1967

G. Dayton Hughes v. Richard D. Hooper : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

G. DAYTON HUGHES,
Plaintiff and Appellant,

vs.

RICHARD D. HOOPER,
Defendant and Respondent.

Case No. 10700

BRIEF OF APPELLANT

Appeal from the Judgment of the Fourth Judicial District Court for Utah County
Honorable Joseph E. Nelson, Esq., Judge

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STATEMENT OF THE CASE

The plaintiff brought this action to recover damages against the defendant for personal injuries and property damage arising from an automobile collision which occurred at an open intersection in the City of Provo, Utah on the 7th day of June, 1963, at approximately 9:00 o'clock a.m. Plaintiff appeals to this Court from a jury verdict of no cause of action predicated upon its finding that plaintiff was contributorily negligent, and that such contributory negligence was the proximate cause of the accident and plaintiff's injuries.

STATEMENT OF FACTS

The collision hereinafter described occurred at the intersection of 100 South Street and 600 West Street, Provo, Utah, which is an open intersection, i.e., there was no regulatory traffic signs or lights controlling. The city ordinances of Provo City established the maximum speed at 25 miles per hour (R. 32, 70).

Plaintiff commenced driving his automobile shortly before the accident, having placed his car into operation between 2nd and 3rd South Street, proceeding northerly on 6th West, passing through the intersection at 2nd South (R. 73). Plaintiff drove his automobile along its course on 6th West at an approximate speed of 20-25 miles per hour (R. 12, 137). When he approached the intersection of 100 South Street and 600 West Street, he slowed his speed to approximately 15 miles per hour (R. 151), and as he entered the subject intersection he shifted his vehicle from high gear to second gear. Plaintiff, as he approached the intersection of 1st South Street, looked to see whether the intersection was clear (R. 73, 138). To his left, parked along the southerly side of 100 South Street, were several closely parked vehicles (R. 138) which obstructed his view.

Defendant had no definite recollection of the parked vehicles (R. 181) but acknowledged he could have seen plaintiff's vehicle 150 feet from the intersection (R. 180). He first saw plaintiff's vehicle when he was approximately at the crosswalk to the intersection and when plaintiff was approximately at the crosswalk to

the intersection (R. 179, see P. Ex. 6, where defendant drew squares representing his vehicle and plaintiff's vehicle with red crayon).

Plaintiff entered the intersection first (R. 21, 57; see P. Ex. 6). Exhibit 6, which is reproduced herein, clearly demonstrated that plaintiff entered the intersection first. Mr. Arnold Coon, engineer, testified that from the investigative report and testimony of Officer Baum, and from the physical measurements he made at the intersection assuming that plaintiff was traveling at a constant speed of 20 miles per hour (the highest rate of speed attributable to plaintiff and the constant speed of defendant's car at 35 miles per hour (the lowest speed attributable to defendant, except for his own testimony) he concluded that plaintiff preceded defendant into the intersection by .15 seconds and was 8 feet into the intersection when defendant entered the intersection (R. 68, 69; see P. Ex. 6).

Defendant's speed was a material fact and the following witnesses testified as follows:

1. Defendant:

Q. (by Mr. Summerhays) As you approached the intersection, about what speed were you traveling?

A. I would say about 25 miles per hour. (R. 164).

2. Plaintiff:

Q. (by Mr. Hughes) Did you have an opportunity to perceive or make judgment as to his

(defendant's) speed as he bore down upon you?

A. I would say 45 or 50 miles per hour. (R. 159).

3. Officer Baum:

Q. (by Mr. Hughes) . . . Did you inquire as to the speed of Mr. Hooper's vehicle at the time of the accident?

A. As I recall, I did.

Q. And what did he relate on that occasion, if you recall?

A. Approximately 30 miles per hour. (R. 14).

Officer Baum further testified concerning his opinion of the speed of defendant's vehicle from his investigation.

Q. Now in connection with the vehicle driven by the defendant, Mr. Hooper, do you have a like opinion of the speed of his vehicle?

A. Yes.

Q. What is that, sir?

A. 35 to 40 miles per hour.

The testimony of defendant as to his speed at the time of the accident can be discounted on simple mathematics and his own testimony. He testified that he first observed plaintiff's vehicle when he was about to the crosswalk (R. 165). On cross examination he drew on Exhibit 6 the position of his vehicle in red and marked the position of plaintiff's vehicle; both were at their

respective crosswalks (see P. Ex. 6). Exhibit 6 clearly shows that from the curb line from which defendant entered the intersection (west) to the point of impact was 38 feet. If defendant was in fact proceeding at 25 miles per hour, he would be traveling at the rate of 36.6 feet per second. Had defendant not decelerated in any manner, he would have struck the rear of plaintiff's vehicle and not the left front fender and door as Exhibit 1 clearly shows.

