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

IN THE SUPREME C
of the
STATE OF U

VERNON J. SMITH,
Plaintiff and Appe

vs.

WILMER LEE BARNETT
Defendant and Res

RESPONDE

Appeal from Judgment of
Court, Salt Lake County,
The Honorable Mar

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IN THE SUPREME COURT
of the
STATE OF UTAH

VERNON J. SMITH,
Plaintiff and Appellant,

vs.

WILMER LEE BARNETT,
Defendant and Respondent

Case No. 10,320

RESPONDENT'S BRIEF

STATEMENT OF NATURE OF THE CASE

This action was brought by the plaintiff to recover for personal injury damages allegedly caused by the defendant when struck by the defendant's car while crossing Rainbow Drive in Murray, Utah.

DISPOSITION IN LOWER COURT

The case was tried before a jury, which brought in a verdict of "no cause of action." The plaintiff moved for a new trial, which motion was denied.

RELIEF SOUGHT ON APPEAL

Defendant seeks an affirmance of the verdict of "no cause of action" and the denial of the new trial.

STATEMENT OF FACTS

The accident which gave rise to this suit occurred on December 29, 1962 at 6:15 P. M. at the intersection of Rainbow Drive and State Street in Murray, Utah. Rainbow Drive runs east from State Street, and State Street runs north and south. The Montek Building, which includes the plaintiff's business, Towne and Country Rambler, in the southern half of the building, is located on the southeast corner. There are two entrances to Towne and Country Rambler, one in the rear of the building and one in the front. The northern half of the building is occupied by the Montek Corporation. The sidewalk in front of the Montek Building on the east side of State Street is 12 feet 5 inches wide. On the northeast corner of the intersection is the Cumberland Motor Co., a service station which has an abandoned gas pump island and used cars sitting along the State Street side. A sidewalk runs north and south along the east side of State Street. There is a stop sign and a utility pole on the northeast corner.

It was dark (R. 119) and the road was dry. The defendant was driving south on State Street, which is composed of three lanes for traffic in each direction, on the inside lane. His lights were on (R. 275). As he approached Rainbow Drive he entered the left turn lane (R. 275), looked east at Rainbow Drive and saw no one (R. 279), then looked at approaching traffic, hesitated for one car to pass (R. 275), looked east again (R. 280) and made a

left turn into Rainbow Drive. When he was about 15 feet east of the west edge or front of the Montek Building (R. 276) the defendant saw a dark object rise up in front of him and sit on the hood (R. 276). The defendant was driving with his foot on the brake pedal (R. 282) and he stopped within two to three feet (R. 282). His speed was between 5 and 10 miles per hour (R. 281-282). The defendant found the plaintiff lying 5 feet directly east of the defendant's car (R. 113). The front of defendant's car was 26 feet 3 inches east of the easterly edge of State Street and 15 feet 7 inches east of the assumed center of an unmarked crosswalk across Rainbow Drive. There was a dent left of center on the driver's side of defendant's car (R. 281). The center of the plaintiff was 10 feet 11 inches north of the curb on the south side of Rainbow Drive and 24 feet 8 inches south of the north curb. The distance from the center of the left turn lane on State Street to the easterly edge of the unmarked crosswalk is 86 feet 6 inches. The distance from the utility pole on the northeast corner to the dent on the car was 26 feet.

There were no lights on in the Montek Building (R. 274) and the nearest street lights are one on the east side of State Street 100 feet south of Rainbow Drive, one on the east side of State Street 100 feet north of Rainbow Drive, and one 150 feet west of the intersection of State Street and Rainbow Drive (R. 115). The nearest light on Rainbow Drive

was one block east, at the intersection of that street and Brown Street (R. 123).

The plaintiff is part owner and manager of Towne and Country Rambler. He testified that he was walking back from a visit to Zion Motors, which is located on the west side of State Street about one-fourth of a block north of Rainbow Drive. He was dressed in a dark suit. He had crossed over State Street and walked south on the sidewalk on the east side of State Street, to the northeast corner of the intersection of Rainbow Drive and State Street. He asserts he looked up Rainbow Drive, looked south on State Street, then looked to the right at the left turn lane on State Street where he saw no cars, and then proceeded across Rainbow Drive (R. 195-196). When he was two-thirds of the way across he became aware of car lights. He shouted, and then was hit (R. 196). The plaintiff did not look back at the left turn lane on State Street after he stepped off the north curb (R. 118). He was looking at the traffic on State Street coming north (R. 118). He did not see the defendant until just before he was hit.

The plaintiff claims to have suffered a large hematoma over the lumbar area of his back, an egg-like bump on the back of his head, abrasions over his buttocks and ruptured discs in his neck that required fusion.

