1965

Thomas Eager v. Michael Willis and Charles Willis : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

THOMAS EAGER,
Plaintiff-Respondent,

vs.

MICHAEL WILLIS, and
CHARLES WILLIS,
Defendants-Appellants.

Case No.
10335

APPELLANTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE
FIFTH DISTRICT COURT OF
WASHINGTON COUNTY

HON. C. NELSON DAY, JUDGE

RAYMOND M. BERRY
Attorney for Defendants-Appellants
1473 South 11th East
Salt Lake City, Utah

PICKETT & PICKETT
Attorneys for Plaintiff-Respondent
Pickett Building
St. George, Utah

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

OTHER AUTHORITIES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

THOMAS EAGER,
Plaintiff-Respondent,

vs.

MICHAEL WILLIS, and
CHARLES WILLIS,
Defendants-Appellants.

Case No.
10335

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries arising from a pedestrian auto collision at the intersection of 300 West and Highway 91 in St. George, Utah.

DISPOSITION IN LOWER COURT

On a jury verdict, the lower court entered judgment in favor of the plaintiff and against the defendants in the amount of $10,000.00.

RELIEF SOUGHT ON APPEAL

The defendants seek a reversal of the judgment in favor of the plaintiff and a new trial.

STATEMENT OF MATERIAL FACTS

The accident happened at about 8:25 a.m. on April 9, 1964 (Tr. 22) at the intersection of 100 North and 300 West in St. George, Utah. 100 North is Highway 91 in St. George, Utah. Highway 91 is approximately 67 feet 3 inches wide, (Tr. 26) and there is a double yellow line separating east and west bound traffic. Highway 91 is marked for four-lane traffic.

The sun was shining from the east and, according to the defendant driver and to Officer Hutchings, who investigated the accident, it created a problem when you were traveling east on Highway 91 (Tr. 28). Highway 91 was posted for a 30-mile speed limit (Tr. 28).

There are crosswalks, across Highway 91, on the east and west side of 300 West. The crosswalk on the east side of 300 West is approximately 10 feet wide (Tr. 26). West of the intersection in front of the O. K. Welders, there is a sign saying "School Crossing", and Exhibit D-3 depicts the area.

At the time of the accident, the plaintiff was acting as a traffic guard policeman and the defendant, Michael Willis, was driving an automobile east on Highway 91 on his way to Dixie College where he was a student. Michael Willis was driving at a speed of about 20 to 25 miles per hour, (Tr. 61) and was driving almost directly into the sun (Tr. 62). He was in the inside eastbound traffic lane (Tr. 61). When

Mr. Willis first saw Mr. Eager, he and a little girl (Jane Cannon) were right in front of him (Tr. 62). He immediately applied his brakes and stopped his car with part of the vehicle in the crosswalk. Mr. Willis saw Mr. Eager about a second before the collision (Tr. 68). Just immediately prior to the accident, Mr. Willis had glanced to the north side of the street and had observed some friends and waved.

Mr. Eager, the plaintiff, went to work at about 8:30 in the morning as a traffic guard. On the morning of April 9, 1964, he arrived and turned on the light in the school crossing sign facing east-bound traffic (Tr. 33). When he reached the north-east corner of the intersection, he saw a little girl standing and took her hand to cross Highway 91 to walk south across 91 in the east crosswalk at 3rd West. As Mr. Eager started to cross Highway 91, there was no traffic approaching from the east, and no traffic was moving north or south on 300 West (Tr. 50). The only car he observed approaching the area was the vehicle driven by Mr. Willis, which was down near the O. K. Welders sign on Highway 91 (Tr. 49). Mr. Willis was driving east, south of the center of the street. (Tr. 51) When Mr. Eager got in the center of the street, he let loose of Jane Cannon's hand and waved with both hands at Mr. Willis to stop. He did not recall saying anything to Jane Cannon and did not make any effort to step back or stay in the west-bound traffic lanes. As he kept waving to Mr. Willis, he observed that he was not seen, and at that moment,

noticed that Jane Cannon had continued to walk southward across the street. He jumped out abruptly to reach her (Tr. 52), and before he could return to the north side of the center of the street, the accident occurred (Tr. 52). Mr. Eager testified that he saw Mr. Willis looking to his left and that he watched him for maybe two seconds, and at that time he could see Mr. Willis did not see him. Mr. Eager abruptly stepped in front of the only car on either street when he observed the driver was not watching in his direction (Tr. 51).

Exhibit P-2 shows that Mr. Thomas Eager was hospitalized from April 9th to and including April 14th. His total hospital bill was $119.70 and in addition to that he had a doctor's bill from Dr. McLaren Ruesch. It was stipulated by the defendant that the fair and reasonable value of the medical services, including doctor and hospital bill was $252.-70. At the time of the accident, the plaintiff was working as a crossing guard, and was receiving $100.00 a month as wages. In the accident, his left fibula was broken near the lower end, and his doctor testified that he had post-traumatic arthritis. After the accident, he was bothered some by pain, but testified that at the time of the trial, he was sleeping fairly good and that he was not taking any drugs such as aspirin or bufferin for pain . He has not received any medical treatment subsequent to June of 1964 (Tr. 58). Mr Eager testified he took no medication for pain, because aspirin and bufferin both-

ered him, but he testifed that while in the hospital, he was given a sleeping pill and that didn't bother him in any way (Tr. 40). Dr. Ruesch testified the fibula was well-healed and every bit as strong at the time of the trial, as before the accident (Tr. 19). He indicated that the arthritis would not keep him from walking around the house and so on, but that it would prohibit prolonged walking.