The deceleration chart of Engineer Coon on Exhibit 6 clearly demonstrates that had defendant been traveling at the speed of 25 miles per hour with 15 feet of braking, he would have stopped short of colliding with plaintiff's vehicle by 11 feet.

With respect to the physical nature of the intersection as it existed at the time of the accident, the evidence clearly indicated that the width of 100 South Street was 52 feet and the width of 600 West Street was 51 feet (see P. Ex. 5).

The intersection was relatively clear with no natural obstacles to obscure the vision of approaching motorists. See Plaintiff's Exhibit 6 for the location of a house and bush on the southwest corner of the intersection which stood between the parties; however, at the time of the accident there was a row of parked vehicles on the southerly side of 100 South Street, closely parked up to 15 or 20 feet from the intersection (R. 139; see P. Ex. 5).

Officer Baum testified plaintiff traveled 29.5 feet

into the intersection and defendant traveled 38 feet into the intersection to the point of collision (see P. Ex. 5 & 6, R. 21), and defendant laid down 10 feet of skid marks before skidding into plaintiff's car at the point of impact. He further testified that plaintiff's car was knocked 17 feet through the air before it struck the pavement (R. 24) which then left 19 feet of skid marks to its point of final rest. Defendant's vehicle after impact, left 47 feet of skid marks, or a total of 57 feet of skid marks prior to its final point of rest (R. 33). After the collision the vehicles came to rest side by side with their front ends facing the northeast corner of the intersection and their sides so closely together that their doors could not be opened (R. 166, 168).

Engineer Coon testified that from the physical measurements of Officer Baum, he determined the following:

> Q. (by Mr. Hughes) Mr. Coon, having assumed the speeds, and course of the two vehicles, then from your background, can you anticipate, and can you relate what final course or what path these vehicles took and came to rest?
>
> Mrs. Summerhays: That question can be answered yes or no, Your Honor.
>
> A. Yes, I believe I can.
>
> Q. (by Mr. Hughes) Now, would you relate for us what that would be?
>
> A. Yes, sir. Again assuming a 35 miles speed for the eastbound vehicle, hitting a vehicle

broadside going northbound, you lose a certain amount of the speed with the application of brakes with the vehicle going 35 miles an hour. This would be composed of two parts. One would be the slowing down as the brakes were applied prior to the wheels locking causing skid marks. Then there would be a further slowdown as the wheels locked and the automobile skidded. I have made a deceleration chart based upon this, and there would be approximately 5 miles per hour of the 35-mile an hour speed, which would be lost due to brakage. So that at the time of impact, I would estimate the speed of the eastbound vehicle as going from 35 miles an hour to 30 miles an hour.

Q. Would you be good enough to make that notation at the top of your Exhibit?

A. (Indicated) (Witness, in blue ink, made notation at the top of Exhibit 6).

Q. Would you indicate that as car No. 2?

A. 30 miles per hour at impact, car No. 2. Now, since there was no evidence in our situation, that we are assuming of having been brakes applied on vehicle No. 1, we would then assume it has been traveling at 20 miles per hour, and was still traveling at 20 miles per hour at the time of impact. Then, as vehicle No. 2 would hit vehicle No. 1, it would have an additional slowdown. This, of course, is made manifest in the energy that has been dissipated in the bending of the respective automobiles. So there would be in the neighborhood of 15 miles per hour of the speed of vehicle No. 2 that would be absorbed at im-

pact. Because of the angle at which the two cars hit, it would be quite likely that vehicle No. 1 would also lose some of its speed, and at the time of braking away from the impact, both vehicles were approximately 15 miles per hour, and going at the same speed, and peeling out of the collision position, they would come to rest essentially at the same point, side by side, as indicated by the dotted line over here (indicated)—Ex. 6.) So from a point, immediately after impact, both cars would have a speed of approximately 15 miles per hour, and would then come to their final resting position, decelerating from that speed.

The testimony in the case as to what plaintiff did is not contradictory, and his actions are brought out most favorably to defendant in the cross examination by his counsel.