Upon the basis of this evidence, with the exception of some evidence going to a claimed loss of

income, which we shall mention later, the case was submitted to the jury. The jury brought in a verdict of "no cause of action." The plaintiff moved for a new trial on the basis of a juror's misconduct, and in support of said motion submitted affidavits of three jurors and Kay Lewis who interviewed the jurors. The motion was denied.

ARGUMENT

Point I.

The Trial Court Did Not Err In Denying The Motion For New Trial Based On Jury Misconduct; There Being Neither Competent Evidence Of Such Misconduct Nor A Showing of Prejudice To The Plaintiff's Case

The rule has been clearly announced in Utah that jurors will not be allowed to impeach their own verdict by affidavits, except where there has been a chance verdict or where it is a result of bribery, *Utah Rules of Civil Procedure,* 59(a)(2). Rule 59 allows jury misconduct as a ground for a new trial, but does not allow such misconduct to be proved by jurors' affidavits except in the two situations mentioned above. The cases in Utah have applied the rule strictly.

In the early case of *People v. Flynn,* 75 Utah 378, 384, 26 Pac. 1114 (1891) the court declared:

> "It is well settled that affidavits of jurors will not be received to impeach or question their verdict, nor to show the *grounds upon which it was rendered,* nor to show their mis-

> understanding of fact or law, nor that they misunderstood the charge of the court, or the effect of their verdict, *nor their opinions*, surmises, and processes of reasoning in arriving at a verdict." (Emphasis ours)

And in *Homer v. Intermountain Abstract Co.*, 9 Utah 193, 33 Pac. 700 and *Hepworth v. Covey Bros. Amusement Co.*, 97 Utah 205, 91 Pac. (2d) 507 (1939) the affidavits of jurors as to their misconduct were not allowed in as evidence for a new trial. The courts have not been hesitant to disallow the affidavits even though the misconduct alleged is of a serious nature. In *Morrison v. Perry*, 104 Utah 151, 140 Pac. (2d) 772 (1943) one juror called to the attention of the other jurors that there was insurance in the case. Four jurors submitted affidavits as to the discussion on insurance. The court held that the affidavits were not competent because of the statutory prohibition of their use except in a chance verdict and bribery. And in *Wheat v. Denver & R.G.W.R. Co.*, 122 Utah 418, 428, 250 Pac. (2d) 932 (1952) one juror mentioned that a settlement offer had been made in the case, and discussed another suit against the defendant. The court refused to allow affidavits or oral testimony of the jurors. The court said:

> ". . . To permit litigants to get jurors to sign affidavits or testify to matters discussed in connection with their functions as jurors would open the door to inquiry into all matter of things which a losing litigant might con-

> sider improper; misconceptions of evidence or law, offers of settlement, *personal experiences*. . . . Such post mortems would be productive of no end of mischief and render service as a juror unbearable." (Emphasis ours)

The court then held:

> ". . . Both the affidavits and oral testimony offered being incompetent, there exists no basis for considering whether the jury was in fact guilty of misconduct which would have required the granting of a new trial." (Supra, page 429)

Cases in other jurisdictions have also followed this rule strictly. In *Maffeo v. Holmes*, 47 Cal. App. (2d) 292, 117 Pac. (2d) 948 (1941) the factual situation was similar to the case at bar. The defendant hit a pedestrian while driving at a slow rate of speed with his lights on. The question of lighting was a critical issue. Some of the jurors visited the scene at the time of night that the accident occurred, in order to observe the lighting, and they concluded that the plaintiff would have been hidden by a shadow. This visit was discussed in the jury room. Affidavits of jurors were taken after the verdict went against the plaintiff. The court strongly condemned the actions of the jury, but said the affidavits were incompetent unless they showed a chance verdict. The court gave this reasoning.

> ". . . and for the very good reason that no juror can specifically establish that he

> reached his verdict by reason of secret evidence of the locus in quo related by an erring juror and not by reason of the testimony of the sworn witnesses, the arguments of counsel, the instruction of the court, or the legitimate suasions of his co-jurors. The jury must be presumed to have done its duty in reaching a verdict. . . . This presumption prevails except where proof authorized by the legislature justifies the upsetting of the verdict." (Supra, pages 951)

And in *George v. City of Los Angeles*, 51 Cal. App. (2d) 311, 124 Pac. (2d) 872 and *Wilson v. Oklahoma Ry. Co.*, 207 Okl. 204, 248 Pac. (2d) 1014 (1952) the courts refused to consider in motions for new trials affidavits of the improper visits of jurors to the scene of the accident. In the *Wilson* case the court refused the juror's affidavits and oral testimony on the grounds that the verdict cannot be impeached by such means for misconduct within or without the jury room.