The Complaint, (R. 1) alleges that the defendant driver was careless and negligent in the manner in which he operated his motor vehicle, and that the plaintiff's injuries were proximately caused by said negligence and carelessness (R. 2). The defendants, in their Answer, denied negligence and affirmatively, as a defense, alleged the accident was solely or proximately caused by the plaintiff's own negligence, (R. 4).

The plaintiff gave four requested instructions on damages, and gave no requests on negligence or contributory negligence (R. 26, 31). The defendants requested 17 instructions, all of which were stock instructions from JIFU, in whole or in part, except two. The court gave 31 instructions.

In Instruction No. 1, the court instructed the defendant has admitted the accident but denies the plaintiff's claimed injuries and affirmatively alleges that the accident was solely caused or proximately contributed to by the plaintiff's own negligence (R. 33). This instruction was excepted to upon the

ground it failed to show the defendant denied negligence (Tr. 83).

The court gave Instruction No. 9. It was excepted to upon the grounds there was no evidence of speed on the part of the defendant driver (Tr. 83), and that further, the last sentence of the instruction was incorrect, in that it invited the jurors to weigh the damages before considering the question of contributory negligence (Tr. 84).

In Instruction No. 12, the court gave its instructions on damages (R. 44), and this instruction was excepted to (Tr. 84), on the ground that the instruction on damages should have been given at the end of the charge, and prior to instructions on liability issues.

In Instruction No. 15, the court instructed the driver of a motor vehicle has the duty to observe and comply with the lawful order and direction of any police officer invested by law, with authority to direct, control and regulate traffic (R. 48). This mandatory instruction was excepted to upon the ground that the driver of an automobile has only the duty to observe and comply with the lawful orders and directions of police officers, if in the exercise of ordinary care, the driver could see and have a reasonable opportunity to obey, and that the instruction was prejudicially erroneous, because it placed an absolute duty to obey upon the part of the defendant, without opportunity to do so.

In Instruction No. 17, the court instructed it is the duty of a driver of an automobile to yield the right of way to a pedestrian crossing the roadway within a marked crosswalk, and that failure to so yield the right of way to a pedestrian in any such crosswalk, constitutes negligence (R. 50). This instruction was objected to as being highly prejudicial (Tr. 86) on the grounds that in this instruction, the court was directing negligence against the defendant and that the instruction was not proper under the facts of this case, as the evidence showed the plaintiff abruptly stepped into the path of the defendant's vehicle at a time when the defendant's car was so close that there was no opportunity for him to yield the right of way, and at a time when it was impossible for the defendant to yield the right of way to the plaintiff.

In plaintiff's closing argument, counsel for the plaintiff told the jury they were not to consider whether or not the defendant was able to pay, (Tr. 81) and reminded the jurors that he wanted them to put themselves in the position of the plaintiff in evaluating the evidence. Plaintiff's counsel said:

> "The amounts are the lack of enjoyment of things that he has enjoyed before and cannot do, do now on acount of the injuries sustained by the admitted negligence of the defendant; I feel you're entitled, Gentlemen of the Jury, to figure yourself in somewhat of the situation of the —

MR. BERRY: I object to this as improper type of argument, asking the jury to consider themselves in the situation of the plaintiff. That is asking for sympathy and passion and is not proper.

THE COURT: Well, I have already instructed the Jury what counsel says is not evidence. It is merely argument. As to its propriety, I'm uncertain. Go ahead, Mr. Pickett." (Tr. 78, Tr. 79)

The amount of the verdit was the amount of the defendant's insurance, $10,000.00.

ARGUMENT

POINT I

THE TRIAL COURT ERRED PREJUDICIALLY IN STATING THE ISSUES IN INSTRUCTION NO. 1

The plaintiff, in his Complaint, alleged negligence, and the defendant, in his Answer, denied negligence. There was no Pre-trial Order. The first issue upon which the plaintiff should have had the burden of proof: Was the defendant driver negligent?

However, Instruction No. 1 relieved the plaintiff of proving negligence on the part of the defendant as an issue. Instruction No. 1 read as follows:

"Instruction No 1 — You are instructed that this is an action brought by the plaintiff to recover from the defendant for injuries allegedly received by the plaintiff as the result of a collision between the plaintiff as a pedes-

trian school crosswalk patrolman who was escorting a school child across Highway 91 at Third West Street in St. George, Utah, on April 9, 1964, and the defendant who was at such time and place operating a motor vehicle.