By Mr. Lawrence L. Summerhays:

Q. Going back to the accident, Mr. Hughes, you stated that you were traveling north on Sixth West, is that correct?

A. Yes.

Q. And you were in an 1951 Ford?

A. Yes.

Q. And this had a stick shift, did it?

A. Yes.

Q. Now during the block immediately preceding the place where the accident occurred, what would you say your maximum speed would have been?

A. Probably 20 miles an hour.

Q. Could you have gotten up to 25?

A. It is possible.

Q. Had you checked your speedometer, actually?

A. No, I had not gone far, only a block, sir, they are short in Provo. I had just started out.

Q. Is that the reason you say that you could not have gotten your speed up to over 25?

A. If you gun out, you probably could, but that is not my usual way of driving.

Q. I say, that is the reason then you say not over 25, because of the distance that you had traveled?

A. Yes, sir.

Q. Now the first time you saw the Hooper vehicle, it was already in the intersection, was it not?

A. No, I would say it was about 15 feet—

Q. Fifteen feet from you and in the intersection?

A. Yes.

Q. Then was that the first time you looked, to see if you could see the car?

A. No, I had looked on the previous intersection, and again at this intersection?

Q. Where was your car when you first looked to the west, to see if there were any cars coming from the west toward the east?

A. Probably somewhere before the intersection.

Q. How far before?

A. I could not say, it's been too long ago, and I can't remember.

Q. Would it have been further than 15 or 20 feet before?

A. Probably not.

Q. Okay then, from a point 15 to 20 feet before the intersection, you could see the full length of the block, could you not?

A. No, sir.

Q. How far could you see?

A. There were several cars parked there, and I know you have driven as you approach an intersection, where cars are parked near the intersection itself, it is ofttimes hard to see cars coming along. I noticed there were cars there, as I approached that.

Q. Now except for the cars that you say were parked there, from the point 15 or 20 feet from the intersection, you could have seen the full length of the block, could you not?

A. Might have.

Q. How far is this house, the side of the house from the street (indicated)?

A. I don't know, I imagine 30 feet.

Q. If you were only 15 feet, certainly the house would not block you, you could look all the way down, could you not?

A. Not if the cars were parked there.

Q. I said absent the cars.

A. If the cars were not there, yes.

Q. Yes, now you say that there were some cars there, how close were the cars to the west side of the intersection?

A. I would say right up to the legal limit, or closer.

Q. And that would be what, about 30 feet?

A. I imagine yes.

Q. You knew then, that those cars constituted a hazard to your vision, did you not?

A. I didn't have much time to analyze it. It was only a matter of a split second or two.

Q. Yes, but as you approached the intersection, you could see that the cars were parked along the intersection, could you not?

A. Yes.

Q. And you knew that they would constitute a hazard to your view, did you not?

A. Maybe, I don't think you make that kind of an analysis every time you come to a corner, to analyze the situation.

Q. You mean you didn't, is this correct?

A. I think I took all the usual care and caution in approaching the intersection, if that is what you mean.

Q. You knew if there was a car coming into the intersection, and hidden behind those cars, that you were not able to see, there might be an accident, did you not?

A. I didn't know there was a car coming, no.

Q. You didn't know one way or another, whether there was, did you?

A. No, I would not know.

Q. Now you say there was not much time from 15 or 20 feet back, to determine whether or not there was a car there, is this correct?

A. It would only be a matter of a split second.

Q. Fraction of a second?

A. Yes.

Q. Under those circumstances, didn't you feel at the time that you should drive more slowly, so that you could make sure that the way was free before you got into the path of any car that might be coming?

A. I would feel that I was making or taking the necessary precautions. I had slowed to 15 or 20 miles. I had to shift, I was going so slow I remember I had to shift gears. As you know, on a stick shift, if you don't shift down, you begin to stall out. Before I finished shifting, I was hit.

Q. When you saw the car, it was too late to do anything?

A. That is right.

STATEMENT OF POINTS

POINT I

THE VERDICT AND THE JUDGMENT OF THE LOWER COURT ARE NOT SUSTAINED BY THE EVIDENCE, AND THE LOWER COURT ERRED IN SUBMITTING THE QUESTION OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE TO THE JURY.

POINT II

THE LOWER COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT IN ACCORDANCE WITH PLAINTIFF'S REQUESTED INSTRUCTIONS AS SET FORTH IN PAGE 49 OF THE RECORD, INSTRUCTION NO. 3.