The rule is thus clear — the affidavits of the three jurors in this case are not competent evidence to impeach their verdict, and thus serve as no basis for establishing the alleged misconduct upon which a new trial was predicated.

The affidavit of Kay Lewis is likewise incompetent evidence as it is merely hearsay of what the jurors told him. In *Glazier v. Cram*, 71 Utah 465, 267 Pac. 188 (1928) the court said the affidavits of third parties as to what jurors told them were

under the same rule as the affidavits of the jurors. And in *Herndon v. City of Seattle*, 11 Wash. (2d) 88, 118 Pac. (2d) 421 (1941) the affidavit of one juror that she heard another juror say he had visited the scene of the accident was declared to be mere hearsay and as such was insufficient to invoke the discretion of the trial court to grant a new trial. To the same effect is *Tartacower v. New York City Transit Authority*, 169 N.Y.S. (2d) 695 (1957) where it held that affidavits of other jurors and third persons as to a juror's statement of an alleged view of the scene were not competent proof to establish misconduct. And in *Kearns v. Hall*, 91 S.E. (2d) 648, 197 Va. 736 (1956) the court adopts the same position and cites numerous cases in support.

The affidavits of the jurors and Lewis are by statute and public policy incompetent evidence of any misconduct. There being no other evidence of the alleged misconduct, the denial of a new trial on that ground was clearly within the discretion of the trial court.

However, even if there were competent evidence of an improper view, the plaintiff has still failed to show that he was so prejudiced thereby that the trial court abused its discretion in refusing the motion for a new trial.

The mere assertion that a juror has misconducted himself is of little value. There must also be proof that the misconduct was such that in light

of the facts of the case the verdict would have been affected. *Herndon v. City of Seattle*, supra. The rule to be applied here appears to be the same as that applied in motions for mistrial. In *Burton v. Zion's Cooperative Merchantile Institution*, 122 Utah 360, 249 Pac. (2d) 514 (1952) the court said a mistrial should not be given if the court believes the misconduct "probably did not prejudice" the moving party. And once the mistrial is refused the appellate court must let that decision stand "unless his determination appears to be so unreasonable that upon review it appears that he was plainly wrong in that there is a strong likelihood that the plaintiff could not have had a fair trial," supra at page 365. And the latitude granted the trial court is indicated in *Redd v. Airway Motor Coach Lines Inc.*, 104 Utah 9, 22, 137 Pac. (2d) 374 (1943). The court there said

> "In denying the motion for a new trial on the ground of misconduct on the part of the jury, the trial court did not abuse its discretion, even assuming that on the showing made a contrary ruling could be sustained."

Thus, in showing prejudice to himself, the plaintiff must show more than a mere possibility, *Ison et al v. Stewart*, 105 Colo. 55, 94 Pac. (2d) 701 (1939). He must show that the verdict was affected or reasonably would have been affected by the misconduct, *Saunders v. A. M. Williams Co.*, 62 Pac. (2d) 260, 155 Ore. 1 (1936). In this case neither one of those criteria has been satisfied.

There is considerable doubt as to whether the alleged misconduct could have added anything new to the jury's understanding of the case. Merely taking a casual view of the scene, where there was no dispute as to measurements, location of objects or physical description, works no prejudice to the moving party. In *Redd v. Airway Motor Coach Lines, Inc.*, supra, the jurors made measurements while taking an authorized view of the scene. The court said the fact that the jurors made certain measurements was not prejudicial because there was no material dispute as to the measurements and thus their use of the measurements in coming to a verdict was of no consequence.

In the present case the alleged misconduct of the juror Fuller in making a left hand turn onto Rainbow Drive and accelerating up to 12-13 miles per hour was not in any way prejudicial to the plaintiff. The plaintiff in the trial did not allege that the defendant was exceeding 10 miles per hour. The dispute was as to the time and space required to stop, assuming a maximum speed of 10 miles per hour. There is no allegation that the juror made any skid tests, nor that he even stopped after he made the left turn. The fact that the juror made a left turn and found he couldn't go much over 10 to 15 miles per hour up to the unmarked crosswalk was merely cumulative upon a minor issue and did not go to the material issues in the case — the point of impact and the light conditions that night. If anything, the

test of the juror showed that the defendant could have been going faster than he testified, and thus any prejudice working from the misconduct would be in the plaintiff's favor.

