involved anymore than in practically any other accident case."

It is stated in 65 ALR 2nd, page 85, that in the majority of the cases involving the striking of pedestrians at or near street intersections, instructions on unavoidable accident and inevitable accident instructions have been considered inappropriate. A few of the cases are cited as follows:

"McBride vs. Woods (1950) 124 Colo. 384, 238 P.2d 183—Where the mishap resulted when the Defendant, whose car was parked diagonally, in a place marked near a street intersection, backed the car out in daylight, slowly, but striking Plaintiff, an elderly person who was passing on the crosswalk and moving somewhat in the direction the vehicle was backed. The Defendant did not see the Plaintiff, nor was he immediately aware that he had struck her, and he testified that, "It was not possible to back out of that parking space and miss the car ahead and get into my own lane without backing into the crosswalk." He conceded that the bumper of his car was backed into the crosswalk a distance of about 3 feet. The court following

a verdict for the Defendant held it was error to submit to the jury the question of unavoidable accident, "where there is absolutely no evidence in the case which warrants a submission" of such question, "all evidence clearly showing that the accident could have been avoided."

P. 86. In Quillin vs. Colquhoun, (1926) 42 Idaho 522, 247 P. 740—wherein a pedestrian suffered injuries at or near a street intersection, the court in reversing the judgment for Defendant disapproved of the inclusion of the words "an accident" in the instruction that if the jury found from a preponderance of evidence that the misadventure "was an accident and not attributable to the negligence of anyone" the verdict should be for the Defendant.

P. 86. In the Missouri case of Jones vs. Goldberg, 78 S. W. 2nd 509 — A pedestrian was injured at a street intersection. It was held that the evidence merely presented issues of negligence and contributory negligence, that there was no basis for the giving of a so called accident instruction to the effect that if Plaintiff's injuries were caused by an accident, mischance or misfortune, and not by any negligence on the part of the defendant contributing thereto, plaintiff was not entitled to recover. Consequently, it was held that the giving of the instruction was error and warranted the trial court in granting a new trial after a verdict for the defendant.

P. 89. In the case of Orr vs. Hart, (1934) 219 Iowa 408, 258 N.W. 84—a street pedestrian case, it was held error to give an unavoidable accident instruction inasmuch as "the record shows conclusively that this accident hap-

pened through the fault and negligence of one or both of the parties thereto."

P. 89. In the case of Smith vs. Johnson (1954) 2 Ill. App. 2nd 315, 120 N.E. 2nd 58—a case of injury to a street pedestrian, it was held error to give an accident instruction inasmuch as there was no evidence that the pedestrian's injuries were sustained by accident alone not coupled with negligence.

P. 89. In Levans vs. Vigne, (1936) 339 Mo. 550, 98 S.W. 2nd 737—a street pedestrian case, it was held not error to refuse to give an accident instruction since the case presented an issue of negligence of defendant and not of casualty from an unknown cause.

It is stated in 1 Blashfield Encyclopedia of Automobile Law & Practice, Section 635, Chapter 15, P. 485:

> "A mere accident being one in which neither party is at fault, the mere fact that neither driver of two automobiles colliding with each other saw the other until too late to avoid the collision is not enough to show that the accident was unavoidable, since in such a case the negligence, if any, producing the situation, determines the liability, so that if either party can avoid an accident by the exercise of proper care it cannot be said to be unavoidable. For example, if a blowout occurs but the driver of the car is reckless, the blowout is no defense."

> "In other words, the issue of unavoidable accident arises only under evidence showing the accident happened from an unknown or unforeseen cause or in an unexplainable manner, which circumstances rebut defendant's alleged negligence * * * "

The facts in the present case clearly indicate the defendant did not see the plaintiff prior to striking him. The only explanation for the defendant not seeing the plaintiff prior to striking him is that the defendant either was not looking, or if he looked, did not see what was there to be seen. The giving of such an instruction under the circumstances of this case was prejudicial to the plaintiff, was certainly not encompassed within the facts of the case, and was error on the part of the trial court. Plaintiff further urges this Court to subscribe to the California rule that instructions on unavoidable accidents should be disapproved and in any event, should not have been given in this particular case.

## POINT 3

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY TO DISREGARD THE TESTIMONY CONCERNING LOSSES SUSTAINED BY PLAINTIFF IN HIS BUSINESS.