POINT III

A MOTORIST, ENTERING THE INTERSECTION FIRST AND HAVING THE RIGHT OF WAY BY REASON OF BEING TO THE RIGHT OF ANOTHER APPROACHING VEHICLE TO AN INTERSECTION, HAS THE RIGHT TO EXPECT, IN ABSENCE OF NOTICE TO THE CONTRARY, THAT THE OTHER MOTORIST WILL HEED THE TRAFFIC LAWS.

POINT IV

DEFENDANT HAD THE BURDEN OF PROOF TO SHOW CONTRIBUTORY NEGLIGENCE AND THAT SUCH NEGLIGENCE WAS AN APPROXIMATE CONTRIBUTORY CAUSE OF PLAINTIFF'S INJURY, UNLESS PLAINTIFF'S PROOF ESTABLISHED CLEARLY SUCH A PRESUMPTION OF CONTRIBUTORY NEGLIGENCE.

ARGUMENT

POINT I

THE VERDICT AND THE JUDGMENT OF THE LOWER COURT ARE NOT SUSTAINED BY THE EVIDENCE, AND THE LOWER COURT ERRED IN SUBMITTING THE QUESTION OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE TO THE JURY.

The jury found there was substantial evidence of negligence on the part of the defendant for in their verdict they stated:

> "We, the Jury impanelled in the above entitled cause, find the issues in favor of the defendant and against the plaintiff, no cause of action.
>
> /s/ Barbara Jolley
> /s/ John L. Carpenter
> /s/ Rulon Finch
> /s/ Richard L. Hutchins
> /s/ Bert S. Jasperson
> /s/ Carl A. Pack

We above are following proposition No. 5. We feel that from the evidence given that the plaintiff was negligent in the operation of his car, by not keeping a proper lookout. Therefore plaintiff cannot recover.

Date April 26, 1966.

/s/ Arthur D. Adams
Foreman"

The jury found negligence on the part of the defendant; otherwise, they would have found against the plaintiff under Instruction No. 4, the trial court's general negligence interrogatory.

It is elementary that evidence which makes the question of negligence a matter of mere surmise, conjecture, or speculation, or which gives rise merely to the possibility of negligence, does not justify submission of the case to the jury. See 38 *Am. Jur., Negligence,* Section 322, P. 1031; 20 *Am. Jur., Negligence,* Section 253, P. 1141. Furthermore, a case should not be left to the jury if the evidence is as consistent with the absence of negligence as with its existence. See 65 C.J.S.Sec 253, P.1141, 43footnote 57, for authorities so holding.

The trial court submitted the following interrogatory to the jury in Instruction No. 5, which was answered affirmatively by the jury as set forth above, namely:

Instruction No. 5

Even though you find the propositions set forth in the next preceding instruction in favor of the

plaintiff, nevertheless, the claim of the plaintiff may be barred by contributory negligence on his part.

Before contributory negligence would preclude plaintiff's recovery, the defendant has the burden of proving by a preponderance of the evidence that the two propositions are true:

Proposition No. 1

That the plaintiff was negligent in the operation of his automobile immediately prior to the collision in one or more of the following particulars:

(a) In failing to yield the right of way to the defendant.

(b) In failing to keep a proper lookout for other vehicles and particularly the vehicle of the defendant.

(c) In traveling too fast for the existing conditions . . .

An examination of the record fails to disclose any evidence whatsoever upon which the Court was justified in submitting the above interrogatory or any part thereof to the jury.

Let us consider the contention of the jury that plaintiff was not maintaining a proper lookout.

In substance, plaintiff testified he traveled about a block and one half before coming to the intersection at which time he looked both to the left and to the right, and that as he approached 100 South Street, he slowed

so as to necessitate shifting from high to second gear, a speed of about 15 miles per hour. Further, he looked to his left and right, and the intersection appeared clear of all vehicular traffic; however, there was a row of closely parked cars to his left obstructing his vision. These cars were parked within 30 feet of the intersection.

Plaintiff first observed defendant bearing down on him when he was in the intersection and defendant was about 15 feet away.

It is clear that plaintiff had done all that is required of a reasonably prudent man under the circumstances, i.e., to proceed into the intersection at a reasonable speed under the circumstances keeping a proper lookout for all vehicular traffic.

Plaintiff had the right to assume that traffic would heed the traffic laws of Utah and the Provo City Ordinances as to speed and not enter the intersection at a rate of speed which would make likely a collision with his car.

Defendant violated Section 41-6-72 UCA in failing to yield the right of way to a vehicle on his left and which entered the intersection first; likewise, he violated the Provo City Ordinance which restricted speed to 25 miles per hour.