A case similar to the present situation is that of *Harden v. Illinois Central Railroad Co.*, 112 N.W. (2d) 324, 326, 253 Iowa 341 (1961). The case involved a car-train collision. The court found contributory negligence on the basis of skid marks and testimony as to the speed that curves approaching the crossing could be taken. Two jurors visited the scene and negotiated the curves, testing at what speeds they could be taken. In sustaining the trial court's denial of a new trial on this ground, the court said:

> ". . . The jurors found they could drive it three to five miles an hour faster. This matter was discussed by various jurors. While we cannot approve of such practice and trial courts should clearly inform jurors as to such conduct, we are not prepared to say this ground should have been sustained. It deals with mere opinions as to what may be a safe speed, and under the situation cannot so clearly be said to have reasonably influenced the verdict, as to lead us to say the trial court abused its discretion."

And in *Herndon v. City of Seattle*, supra, a juror visited the scene of an intersection collision. The trial court granted a new trial. This was reversed on appeal. The court said that the short stop made

by the juror at the intersection brought nothing new into the case, for there was no dispute as to physical surroundings, visibility and measurements. The court said that the bringing in of new evidence by a juror must be shown with certainty in order to be a basis for a new trial.

And in *Jacob v. Miner*, 67 Ariz. 109, 191 Pac. (2d) 734 (1948) the court said that it was the conduct of the parties at the time of the accident which was in issue, not the physical conditions. Thus prejudice to the defendant was not affirmatively probable and the denial of a new trial must be affirmed.

The alleged visit by juror Fuller added nothing new to any material issue of the trial, and if anything was added it was an implication of speed which could only work to the plaintiff's advantage. There was no basis for the trial court to find that prejudice probably occurred, and the evidence is clearly insufficient to show that the trial court abused its discretion.

But even if it be assumed that the verdict of the juror Fuller was affected by the visit he allegedly made, there still would be no prejudice to the plaintiff since the verdict was unanimous and only three-fourths of the jurors need agree in order to constitute a valid verdict in a civil case. *Utah Constitution, Article* 1, *Section* 10; *Tartacower v. New York City Transit Authority*, supra.

The plaintiff is not entitled to a new trial on the basis of jury misconduct for another reason — failure to file an affidavit in support of such motion, stating that he had no knowledge of the misconduct before the jury retired. In *Glazier v. Cram*, supra, the court held that the appellants could not validly claim the right to a new trial where they had failed to file such an affidavit. The court said:

> ". . . It is a general rule, subject to few exceptions, that a motion for a new trial upon this ground (juror misconduct) must be accompanied by affidavits showing that the misconduct complained of was not known to the party moving for a new trial — or his counsel — until after the case was submitted to the jury."

The defendant submits, therefore, that the plaintiff is not entitled to a new trial by reason of any misconduct of the jury because no competent evidence was submitted in support of such motion. Even had there been competent evidence of misconconduct, the plaintiff has failed to show any prejudice to his case and has failed to file the necessary affidavit that he had no knowledge of such alleged misconduct before the jury retired.

POINT II.

The Trial Court Did Not Err In Giving An Instruction On Unavoidable Accident.

The rule in Utah is clear: An instruction on unavoidable accident may be given where there is

evidence that the accident occurred without the negligence of the parties involved. In *Nelson v. Lott*, 81 Utah 265, 17 Pac. (2d) 272 (1932) the defendant struck the plaintiff with his car when the plaintiff stepped out from the side of the road. The court gave an instruction on unavoidable accident and the defendant objected on the ground that the instruction contained words which indicated that an unavoidable accident could be caused by the defendant's negligence. The court held that the instruction was proper even though there were questions of negligence and contributory negligence.

In *Denison v. Chapman*, 6 Utah (2d) 379, 314 Pac. (2d) 838 (1957) the court sustained the instruction of unavoidable accident. There the car of one defendant slid into the truck of the other defendant, causing the truck to cross the center line, colliding with the plaintiff. The court held that the icy road was the proximate cause of the accident and not the actions of the defendants. The court found that the sliding of the car into the truck was not due to the negligence of the driver but was due to the conditions.