The plaintiff claims injuries to his person, pain and suffering and loss of earnings, all to a total claim in the sum of $25,000 and for expenses incurred for hospitalization and medical treatment in the sum of $252.70.

The defendant has admitted the accident, but denies the plaintiff's claimed injuries and affirmatively alleges that the accident was solely caused or proximately contributed to by the plaintiff's own negligence." (R. 33) (Emphasis Added)

The objection is to the part of Instruction No. 1 *underlined* in last sentence. It releases the plaintiff from proving negligence and states the defendant's only defense is the affirmative defense of contributory negligence. Instruction No. 1 did not contain the usual cautionary phrase that the instruction is only a statement of the claims of the parties, and not evidence, and thus, the jurors are entitled to treat this instruction as stating more than merely issues or contentions of parties. This instruction gave plaintiff's counsel an advantage, unfairly, in arguing the case during closing argument. Plaintiff's counsel told the jury the defendant admitted negligence (Tr. 78).

Why shouldn't the plaintiffs' counsel have argued the case to the jury as he did in view of this instruction. There is no reason to undertake the

burden of proving an issue the court indicates your client need not prove The jury probably treated Instruction No. 1 as freeing the plaintiff from proving negligence. However, at best, they could have treated the instruction as merely a requirement on the part of the defendant to prove he was not negligent. This, of course, is not the law.

The issues of negligence was material. The defendant driver was driving into the sun which obscured his vision. When the accident happened, there was no traffic on Highway 91, or in the area approaching the intersection on 300 West. The plaintiff started to cross the street with a little girl, Jane Cannon, walking between her and the defendant's car. Mr. Eager let loose of her hand when he approached double yellow line dividing east and westbound traffic on Highway 91, and endeavored to signal the defendant driver to slow or stop. After he observed the defendant driver for some two seconds and saw that he was not seen, he then jumped into the path of the defendant's vehicle abruptly to reach the child which had proceeded ahead. The posted speed limit in the area was 30 miles an hour; the defendant said he was going 20 to 25 miles per hour. He stopped his car in the crosswalk where the accident occurred, and the investigating police officer, Mr. Hutchings, agreed there was no evidence of speed on the part of the defendant driver.

Instruction No. 9 (R. 41) does not cure the error

complained of in Instruction No. 1 because it fails to tell the jury the burden is upon the plaintiff to prove negligence by a preponderance of the evidence. At best, Instruction No. 9 presents a conflict between two instructions. Instruction No. 4 (R. 36) does not correct the prejudicial error, because no burden of proving negligence was placed on the plaintiff by the virtue of giving Instruction No. 1.

Nor does Instruction No. 11 rectify the prejudicial error, because it became unnecessary to claim the defendant was negligent by virtue of the giving of Instruction No. 1.

In summary, it is submitted it was prejudicial error to fail to advise the jury the defendant denied negligence and that burden of proof on this point, was upon the plaintiff.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN STATING THE DUTIES OWED TO PLAINTIFF. NO. 17.

Although it seems probable the issue of negligence was eliminated in the lawsuit by the giving of Instruction No. 1, it appears the court further hid the issue of negligence in the lawsuit by giving Instructions No. 15 and No. 17. Effectively, these instructions directed negligence against the defendant, although the court did not rule as a matter of law, the defendant was negligent.

Instruction No. 15 reads as follows:

> "The driver of a motor vehicle has the duty to observe and comply with the lawful order and direction of *any police officer* invested by law with the authority to direct, control, and regulate traffic." (I. 48)

Instruction No. 17 reads as follows:

> "It is the duty of the driver of an automobile to yield the right of way to a pedestrian crossing the roadway within a marked crosswalk. Failure to do so yield the right of way to a pedestrian in any such crosswalk constitutes negligence." (R. 50)

Instruction No. 15 was a misstatement of the law, as applied to the facts of this case, because it indicates the driver of a motor vehicle owes an absolute duty to observe and comply with the lawful orders and directions of the police officer. At the time, exceptions were taken to this instruction, the court said it was copied from the State Statutes, (Tr. 86). The court was referring to Section 41-6-13, Utah Code Annotated 1953, and that statute reads as follows:

> "Obedience to police officer — No person shall *wilfully* fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control or regulate traffic". (Emphasis added)

Since the statute refers to a wilful act, it is hard to see how it is authority for the propositions stated in Instruction No. 15 where the word "wilfully" was excluded.

In Charvoz vs. Cottrell (1961) 12 U. 2d 25, 361 P. 2d 516, our court said:

> "The defendant testified that when he first saw the decedent, the latter was in the crosswalk approaching the dividing line of 17th South. He immediately applied his brakes, but could not stop in time to avoid hitting the deceased. He also testified that the decedent, after being first observed, walked some six feet or more across the dividing line and into the defendant's line of traffic Plaintiff contends that deceased had the legal right of way and therefore, defendant was negligent as a matter of law. *It is well settled that statutes or ordinances giving pedestrians the right of way at street crossings create a preferential, but not an absolute right in their favor. Before the duty of a driver to yield the right of way arises, he must be in a situation whereby he is either aware of the presence of* a *pedestrian within the crosswalk, or should have, in the exercise of ordinary care, become aware of the pedestrian's presence in time to yield the right of way*". (Emphasis added)

In the Louisville Railroad Company vs. Offutt's Administratrix (1932), 55 S.W. 2d 391, 246 Ky. 508, where the question of striking a pedestrian police officer was presented, the court said the bus driver owed the traffic officer the same duty as regards warning, lookout and speed as owed to other ordinary pedestrians.