Plaintiff should not be adjudged negligent for committing himself to the intersection at 15-20 miles per hour for he had right to assume that no vehicle

would be coming to the left at a speed in excess of 25 miles per hour. See *Jones v. Williams,* 358 Pa. 559, 58 A 2d 57.

The reasonableness of plaintiff's right to rely that others will use the highway lawfully and not speed is best shown by demonstrating the accident would not have occurred if the defendant had been traveling 25 miles per hour as he said he was and complied with the traffic ordinances of Provo City.

The "Deceleration Curve" on part of P. Ex. 6 is mathematically conclusive on this point. The horizontal distance scale demonstrates that defendant, traveling at 35 miles per hour, braking as he did, would bring his vehicle to rest after traveling 55 feet. Thus defendant's speed was zero at 55 feet. By working backward on the normal braking curve, as indicated,[1] defendant would have traveled 27 feet, had he actually been going 25 miles per hour, the maximum speed permitted. The defendant's testimony that he was traveling 25 miles per hour is controverted by the physical facts of the accident. It is the general rule, and the rule of this State, that testimony which is contrary to uncontroverted physical facts, does not constitute substantial evidence. Haarstrich v. Oregon Short Line R. Co., 70 U. 552, 262, P. 101. 20 AM. Jur., Evidence, Sec. 1183 32 C.J.S., Evidence, Sec. 1031(c).

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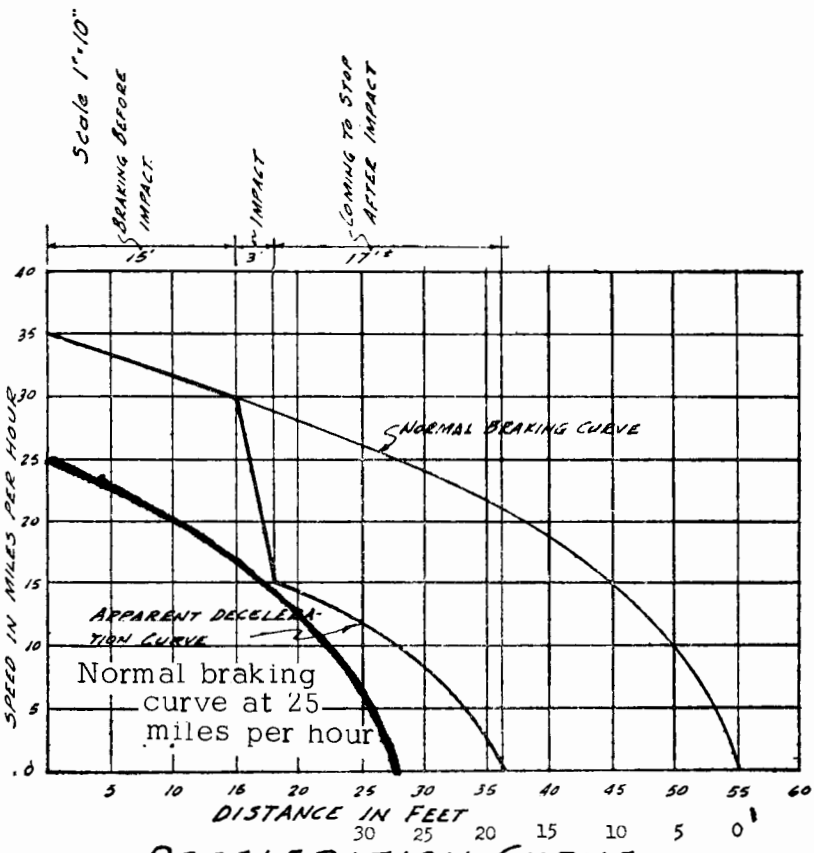
1 This scale and normal braking curve at 25 miles per hour are added for clarity of argument.



DECELERATION CURVE

Pltf's exhibit #6
#26,740—

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1 This scale and normal braking curve at 25 miles per hour are added for clarity of argument.

Defendant, under his own testimony, had at least 38 feet from the time he first observed plaintiff within which to stop. Defendant would have stopped short of colliding into plaintiff's vehicle by 11 feet.

The requirement that two essential elements in contributory negligence exist, namely: (1) Negligence for which plaintiff is responsible; and (2) causal connection between such negligence and the injury complained of are not supported in the record.