And of great significance in this appeal is the case of *Porter v. Price*, 11 Utah (2d) 80, 355 Pac. (2d) 66 (1960). There the court was faced with an instruction identical to that given in the present case, which is the instruction set out in *Jury Instruction Forms, Utah, Section* 16.1. There the defendant's car went out of control when he suffered a

diabetic insulin shock. The verdict was in the defendant's favor and the plaintiff appealed on the basis that it was error to give the instruction on unavoidable accident. The court held the instruction to have been properly given, and drew an important distinction in rejecting the case of *Butigan v. Yellow Cab Co.*, 49 Cal. (2d) 652, 320 Pac. (2d) 500 (1958). The appellant there, as here, cited the *Butigan* case for the proposition that it is error to give the instruction. The court distinguished the *Butigan* case on these grounds:

> ". . . In that case there was substantial evidence of negligence by the defendants, and there was almost no affirmative evidence that the accident resulted from any cause other than those circumstances which were under the control of an ordinary prudent man, yet the jury decided for the defendant. The court stressed this inconsistency in deciding that the instruction was prejudicial error, and such inconsistency is not present in the instant case Here, much of the evidence tended to show circumstances beyond the control of a reasonable man and the jury decided accordingly. Also, in the Butigan case, the instructions themselves were misleading in suggesting 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.' Such confusion is not apparent in the instruction here." (Pages 82-83)

The court then went on to lay down a test for when the instruction was proper:

> ". . . However, there are some situations where the evidence is susceptible of being so interpreted that an accident occurred without negligence on the part of anyone, and if it is *reasonably susceptible of such interpretation*, and a party requests it, the trial court commits no error in so advising the jury." (Emphasis ours, Page 84)

The rule in Utah then is that the instruction will be allowed in circumstances where the evidence is reasonably susceptible of being interpreted as showing a lack of negligence on the parties involved. The *Butigan* doctrine has thus been rejected in Utah, as it has been in various other states. *Ridgway National Bank v. North American Van Lines Inc.*, 326 Fed. (2d) 934 (CCA 3rd 1964); *Panaro v. Cullen*, 185 A. (2d) 889 (1962); *Franco v. Fujimoto*, 47 Hawaii 408, 390 Pac. (2d) 740 (1964); *Hackworth v. Davis*, 87 Idaho 98, 390 Pac. (2d) 422 (1964). It should, however, be noted that even some of the California cases indicate doubt as to how far the *Butigan* case really went. *Rayner v. Ramirez*, 159 Cal. App. (2d) 372, 324 Pac. (2d) 83 (1958); and *Emerton v. Acres*, 160 Cal. App. (2d) 742, 325 Pac. (2d) 685 (1958).

The great majority of states allow the unavoidable accident instruction to be given. In 65 *A.L.R.* (2d) 24 it is stated that in most states the instruction may be given in motor vehicle cases where the evi-

dence discloses facts supporting such instruction. The note then cites 37 jurisdictions in support of that statement . The note also mentions on page 23 that the position taken by a few courts that do not allow the instruction "will no doubt continue to be productive of numerous appeals concerning matters not worth the attention, expense and risk they have entailed."

The Utah rule, clearly allowing the instruction, leaves one final question: Whether there was such conclusive evidence of negligence in the present case that the trial court abused its discretion in giving the instruction. A review of the facts and cases similar to this situation shows that the court acted well within the limits of its discretion. There is no evidence that the defendant acted negligently in any of the sequence of events. He made a proper left turn after the immediate traffic going north had cleared. He had his lights on. He testified that he had looked at the crosswalk area before he turned, and that he saw nothing. His speed was well within the speed limit — testified to by the defendant and his wife as being less than 10 miles per hour. The defendant was driving with his foot on the brake. The plaintiff points out that the defendant was negligent in either not looking or not seeing what was there to be seen, but this is merely a conclusion that the plaintiff could have been seen. The defendant must see only that which a person acting reasonably under the given conditions would have seen. The facts

here show that there was no lighting in the area into which the defendant entered, that plaintiff was dressed in a dark suit, and that due to the nature of the turn defendant's lights may not have been focused on the area of impact until just before it occurred. The evidence seems easily susceptible of the interpretation that the defendant was not negligent.

There is also evidence that the plaintiff was acting without negligence in that he said he was walking in the crosswalk area and watching the north-bound traffic due to his knowledge that the traffic coming from the south often turned right onto Rainbow Drive.

It thus is clear that the evidence was reasonably susceptible of the interpretation that circumstances beyond the control of the parties were responsible for the accident, and not the acts of the parties. The combined factors of darkness and the positions of the parties created a situation which could reasonably be interpreted as the proximate cause of the accident. This point is illustrated in cases with similar situations.

In *Nelson v. Lott*, supra, the accident took place on a road leading into a rodeo ground from a highway. The plaintiff had parked his car on the shoulder of the highway and walked down to the ticket booth situated alongside the rodeo access road. He saw the defendant's stopped car about a rod away, facing the highway. He purchased his ticket

and stepped into the road with his back to the defendant's car as he folded his money. He was then struck by defendant's car. Witnesses said that the plaintiff had stepped in front of defendant's car so quickly that defendant had no time to stop. There were definite issues of negligence as to the actions of both parties, but the court also found that there was sufficient evidence of no negligence that the instruction was properly given.