The trial court by its instruction No. 10 instructed the jury as follows:

> "You are instructed that the court has struck from the case all the evidence that has been presented to you relating to the alleged loss claimed to have been sustained by the Plaintiff, Vernon J. Smith, from the operation of his business, Town & Country Rambler,
>
> "Therefore, you are not permitted to consider that evidence in arriving at the amount of your award of damages for Mr. Smith, if you decide that he is entitled to recover damages."

Instruction No. 10 was prejudicial error as far as Plaintiff is concerned. Plaintiff presented testimony con-

cerning his business loss, his change in his cash position by reason of the Plaintiff being absent from his business, in which it forced the Plaintiff to incur an $11,000 obligation that he would not otherwise had to incur in order to keep his business operative (R. 204, 205). This was testimony in the nature of the increased cost of doing business which was incurred as a result of the loss of Plaintiff's services to the business and which is direct testimony concerning the impairment of Plaintiff's earning power. Such impairment and costs are all proper matters to be submitted to the jury for its consideration in determining what effect the owner's injuries have upon his earning power.

The case of Kennerd vs. Kaelin—Wash. (1961) 364 P. 2nd 446—the trial court admitted evidence concerning the Plaintiff's pallet board manufacturing business and the effect which his disabilities had upon his earning capacity in that business. The court admitted evidence that the plaintiff's services to his business were curtailed, that the cost of labor was increased after his accident. The Washington court instructed the jury that in considering the monetary loss suffered by the Plaintiff, if any, as a result of the impairment of his earning capacity, it should take as a standard measurement the value of Plaintiff's services to his own business and that in computing such value it should take into consideration the following factors: 1. The increased costs of doing business which the evidence showed were related to the Plaintiff's injuries. 2. The cost of additional help in conducting the Plaintiff's business necessitated by his injuries as established by the evidence. 3. The market value or amount commonly paid for the services which respondent had been and would be prevented

from rendering to his business as established by the evidence. The jury was further instructed that the 3 factors were not offered as distinct elements of damage, but as a guide to measure the impairment of the respondent's earning capacity.

The Washington court stated, page 447:

"The evidence did not disclose a change in profits, and the jury was not instructed to consider loss of profits as an element of damage. The evidence and the instructions merely dealt with the impairment of the respondent's earning capacity. Since one of his sources of income was the business that he owned, and to which he had contributed his personal services, the value of those services was a proper factor to consider in determining the extent of the impairment of his earning capacity."

" * * * the character and extent of the business, as well as the income therefrom, are all proper matters to submit to the jury for its consideration in determining what effect the owner's injuries have had upon his earning power. We find no error in admitting the evidence or in the court's instructions regarding the significance which the jury should attach to it."

Giving of instruction No. 10 not only was error but also striking evidence by way of an instruction, lends undue emphasis to the defense, and since no reason was given for the evidence being stricken, leads the jury to the conclusion that the judge must not have believed the plaintiff and therefore the jury should not believe the plaintiff. This plaintiff ascribes as being prejudicial error.

## POINT 4

## THE INSTRUCTIONS TO THE JURY AS A WHOLE WERE PREJUDICIAL TO THE PLAINTIFF.

It is clear from the reading of the court's instructions that undue emphasis was given to the defense, thereby making the plaintiff's task of proving his case by a preponderance of evidence an awesome burden. The Court will note that the trial court's instruction No. 6 was a general instruction concerning negligence, ordinary care and approximate cause. Number 7 then went on to instruct concerning contributory negligence. Number 8 concerned a preponderance of evidence. Number 9 a burden of proof, and then instruction No. 10 (discussed as point 3 herein) was inserted which immediately cut ground from under the Plaintiff. Number 10 was followed by instruction No. 11, (discussed under point 2 herein) as to an unavoidable accident, again lending great emphasis to the defense. Instruction No. 12 is an instruction to the effect That a person who uses due care has a right to assume that another also will use due care. Number 13 states that the Defendant was not under a duty to foresee all that he might by way of hindsight and that he was not required to use extraordinary caution to avoid an injury that he could not reasonably have expected. Instruction 14 sets forth that the Plaintiff to be free of contributory negligence must keep a reasonable and adequate lookout, to use ordinary care and not to place himself in a position of danger and that if Plaintiff was walking in other than a crosswalk or an unmarked crosswalk at an intersection, that he must yield the right of way to all vehicles on the roadway. It is not until the trial court reaches its instruction 15 and

16 that it discusses the defendant's duties which would constitute negligence toward the plaintiff.