It is the appellant's contention that the driver of a motor vehicle has the duty to yield the right of way

to a pedestrian, but only when he is in a situation where he is aware of the presence of the pedestrian within the crosswalk, or should have been aware, in the exercise of ordinary care, of the pedestrian's presence in time to yield the right of way.

The question of the defendant driver's duty to yield the right of way should have been decided by the jury and not by the court, because the evidence showed the defendant driver was driving into the sun which obstructed his vision, and further showed that the plaintiff abruptly jumped into the path of the defendant's vehicle when it was so close as to make it impossible for the defendant, Mr. Willis, to yield.

This instruction was clearly in conflict with Instruction No. 16 which was a correct statement of the law as to the duty to yield the right of way to a pedestrian in a crosswalk. Instruction No. 17 further unbalances the charge in favor of the plaintiff and against the defendant driver, Mr. Willis.

No claim was made that Mr. Eager, the plaintiff. was not in the crosswalk. Mr. Willis, the defendant, admitted he was in the crosswalk, and it was admitted by the plaintiff that he jumped abruptly into the path of Mr Willis' vehicle. Under the facts of this case, the giving of this instruction had a further prejudicial effect in directing negligence against the defendant driver, and again, this instruction was

in conflict with Instruction No. 16, which was a correct statement of the law.

In Coombs vs. Perry (1954), 2 U. 2d 381, 275 P. 2d 680, where a pedestrian was struck in the evening twilight in a crosswalk in an accident in Ogden, and where the defendant driver testified he had not seen her before striking her, the court said the question of the driver's negligence in keeping a proper lookout for the pedestrian in the crosswalk and in affording her the right of way to which she was entitled, was for the jury to decide. Where vision is obscured it is jury question as to the negligence of the defendant driver in failing to keep a proper lookout, or in failing to see a pedestrian in a crosswalk. Instruction No. 16 (R. 49) was a proper statement of the duty owed to the plaintiff by the defendant driver, Mr. Willis. However, it is surely certain this instruction was in conflict with Instructions No. 15 and 17 and was sandwiched in-between in the charge.

It appears the rule of law in Utah is that if the court gives conflicting instructions on a material point of law, it will be presumed prejudicial error was committed by the lower court.

In Sorenson vs. Bell (1917), 107 P. 72, 51 U. 262, the court reversed a verdict for the defendant where erroneous instructions on the burden of proof were given in charge. In Sorenson vs. Bell, supra, the court said:

> "* * *True, counsel point to other portions of the charge wherein they contend the rule respecting the burden of proof is correctly stated . If that be conceded, it still does not minimize, much less cure, the probable error contained in the foregoing instruction. At most, it would merely present a case of where two instructions were given on the same subject, one proper and the other improper. Where such is the case and the evidence is conflicting upon the subject covered by the instructions or is such that more than one conclusion is permissable, and the record leaves it in doubt whether the jury followed the instruction that is proper or the one that was improper, then but one result is legally permissable in this court, and that is to reverse the judgment and grant a new trial to the agrieved party* * *."

California holds the only proper thing to do is to grant a new trial if you can't tell which instruction the jury followed. In Galway vs. Guggolz (1931) 4 P. 2d 290, 11 Cal. App. 639, in a case involving conflicting instructions of right of way at an intersection, the California court held a new trial should be granted. And in Francis vs. the City and County of San Francisco (1955) 282 P. 2d 496, 44 C. 2d 335, where a pedestrian brought suit for injury sustained while struck in a crosswalk by a bus and where an erroneous instruction on contributory negligence was given, the California Supreme Court said:

> "The giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to pro-

uce a clear conflict in the instructions, and it
; not possible to know which instruction was
)llowed by the jury in arriving at a verdict.
Vestberg vs. Willde, 14 Cal 2d 360, 371, 94 P.
d 590; Goodwin vs. Foley, supra, 75 Cal. App.
d 195, 200, 170 P. 2d 503 and cases cited. An
xamination of the entire charge to the jury
oes not convince us that the error complained
f was cured by other instructions."

Bernaski vs. Lindahl (1956) 307 P. 2d 510,
553, where a bus passenger brought an action
onal injuries sustained in a collision with de-
's vehicle, the court on appeal held the lower
roperly granted a new trial where it gave
tent instructions, one holding the defendant
t negligent as a matter of law for violating
statute, and the other instructing the jury
y must find the defendant motorist guilty of
nce by a preponderance of the evidence.

Oklahoma, in Thompson vs. Chamblee
245 P. 2d 716, 206 Okl. 602, where instruct-
ere clearly conflicting and confusing, the
ld granting a new trial was proper.