In a recent New Mexico case the situation is almost identical with the present case, *Falkner v. Martin*, 74 N.M. 159, 391 Pac. (2d) 660 (1964). There the plaintiff was struck at an intersection one hour after sunset. There was a conflict of evidence as to whether she was in the crosswalk. The defendant was going 15 to 18 miles per hour with his lights on. There was no evidence that the plaintiff could have been seen by anyone in the car before she was actually hit. The testimony was that she "loomed in front of the car." The jury found no cause of action. The plaintiff appealed, asserting that it was error to give an instruction on unavoidable accident. The court affirmed the giving of the instruction. The court said that the prior case of *Lucero v. Torres*, 67 N.M. 10, 350 Pac. (2d) 1028 (1960) had established the rule that there may be due to the nature of the particular motor vehicle accident genuine questions of unavoidable accident. The court then quoted from the *Lucero* case suggestions

as to when such questions were raised:

> "A prominent feature may be one of surprise, sudden appearance and reasonably unanticipated presence of a pedestrian, combined with circumstances which present a fair issue as to whether the failure of the driver of a motor vehicle to anticipate or sooner to guard against the danger or to avoid it, is consistent with a conclusion of the exercise of his due care. In such cases the trial courts are inclined to grant the instruction on unavoidable accident and their action in so doing is generally approved by the appellate courts." (Citations omitted, supra at 662)

The court then held that there were issues of negligence as to both parties, but that nevertheless there was evidence of no negligence, thus warranting the instruction on unavoidable accident.

The reasoning of the New Mexico case is consonant with the Utah view of the unavoidable accident instruction. Thus, under the facts of the present case, which also indicate that the plaintiff "suddenly loomed" in front of the defendant's car out of the darkness, the only possible conclusion is that the facts are reasonably susceptible to an interpretation of no negligence. The giving of the instruction should thus be affirmed.

POINT III.

The Court Properly Instructed The Jury To Disregard The Alleged Losses Suffered By Plaintiff's Business.

The law is very clear in disallowing proof of business losses in a personal injury action where

the business loss is incapable of being proved directly attributable to the injury. The general rule is stated in 12 *A.L.R.* (2*d*) 296:

> "It is a general rule that evidence of the profits of a business in which the plaintiff in a personal injury action is interested, which depend for the most part upon the employment of capital, the labor of others, or similar variable factors, is inadmissable in such an action and cannot be considered for the purpose of establishing the pecuniary value of lost time or loss or diminution of earning capacity, for the reasons that a loss of such profits is not the necessary consequence of the plaintiff's injury and that such profits are uncertain and speculative."

This rule has been accepted in Utah. In *Rosenthal v. Harker*, 56 Utah 113, 189 Pac. 666 (1920) the court found that the business losses suffered by a junk dealer were properly considered in assessing damages against the defendant. The court in so holding clearly distinguished the situation from one where the business was supported by invested capital and labor of other persons. The court said on page 118:

> ". . . There was no attempt made to prove profits realized from capital invested. In fact, the testimony tends to show that the plaintiff had no appreciable amount of capital invested in the business conducted by him. Therefore the profits proven, and of which defendant complains, partook almost wholly

> of the nature of earnings realized by reason of the personal efforts and labor of the plaintiff. The authorities cited by counesl for defendant hold and adhere to the well established doctrine and the general rule that profits of a business should not be regarded as an element of damages in this class of cases. . . . We remark that ordinarily the rule announced by the cases cited and relied on is the proper one to be followed. However under the facts and circumstances of the present case, for the reasons heretofore stated, we think the admission of the testimony and the instruction of the court complained of by defendant was proper and right. There was no appreciable capital or investment in the business, and the profits or earnings therefrom depend entirely on the labor and personal efforts of plaintiff."

The present facts clearly indicate a situation where the general rule does apply. Plaintiff Smith was at the time of the accident one-third owner and general manager of the Towne and Country Rambler Corporation (R. 191). He claims that the $11,000 obligation which he undertook subsequent to the accident was a proper element of damages. But that claim obviously cannot be sustained. First of all, the Towne and Country Rambler Corporation was a heavily capitalized corporation with an annual gross of nearly a million dollars (R. 229). It employed forty employees (R. 231). It sold new and used cars, and thus was in a market of considerable flux. These facts alone are sufficient under the general rule to exclude the use of its profits and losses and other

business related expenditures in assessing damages for plaintiff's personal injuries. See *Shewry v. Heur*, 255 Iowa 147, 121 N.W. (2d) 529 (1963). It is true that the plaintiff occupied an important position in the operation of the corporation, but the fact that substantial capital and labor outside of his own was being employed negates the direct link necessary between the business fortunes and the plaintiff's services. Under the rule of the *Rosenthal* case the evidence was properly rejected.