Considering the instructions as a whole, they are prejudicial and patently unfair to the plaintiff herein.

POINT 5

THE COURT ERRED IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NUMBER 6.

Plaintiff's requested instruction number 6 reads as follows:

> "You are instructed that the Defendant, Wilmer Lee Barnett, is negligent as a matter of law in failing to observe the Plaintiff, Vernon J. Smith, prior to striking Mr. Smith with his vehicle."

It is clear and undisputed from the evidence that the defendant, Wilmer Lee Barnett, did not see Mr. Smith, the plaintiff herein, until he had struck Mr. Smith and Mr. Smith was on the hood of his vehicle (R. 279, 280, 282). The Defendant did not know where Mr. Smith came from or which direction he was going or where he was just prior to the impact, except that Defendant testified he went only a foot or two with his vehicle after the impact. If the Defendant was driving at 5 to 10 miles an hour, which was his testimony, and if his lights were on, and on an intersection such as this, there is no reason why the Defendant should not have seen the Plaintiff prior to the impact and prior to striking the Plaintiff with the center of defendant's vehicle. The only believable evidence has to be that the Defendant was not looking or he did not see what was there to be seen or that he was going faster than his testi-

mony concerning his speed. The law is so clear as to not require any citations to the effect that if a person fails to keep a proper lookout, he is negligent as a matter of law.

POINT 6

THE COURT ERRED IN FAILING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NUMBER 1.

Plaintiff's requested instruction number 1 reads as follows:

> "You are instructed as a matter of law that defendant was negligent in the operation of his automobile. You are further instructed that the plaintiff, Vernon J. Smith, is entitled to damages and that you must award damages in accordance with the following instructions concerning damages:"

The Plaintiff testified he was walking south on State Street as he approached Rainbow Drive. Plaintiff looked for traffic prior to crossing. Plaintiff looked to his left for traffic approaching on Rainbow Drive. Plaintiff looked south for North bound traffic that may turn East on Rainbow Drive and plaintiff looked to his right for left turning traffic going South on State Street. There was no traffic in the left turn lane when plaintiff began to cross Rainbow Drive (R. 195). Plainiff then testified as he crossed Rainbow Drive he kept a lookout for other traffic and since there was North bound traffic his attention was directed to the North bound traffic which ofttimes turned left on Rainbow Drive (R. 227). Plaintiff had walked 24 feet 8 inches across Rainbow Drive when he was struck by Defendant's vehicle. Plaintiff saw defendant's vehicle prior to its striking him. Plaintiff shouted and attempted to get

out of the way of defendant's vehicle but he was run down and struck by the defendant without the defendant ever seeing the plaintiff (R. 196). Plaintiff testified he was in the area which would be an extension of the sidewalk running from the North side of Rainbow Drive to the South side. Defendant testified as he approached the left turn lane on State Street he slowed but did not stop and that one North bound vehicle passed and defendant then crossed in front of another North bound vehicle (R. 275). Plaintiff drove a distance of 86 feet 6 inches from the South edge of the left turn area to the East edge of the sidewalk on State Street. The impact of the vehicle on Mr. Smith dented the front end of the vehicle and caused injuries on Mr. Smith which included a large hematoma over his lumbar area, an egg-like lump on the back of his head, large abrasion over his buttock with discoloration, black and blue spots over his legs and his sides which injuries resulted in a subdural hydroma and ruptured discs in his neck that required fussion. Defendant testified that he was going 5 to 10 m.p.h. (R. 282) and that he stopped within one or two feet after striking Mr. Smith. Officer Kutulas testified (R. 188) that a vehicle going 10 m.p.h. excluding any reaction time at all and after the foot is firmly on the brake would travel 10 feet before coming to a stop.

From the physical facts and from the testimony the only believable evidence which is substantiated by the physical evidence is that the plaintiff was struck in the crosswalk area and knocked a distance of 20 feet 7 inches by the defendant and that the defendant's speed was such that the plaintiff was unable to get out of the way of the defendant's vehicle as it bore down upon him and that the

defendant did not see the plaintiff until the plaintiff was on the hood of the defendant's car.

The trial court erred in failing to grant plaintiff's requested instruction No. 1, and the case should have been tried only on the matter of damages.

## CONCLUSION

Based upon the jury misconduct and the error in law committed by the trial court, the case should be remanded to the lower court for a new trial with directions to the lower court concerning proper jury instructions.

Respectfully submitted,

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