POINT II

THE LOWER COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT IN ACCORDANCE WITH PLAINTIFF'S REQUESTED INSTRUCTIONS AS SET FORTH IN PAGE 49 OF THE RECORD, INSTRUCTION NO. 3.

Plaintiff incorporates herein the arguments set forth under Point I and for the reasons therein set forth urges this Court to set aside the verdict and judgment of the lower court and order said court to grant the plaintiff a new trial solely for the purpose of ascertaining the amount of damages suffered by the plaintiff, and that the lower court enter judgment for plaintiff in accordance with such findings.

POINT III

A MOTORIST, ENTERING THE INTERSECTION FIRST AND HAVING THE RIGHT OF WAY BY REASON OF BEING TO THE RIGHT OF ANOTHER APPROACHING VEHICLE TO AN INTERSECTION, HAS THE RIGHT TO EXPECT, IN ABSENCE OF NOTICE TO THE CONTRARY, THAT THE OTHER MOTORIST WILL HEED THE TRAFFIC LAWS.

Plaintiff in approaching 100 South Street looked to the right and to the left. His view was obscured to the left by reason of closely parked vehicles along the southerly curve line of that street. So far as plaintiff approaching the subject intersection, he had the right of way by reason of being to the right of any traffic approaching from the west, and he had the right to assume that a motorist approaching from the west would observe the traffic laws. See *Hogg. v. Muir,* 383 P. 413; 119 A.2d 53, 59 ALR 2d 1197.

POINT IV

DEFENDANT HAD THE BURDEN OF PROOF TO SHOW CONTRIBUTORY NEGLIGENCE AND THAT SUCH NEGLIGENCE WAS AN APPROXIMATE CONTRIBUTORY CAUSE OF PLAINTIFF'S INJURY, UNLESS PLAINTIFF'S PROOF ESTABLISHED

CLEARLY SUCH A PRESUMPTION OF CONTRIBUTORY NEGLIGENCE.

Plaintiff in proceeding north on 600 West Street, drove with circumspection and well within the posted speed limit. The only thing he could have done more than he did was to come to a complete stop at the intersection of 100 South Street. The law does not impose this burden upon a motorist who approaches an open intersection and has the right of way. The negligence of defendant is apparent and such negligence was the proximate cause of the accident. Defendant cannot seriously contend to the contrary but hopes to avoid liability on the ground that plaintiff was contributorily negligent which proximately contributed to the collision and to the damages sustained. The burden of proof of an affirmative defense of contributory negligence is the party pleading such defense.

See *Wigmore on Evidence,* 3rd Edition, Sec. 2507, *Bell v. Carlson,* 270 P. 2nd 420, *Bryan v. Hill,* 45 Idaho 662, 264 P. 869. Defendant adduced no evidence supporting his affirmative defense.

CONCLUSION

In view of the undisputed evidence in this case, the duty imposed upon the plaintiff driver by the trial court was such as required of him a standard care which would preclude his involvement in a moving automobile accident at any open intersection, regardless of whether he

entered the intersection first, whether he had the right of way, or whether or not the other driver was speeding. The contributory negligence interrogatory, Instruction No. 5, allowing the jury to speculate upon the evidence, which was clearly more consistent with the absence of plaintiff's negligence than with its existence. The judgment of the lower court should be reversed.

Respectfully submitted,

ROBERT W. HUGHES
Attorney for Appellant and Plaintiff

.71
.56
DIF. = .15 SEC.
ENTERING INTERSECTION.

CAR #2 DISTANCE FROM INTSEC. = 8' WHEN CAR #1
ENTERS INTERSECTION

Hooper

.56 SEC

28'

36'

100 SOUTH STREET

HOOPER CAR CONSTANT SPEED OF 32 MPH = 31.6 FEET PER SEC TO BRAKING POINT

AVERAGE SPEED 32.5 MPH = 47.6 FPS IMPACT SPEED 30 MPH = 44 FPS

150'

101'

50'

.71 SEC

26'

29'

29.5'

Hughes

59'

88.5

HUGHES CAR CONSTANT SPEED OF 30 MPH = 44 FEET PER SECOND

E 600 WEST STREET

SPEED IN MILES PER HOUR

DISTANCE IN FEET

Scale 1"=10'

SURVEY OF ACCIDENT
BETWEEN
HUGHES & HOOPER
PROVO, UTAH - JUNE 1963
FOR: ROBERT HUGHES
COON, KING & KNOWLTON, ENGINEERS
1144 E. 2300 SO. SALT LAKE CITY

Plaintiff's Exhibit #6
26, 1940 -