However, there is also another reason for not allowing the evidence as to the $11,000 obligation -- there is no proof that the plaintiff in fact did suffer any loss or impairment of his cash position. The evidence was somewhat confusing, but it appeared that the plaintiff acquired the other two-thirds stock in the corporation and gave in consideration the note for $11,000. He thus suffered no loss on that transaction. He then transferred the stock to a man named Bostrom in exchange for Bostrom's promise to make available to the Corporation $55,000.00, $20,000 of which he soon paid to the Corporation (R. 249). The testimony indicates that the Corporation was in financial trouble even before the accident (R. 262), that there had been large net losses from September, 1962 through December of that year (R. 231) and that the cash position on the 1st of December was poor, with only $766 in the bank (R. 242). The $20,000 paid in by Bostrom helped the cash position of the Corporation, and by February sub-

stantial profits were being shown by the Corporation (R. 233) and total liabilities were reduced (R. 234). Plaintiff said they were back on their feet by March (R. 244). The total sales in 1963 were above 1962 (R. 237) and plaintiff testified that he made more money in 1963 than he did in 1962 (R. 237). The evidence submitted was highly speculative as to whether there ever was a loss on the $11,000 obligation. It could have resulted in a profit to plaintiff due to its life saving effect upon the Corporation. And the evidence was not clear as to whether the obligation was in fact upon the Corporation and not the plaintiff.

Under the facts presented the plaintiff could not even prove a loss had occurred as well as show that the loss was directly attributable to his injury. The facts negate both propositions. Thus, the ruling of the trial court that the claim of loss was too speculative or remote was proper under the facts and the law.

The plaintiff also makes the novel argument that the striking of evidence by Instruction No. 10 is prejudicial error because it lends undue emphasis to the defendant. However, the general rule is that an instruction should be used in order to prevent prejudice upon the party moving for the evidence to be stricken. The rule is stated in 53 *Am. Jur., Trial, Section* 671, *page* 518:

> "In like manner, where evidence is admitted upon the theory that its relevancy may

be subsequently shown by other evidence, and such evidence is not introduced, the court should exclude the irrelevant evidence on its own motion and instruct the jury to disregard it."

The facts in this case show that if any prejudice was worked, it was upon the defendant by the allowance of extensive testimony as to the alleged business loss of the plaintiff. The evidence was allowed in with the condition that if it was not tied up later the court would entertain a motion to strike (R. 203). Thus, when it was not tied up, the court was obligated to strike it by an instruction to the jury.

It appears that if every time the court strikes evidence by an instruction it is construed to mean that is disbelieves that party's case not only would the court's powers be stifled but great prejudices would be worked upon the moving party. The court gave the benefit of the doubt to the plaintiff in allowing the evidence. The plaintiff, therefore, has no right to the benefit of the doubt when the evidence is stricken. Giving an instruction is the only equitable means to strike evidence allowed in with the condition that it be tied up later. The defendant had a right to have the jury clearly instructed that the evidence was not to be considered. And the plaintiff's fear that the jury may think the judge does not believe the evidence is a hazard endured by both parties whenever the court rules, and clearly is not error.

POINT IV.

The Instructions To The Jury When Read As A Whole Were Not Prejudicial To The Plaintiff.

The plaintiff in Point 4 of his Brief points out that the instructions over-emphasized the defendant's case, but he supports that assertion with what seems to be an objection to the chronological order of the instructions and not their content. It has been clearly pointed out in a recent case that the instructions must be considered as a whole, and the fact that a supplemental instruction is given on contributory negligence does not mean that undue emphasis is to be implied to the plaintiff's detriment. *Hill v. Cloward,* 14 Utah (2d) 55, 377 Pac. (2d) 186 (1962). The fact that the instructions dealing with the duties of defendant were given last is not in and of itself material. If the instructions adequately expressed the law of the case and were not given in such a way as to mislead the jury they are adequate and further inquiry is not warranted. 53 *Am. Jur., Trial, Section* 561, *page* 445.

The instructions were arranged in what seems to be the most logical fashion, with statements of the general duties and definitions preceding the instructions on specific duties under the evidence. The plaintiff doesn't point out any error of law in the instructions nor any repetition of a particular point. The crux of the objection comes down to the fact that the duties of the plaintiff were defined before those

of the defendant. This clearly is no basis for prejudicial error.