Graham vs. Atlantic Coast Line R. Company
82 S.E. 2d 346, 240 N.C. 338, the court said
onflicting instructions to the jury on a ma-
)int were given, one correct and the other in-
a new trial must be granted. The court said:

"As stated by Barnhill, J., (C.J.), in
tate vs. Overcash, 226 N.C. 632, 39 S.E. 2d
10, 811: 'When there are conflicting instruc-

> tions to the jury upon a material point, the one correct and the other incorrect, *a new trial must be granted.*' We may not assume that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law. *We must assume instead that the jury, in coming to a verdict, was influenced by that part of the charge that was incorrect.*" (Emphasis added)

In Lucas vs. Kirk (1963), 275 Ala 20, 151 So. 2d 744, the court held a misstatement of the law must, of necessity be reversible error, even when construed in light of other charges given at appellant's request and oral charge to the jury on correct law.

In Pettingell vs. Moede (1954), 271 P. 2d 1038, 129 Colo. 484, the Colorado court, following a line of decisions, held an erroneous instruction was not cured by a correct instruction on the law.

In Arizona, in Ieronimo vs. Hagerman (1963), 380 P. 2d 1013, 93 Ariz. 357, where conflicting instructions were given in an automobile accident case, involving a collision at an intersection, the court sitting En Banc, said that even though correct instructions were given, and even though the instructions were considered as a whole, that the giving of an unequivocal, erroneous instruction was not cured by mere giving of a correct instruction concerning the same subject matter.

on 41-6-78 of the Utah Code Annotated
s as follows:

"41-6-78. Pedestrians' right of way. —
When traffic control signals are not in
ce or not in operation the driver of a vehicle
ll yield the right of way, slowing down or
oping if need be to so yield, to a pedestrian
ssing the roadway within a crosswalk when
pedestrian is upon the half of the roadway
on which the vehicle is traveling, or when
pedestrian is approaching so closely from
opposite half of the roadway as to be in
nger, but no pedestrian shall suddenly leave
urb or other place of safety and walk or run
o the path of a vehicle which is so close that
s impossible for the driver to yield. This
vision shall not apply under the conditions
ted in Section 41-6-78(b)."

er Instruction No. 17 as given by the trial
defendant driver, Mr. Willis, had an abso-
to yield the right of way to the plaintiff,
r. The instruction does not take into con-
that in this situation, vision was obscured
ing sun, and that Mr. Eager abruptly and
stepped into the path of the defendant's
making it impossible for a collision to be
Under Instruction No. 17, a driver could be
tious, and still be negligent in failing to
right of way Under certain circumstances,
on No. 17 would be appropriate. If you
the defendant driver had no excuse for not
not yielding to the pedestrian, Instruction

No. 17 certainly would be proper. However, when the evidence shows vision was obstructed and that plaintiff moved abruptly and suddenly into the path of the vehicle involved, it is submitted that Instruction No. 17 was erroneously given and that the effect was highly prejudicial because:

(a) It made proof of contributory negligence impossible, and

(b) It made failure to yield right of way to any pedestrian in any crosswalk under any circumstances, negligence.

It is submitted that where a court gives inconsistent and conflicting instructions on the duty owed on seeing and yielding the right of way to a pedestrian, the court, in effect, delegates to the jury the duty of deciding the law as well as the facts, and does unavoidably commit prejudicial error.

POINT III

THE COURT COMMITTED PREJUDICIAL ERROR THREE TIMES IN GIVING INSTRUCTION NO. 9

Instruction No. 9 reads as follows:

> "Before you can return a verdict for the plaintiff, you must find from a preponderance of the evidence that each of the following two propositions are true:
>
> Proposition Number One
>
> That the defendant was negligent in the operation of the motor vehicle which

he was driving at the time of the accident in one or more of the following particulars:

A. In driving too fast for existing conditions,

B. In failing to keep a proper lookout for pedestrians in the crosswalk.

Proposition Number Two

That the said negligence of the defendant, if any, was the proximate cause of the occurrence and the injury to the plaintiff.

If you find that the two foregoing propositions are true, you should determine the damages sustained by the plaintiff according to the instruction hereinafter given to you on that subject." (Emphasis added) (. 41)

Instruction No 9 was prejudicially erroneous for three reasons:

1. It was a formula instruction not considering all of the issues in the case,

2. It told the jury to consider damages without considering contributory negligence,

3. There is no evidence the defendant driver was going too fast for existing conditions.

This instruction directs the jury to consider damages without considering the affirmative defense of contributory negligence. It asks the jurors to arrive at a verdict for the plaintiff without considering

the defendant's affirmative defense, and does not caution the jury to consider other instructions before going on to the damage question. It is argumentative.

The general rule appears to be that it is prejudicial error to give an instruction which purports to contain all the elements necessary for the verdict for any party, but which neither includes all of such elements nor refers to other instructions that do. Such a defect in a formula instruction is not rectified by giving of other instructions which deal with the omitted issue.