POINT V.

The Court Properly Refused To Give Plaintiff's Requested Instruction Number 6 — That Defendant Was Negligent As A Matter Of Law In Failing To Keep A Proper Lookout.

The plaintiff seems to have greatly over-simplified the proposition when he states in his Brief at page 25, under Point 5, "that if a person fails to keep a proper lookout, he is negligent as a matter of law." That proposition assumes the critical issue — whether or not the defendant under these particular circumstances acted unreasonably in keeping a lookout. The only practical approach, therefore, is that taken in *Covington v. Carpenter*, 4 Utah (2d) 378, 381, 294 Pac. (2d) 788 (1956) where the court said that in most cases the question should be submitted to the jury to determine whether the defendant kept a proper lookout. The court laid down this rule:

> ". . . 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."

Under that test the facts of this case clearly call for a jury determination of whether defendant or plaintiff was guilty of an improper lookout. In *Charvoz v. Cottrell*, 12 Utah (2d) 25, 28, 361 Pac. (2d) 516 (1961) the fact situation was very similar to the present case. There the deceased was in the marked crosswalk, crossing the street at night. The lighting around the intersection was dim and the backdrop was dark. The road was black-top and the deceased was wearing dark clothing. The defendant was driving at 30 miles per hour with his lights on. He applied his brakes as soon as he saw the deceased, but it was too late. The court held:

> ". . . Therefore, although the evidence is undisputed that the defendant could have stopped his car in time to avoid the accident had he seen the deceased at a distance of 100 feet, the circumstances are such as to create a doubt in the minds of reasonable men as to defendant's ability to observe the decedent at that distance and hence the issue of failure to keep a proper lookout was for the jury."

In the present case the general condition of darkness and the fact that defendant was in the process of turning so that his headlights were not directed into Rainbow Drive until the vehicle had substantially completed its turn are easily sufficient to raise a question in the minds of reasonable men as

to whether defendant should, in the exercise of reasonable care, have seen the plaintiff sooner than he did. Thus the question was properly submitted to the jury.

Point VI.

The Court Properly Refused To Give Plaintiff's Requested Instruction Number 1 — That The Defendant Be Found Negligent As A Matter Of Law.

The law is extremely clear on this point. If fair minded men could draw different conclusions from the evidence, the issue of negligence is for the jury. In the present case the evidence of the plaintiff is not as believable as that of the defendant. The defendant and his wife testified that the impact was outside the crosswalk area and that they stopped within 2 to 3 feet. The front of the car was 15 feet 7 inches east from the center of the unmarked crosswalk. Officer Katulas testified that had the defendant been going only 5 miles per hour, as the defendant testified, he could have stopped in approximately 3½ feet (R. 299). Thus this evidence puts the place of impact well outside the unmarked crosswalk area. Both parties concede that there was no lighting in the immediate area and both claimed not to have seen the other until just before impact. Plaintiff's testimony was that he was in the crosswalk area, but that he was looking south and not at the left turn lane. This evidence clearly offers a direct issue as to negligence. The situation is similar to that

in *Charvoz v. Cottrell*, supra. There the court said:

> "Certainly, if there is a conflict in the evidence, the question of negligence is not one of law, but one of fact to be determined by the jury. However, even if the facts are undisputed, if fair-minded men can honestly draw different conclusions from them, the issue of negligence should be settled by a jury. In other words, negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they are shown." (Page 27)

All reasonable men could hardly come to the same conclusion under the facts here. The instruction was, therefore, properly denied.

CONCLUSION

There is no basis for a new trial upon the grounds raised by the plaintiff. The facts of this case, even read in a light most favorable to the plaintiff, clearly show evidence that this accident may well have been unavoidable on the part of either party. This court has made it clear that an instruction to that effect is proper where evidence susceptible of such interpretation is present. Likewise, the evidence presents closely drawn issues as to the negligence of both parties. The assertion that these issues could have been decided as a matter of law are patently without merit.

The judgment of the trial court in the arrangement and choice of instructions was well within its discretion. The plaintiff failed to present any

evidence or law to support his allegation that prejudice resulted from the striking of the confusing and speculative evidence of business loss and from the method of arranging the instructions. The business of the courts would be unjustifiably interrupted if such actions by the court were deemed prejudicial. The issue of misconduct was not properly presented before the trial court. In the absence of competent evidence of misconduct there is no basis for a new trial, and even if there had been competent evidence there is no showing that the plaintiff was in any way prejudiced.

We respectfully submit that the new trial was properly denied, there being no showing by the plaintiff of any basis under Utah law or the facts of this case justifying a new trial.

Respectfully submitted

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