In Charvoz vs. Bonneville Irrigation District (1951) 120 U. 480, 235 P. 2d 780, where the trial court gave an improper formula instruction telling the jury the verdict must be for the defendant and against the plaintiff unless the jury found the defendant's negligence was the sole, proximate cause of the damage, our court reversed the lower court and said one is accountable if his negligence concurs with an act of God or with negligence of a stranger and reversed a verdict for the defendant of "No Cause of Action." Even more strongly, in Ivie vs. Richardson (1959), 9 U. 2d 5, 336, P. 2d 781, where a pedestrian was struck by an automobile, this court spoke out against the use of a formula instruction. Ivie vs. Richardson, supra, the court gave this instruction, No. 4:

"Instruction No. 4 —

'If you find from a preponderance of the

evidence the defendant failed to keep and maintain a proper lookout for the plaintiff in the driveway where the accident occurred and that such failure proximately resulted in the accident, then your verdict must be in favor of the plaintiff and against the defendant.' *The above instruction, taken by itself, is in error because it fails to take into account the possible contributory negligence of the plaintiff.* This kind of an instruction, sometimes referred to as a formula instruction, which makes a recital in accordance with the contention of a party and ends with a conclusion: and if you so find, then your verdict must be for the party, is not generally a good type of instruction to give. This is so because it lends itself to error just noted, and also because it tends to be argumentative rather than set out the principals of law applicable to the issues impartially as to both parties. For such reasons it is better to avoid giving instructions of this type It is conceded the issue of contributory negligence was properly covered in the next instruction. This, however, put one instruction aginst another and might have been confusing to the jury.

Of more importance is the error assigned in giving Instruction No. 10. It states that the driver of a vehicle, *** emerging from *** any *** driveway or building shall stop such vehicle immediately prior to driving onto a sidewalk *** and shall yield the right of way to any pedestrian *** to avoid collision ***, this instruction is a correct statement of the law, but is not applicable in the instant fact situation. The plaintiff was not on a sidewalk or a sidewalk area. The failure of the defend-

> ant to stop, if he did, had no causative effect in this accident. Nor was the plaintiff in any area where she necessarily had the right of way over the defendant. It was simply a situation where each had the duty to use due care for the safety of themselves and each other. The above instruction might have had the effect, as the defendant contends, of giving the jury the impression that the plaintiff was entitled to the right of way, and therefore was in error in this fact situation." (Emphasis Added).

The formula set out in Instruction No. 9 was in error because it did not state all the issues impartially. It asked the jury to consider the damages without considering the issue on contributory negligence. The instruction was argumentative, because it told the jurors to consider damages without deciding the question of contributory negligence. It was improper, because it did not caution the jurors to consider contributory negligence before considering damages.

Additionally, Instruction No. 9 was improper because it told the jurors they could find the defendant was negligent in the operation of his motor vehicle, because he was driving too fast for existing conditions. The plaintiff adduced no evidence of speed on the part of the defendant driver, Mr. Willis. He was driving 20 to 25 miles per hour in a 30 mile posted zone. He was driving into the sun where his vision was obscured, but he was not speeding, and the investigating police officer said there was no evi-

dence of speed on his part. There was no other traffic on the roadway at the time of the accident, and the accident would not have occurred except for the plaintiff's admitted sudden move into the path of the defendant, Mr. Willis' car.

In Hunter vs. Michaelis (1948) 114 U. 242, 198 P. 2d 245, where a pedestrian was struck by a car, and where the applicable law provided no person should drive a vehicle upon the highway at a speed that is greater than is reasonable and prudent, and where the posted speed limit was 25 miles an hour, and where the traffic was relatively light with few cars on the street, the court said, in reversing a verdict, there is no evidence to show speed of 20 to 25 miles per hour was excessive or unreasonable, and that the evidence did not justify the instruction on speed of the defendant's car because the negligence, if any, was the failure of the defendant keep a proper lookout.

If it was negligence to drive at the speed the defendant was drivng, it was negligence to use Highway 91 on the morning in question. It is submitted, in this case, our negligence, if any, was the failure to keep a proper lookout and not the speed at which the defendant was operating his automobile.

If the jury even considered the question of negligence, in view of Instruction No 1, it is probable the defendant driver was found negligent on an improper ground not supported by the evidence, and

since we don't know which ground the jury found the defendant negligent upon, the only way to correct the error is to grant a new trial.

POINT IV

THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING ON DAMAGES SO AS TO MISLEAD JURY ON ISSUES OF LIABILITY.

The damage instruction was No. 12 (R. 44-45). Following Instruction No. 12, the court gave eight additional instructions on liability issues (R. 46-53). The court, both by giving Instruction No. 9 and again by giving Instruction No 12, told the jury to consider damages prior to considering all of the liability issues. The instruction relating to the duties owed a pedestrian by a driver and the duties of a pedestrian using a crosswalk, were stated in Instruction No. 16 (R. 49), and these duties would not have been considered by the jury at the time they ordinarily would have discussed damages, if they followed the sequence of instructions given.

It appears the jury may well have decided the issue of damages prior to considering all issues relating to liability. The ordinary procedure is to instruct the jury so that they will determine liability before considering damages and instructions must not mislead or influence the jury to consider damages before considering liability issues.

Following the damage instruction, it is generally customary to give a cautionary instruction advis-

ing the jury that from the fact they are instructed concerning damages that they should not assume the court believes that the plaintiff is entitled to recover. In this case, the trial court did not give a cautionary instruction relating to damages.

The arrangement of the charge could hardly do other than give the jury the impression that they were to decide the damages in any event, and would mislead the jurors from returning a verdict in favor of the defendants.

In Lund vs. Mountain Fuel Supply Company (1961) 12 U. of 2d 268, 365 P. 2d 633, where the jury was instructed to decide the damages prior to their determination of the issue of liability, this court held the instructions were misleading, and granted a new trial.

In summary, it is submitted the inclusion of Instruction No. 12 in the middle of the charge and the inclusion of the last paragraph in Instruction No. 9 telling the jurors to decide the damages after considering the issue of negligence, certainly conveyed to the jury the impression the trial judge was of the opinion the plaintiff should recover.

Since the jury was requested to return a general verdict, asking the jury to determine damages gave them no opportunity to determine damages and also to return a verdict in favor of the defendants. The jurors were not told to sign the verdicts.

POINT V

EXCESSIVE DAMAGES WERE AWARDED UNDER THE INFLUENCE OF IMPROPER ARGUMENT

Mr. Eager incurred special damages totaling $252.70. At the time of the trial and since he had left the hospital, he had taken no drugs for pain or discomfort. However, he said aspirin and bufferin made him sick and further admitted that in the hospital he took a pill for pain to sleep without any trouble. He was earning wages of $100.00 per month at the time of the accident and to the time of the trial had missed approximately $800.00 in income.

At the trial, Mr. Eager was up and around. His doctor, Dr. Ruesch gave him no per cent of partial disability, but did indicate he had some disability due to what he described as post-traumatic arthritis.

The jury awarded Mr. Eager $10,000.00, exactly the amount of liability insurance required under Section 41-12-5, Utah Code Annotated 1953 as amended in 1961.

In arguing the case to the jury, Mr. Pickett showed considerable enthusiasm. He told the jury not to consider how the defendant would pay the damages (Tr. 81), a statement obviously made to remind the jurors insurance was present. To further remind the jurors that they should not consider this man's injury from an impartial standpoint, he said in his closing argument (Tr. 78-79),

"The amounts are the lack of enjoyment of things that he has enjoyed before and cannot do, do now on account of the injuries sustaied by the admitted negligence of the defendant; I feel you're entitled, Gentlemen of the Jury, to figure yourself in somewhat of the situation of the —

MR. BERRY: I object to this as improper type of argument, asking the Jury to consider themselves in the situation of the plaintiff. This is asking for sympathy and passion and is not proper.

THE COURT: Well, I have already instructed the Jury what counsel says is not evidence. It is merely argument. As to its propriety, I'm uncertain. Go ahead, Mr. Pickett."

All humane people want to sympathize with injured persons Asking the jurors to put themselves in the place of plaintiff is perhaps the most prejudicial and improper type of argument experienced in jury trials. The natural impulse of the juror is to follow the "Golden Rule" and do unto others as you would like to have them do unto you. Supposedly, sympathy has no place in a law case. Theoretically, a party is entitled to jurors of a state of mind free of bias and prejudice and ones who will act impartially considering the issues. To ask a juror to put himself in the state of mind of the plaintiff is, in effect, to ask him to adopt a point of view which will make him unqualified for jury service.

In Bullock vs. Branch (1961), ...Fla....., 130 So. 2d 74, where plaintiff's counsel used a "Golden Rule" argument, asking jurors to determine what they would want for the same injuries, the appellant court, in reversing the lower court and in granting a new trial, said the prejudicial and inflammatory effect of the "Golden Rule" argument need not be demonstrated to show reversible error, but will be presumed, in that the trial court erred in failing to instruct the jury to disregard the argument, even in the absence of a motion.

The court commented:

> "It is hard to conceive of anything that would more quickly destroy the structures of rules and principles which have been accepted by the courts as standards for measuring damages and actions of law, than for juries to award damages in accordance with the standard what they themselves would want if they or a loved one had received the injuries suffered by a plaintiff. In some cases, indeed, many a juror would feel that all the money in the world could not compensate him for such an injury to himself or his wife or children. Such a motion as this — identifying of the juror with a plaintiffs injuries — could hardly fail to result in injustice under our law, however, profitable it might be deemed by many plaintiffs in personal injury suits."

In Russell vs. Chicago R. I. & PR Company (1957) 249 Iowa 664, 86 N. W. 2d 843, the court said where in final argument to the jury by plain-

tiff's counsel in an action to recover for personal injuries, the plaintiffs' counsel asked jurors how much they would take to go through life injured as the plaintiff was, the argument was improper and prejudicial and affirmed an order granting a new trial.

In Larson vs. Hanson (1932), an old and leading case on this subject, 207 Wis. 485, 242 N. W. 184, where the attorney for the plaintiff in a personal injury action had remarked to the jury that there is not a man in view who would trade his left arm for $30,000.00, and a judgment for the defendant was entered notwithstanding the jury verdict for the plaintiff, the appellant court stated that such a remark clearly constituted improper argument, and that the trial judge had grounds for coming to the conclusion that his warning to the jury to disregard the remarks had not been effective to counteract a prejudicial effect.

In Seymour vs. Richardson (1953), 194 Va. 709, 75 S.E. 2d, 77, where plaintiff's counsel in closing argument said:

> "All Mrs. Richardson asks you gentlemen to do when you retire is to apply the Golden Rule. Do unto her what you wish that would be done."

The argument was held improper and a judgment for the plaintiff reversed.

In Chicago and Northwestern Railroad Company vs. Kelly (1936) 8th Circuit Ct. of App., Minne-

sota, it was held reversible error for plaintiff's counsel in a personal injury action to ask the jurors to place themselves in the position of the plaintiff, the plaintiffs' mother or son or husband, and the court commented that to judge a case in that position would have disqualified the jurors to act as jurors and it was improper and prejudicial.

In 53 Am. Jur. Trial, Section 496, Page 401, the general rule is stated that it is improper for an attorney, in his closing argument, in a personal injury case, to ask the jury what compensation or what they would want to compensate them for the same injury.

There are many cases on his subject. In some the appellant courts have not found the improper argument to constitute reversible error. In many of the cases where it has not been held reversible error, the defendant's attorney has failed to make a timely objection, and in some, he's elected to fight fire with fire by asking the jurors to put themselves in the place of the defendant, and for this reason, no reversible error has been found. However, as it is difficult to tell what influence improper argument has on a juror's mind, the defendants' submit that the cases which presume error where the argument occurs and where there is a timely objection, are correct. Further, the trial judge's comment to the jury that he was uncertain about the propriety of the argument of Mr. Pickett and his instructions to him

to go ahead would seem to be a direction to the jurors to put themselves in the place of plaintiff in weighing the evidence, and thus the direction to the jurors to adopt a state of mind that would disqualify them for jury service under Rule 47.

The lump sum the jury awarded is indicative that the jurors were thinking about something other than plaintiff's damages. In Ivie vs. Richardson (1959) 9 U. 2d 5, 336 P. 2d 781, where the amount of the award was out of proportion to the plaintiff's injury, the court took judicial notice that the awarding of $5,000.00, which was the amount of the Financial Responsibility law requirement at that time, was an indication that they were considering insurance.

It is submitted the jury awarded $10,000.00 to the plaintiff because they wished to award, if at all possible, insurance money and nothing more or nothing less and that Mr. Pickett's argument was suggestive in causing them to do this.

POINT VI

THE CUMULATIVE ERRORS OF THE LOWER COURT REQUIRE THE DEFENDANTS BE GRANTED A NEW TRIAL.

If it is clear from the record a fair trial was not had, in the interest of justice; a new trial should be granted.

In Ivie vs. Richardson, supra, this court said:

> "It is unnecessary and would serve no useful purpose for us to decide whether any one of the errors above discussed, considered separately, would constitute sufficient prejudicial error to require a new trial . The question is whether the case was presented to the jury in such a manner that it is reasonable to believe there was a fair and impartial analysis of the evidence and a just verdict. If the errors were commited which prevented this being done, then a new trial should be granted, whether it resulted from one error, or from several errors cumulatively. We expressly do not mean to say that trivia which would be innocuous in themselves, can be added together to make sufficient error to result in prejudice and reversal. The errors must be real and substantial and such as may reasonably be supposed would affect the result. However, errors of the latter character, which may not by themselves justify a reversal, may well, when considered together with others, render it clear that a fair trial was not had. In such event justice can only be served by the granting of a new trial, absent the errors complained of. It is so ordered. Costs to the appellants."

The defendants submit they have pointed out a substantial number of real and prejudicial errors committed in the lower court and that justice will be served by granting a new trial. It is expensive, onerous and distasteful to retry a case. However, the fact it is wearisome to retry a case is no excuse for denying a new trial. Nor is it an excuse to deny a

new trial, that the granting of one will work a hardship on one of the parties. The parties, equally, are entitled to a fair trial, and if for some reason a party at the first trial did not receive substantially a fair trial, justice can only be served by the retrial of the case.

The defendants believe the case was not fairly tried as set forth by the errors complained of in this brief, and that justice can only be achieved by the speedy granting of a new trial, absent the errors complained of in this appeal.

CONCLUSION

Because of the prejudicial errors committed in the lower court, the judgment in favor of the plaintiff and against the defendants should be reversed.

Respectfully submitted,

RAYMOND M. BERRY
Attorney for Defendants-Appellants
1473 South 11th East St.
Salt Lake City, Utah

I hereby certify that on this.....day of ...., 1965, I mailed two copies of this Brief by United States mail, postage prepaid, to Pickett & Pickett, Attorneys for the Plaintiff-Respondent, at the address shown on this Brief.