1971

# Zona Larsen v. Breitling Brothers Construction Company : Appellant's Brief

# IN THE SUPREME COURT OF THE STATE OF UTAH

ZONA LARSEN,
*Plaintiff and Appellant,*

vs.

BREITLING BROTHERS CONSTRUCTION COMPANY,
a corporation,
*Defendant and Respondent.*

Case No. 12125

## APPELLANT'S BRIEF

Appeal From the Third District Court for
Salt Lake County, State of Utah
Honorable Merrill C. Faux, *Judge*

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## CASES CITED



## TEXTS CITED

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### STATEMENT OF KIND OF CASE

This is an action by plaintiff for damages for personal injuries that arose out of a truck auto collision that occurred on the 6th day of August, 1968, at or near the intersection of 3650 South and 3200 West in Salt Lake County, Utah.

### DISPOSITION IN LOWER COURT

The action was tried to a jury on the issues of the negligence of the defendant and the contributory negligence of the plaintiff and a jury verdict was rendered in favor of the defendant and against the plaintiff.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the jury verdict and judgment entered thereon, and the judgment of this Court, that the defendant was negligent as a matter of law and that such negligence was the sole proximate cause of the accident in question. That failing, plaintiff seeks a new trial on all issues.

## STATEMENT OF FACTS

Zona Larsen, (plaintiff and appellant) resides at 573 Wall Street, in Salt Lake City, Utah, and was sixty three years of age on the date that the accident occurred. She had driven a car earlier in her life but had not possessed a driver's license for a number of years and prior to the accident in question had obtained a learner's permit, had taken drivers training and on the day of the accident, (August 6, 1968) was operating a motor vehicle accompanied by a neighbor, Mrs. Phyllis B. Stetich.

On the morning in question, Mrs. Larsen had left her home accompanied by Mrs. Stetich and they had gone to the Sutherland Lumber Company on Redwood Road, and thence, journeyed South on Redwood Road to 3500 South Street and there turned West to 3200 West where she made a left turn and was proceeding South on 3200 West. (R. 189) She was on her way to visit a daughter who resided on American Drive which is in Granger, Utah.

At the time Mrs. Larsen made her left turn on 3200 West she was aware that a dump truck had also

made a left turn behind her and she was generally aware of the presence of the dump truck as both vehicles proceeded South on 3600 West. (R. 190) As Mrs. Larsen approached the intersection of 3650 South she intended to make a left turn to proceed East. Approximately 100 feet back of the intersection she put on her left turn directional indicator and slowed down by releasing her foot from the accelerator. (R. 192). Her speed and that of the truck just before she started to slow down was aproximately 25 to 27 miles per hour. (R. 192). Before Mrs. Larsen reached the intersection her vehicle was struck by the dump truck and she sustained the injuries complained of in this action.

Mrs. Phyllis Stetich is a neighbor of Mrs. Larsen and was riding with her as a passenger in the front seat of the automobile. She testified to the same essential facts as did Mrs. Larsen. She stated that they did stop for a semaphore light at the intersection of 35th South and 3200 West and when the light turned green they made a left turn and proceeded South on 3200 West toward the intersection of 3650 South where the impact occurred.

Mrs. Stetich had ridden with Mrs. Larsen on several occasions and in her opinion she had progressed and was a good driver. (R. 163).

In her judgment they were traveling at approximately 20 to 25 miles an hour as they proceeded South on 3200 West. (R. 165). 3200 West is a two lane road

with a dirt shoulder on each side and a rather deep ditch on the West side (R. 166). As the vehicle approached the intersection Mrs. Stetich observed that Mrs. Larsen put on her left turn signal and slowed down somewhat and was then struck in the rear. (R. 167). Mrs. Stetich observed nothing unusual in the manner that Mrs. Larsen drove the vehicle or aproached the turn. (R. 168).

The accident was investigated by Deputy Sheriff Barr H. Petersen. He responded to a call to an accident and found both the vehicle of Mrs. Larsen and the Breitling Brothers dump truck in the vicinity of the intersection. Deputy Petersen determined the probable point of impact as being approximately 50 feet back of the South edge of the intersection. He determined this point to be approximately 26.7 feet from the East edge of the roadway and approximately 9 feet 9 inches to the center line. The Southbound lane of travel was approximaely 16 feet in width. The point of impact was determined by a slight scuff mark evidently made by the left front tire of the dump truck. There were no skid marks by either vehicle to the point of impact. (R. 245-246). At impact the dump truck would have been toward the right hand edge of the roadway and the Comet automobile driven by plaintiff would have been toward the center of the roadway. The investigating officer had a conversation with each party at the scene of the accident. We quote from the Record at Page 248:

"Driver No. 1 (dump truck driver) states

he saw No. 2; (Larsen) she appeared to be pulling to the right to let him pass; then, came back into the center, and her brake lights came on. He applied brakes, but was unable to avoid the collision."

"Driver No. 2 (Larsen) states she signalled for her left-turn — for her turn — was, then, hit from the rear by No. 1. No. 2 states she was a little ways from the center, as the road she was going to turn on is quite narrow. Let's see — No. 2 states she is familiar with the area; however, she didn't know the name of the streets."

The dump truck belonging to the defendant and respondent, Breitling Brothers, was operated by one Brent Rulon Dickey. At the time of this accident Mr. Dickey was employed by the defendant during the day and was working afternoons gassing cars for Salt Lake City. He was also a student at the University of Utah during the regular school year. (R. 262-275-276).

The truck involved was a 1959 Reo dump (R. 262) that weighed aproximately 18,000 pounds unloaded. (It was unloaded at the time of the accident). The truck was equipped with air brakes (R. 265) but the air brakes were not sufficient to lock the wheels on full aplication. (R. 266).

As Mr. Dickey made a left turn following behind the Larsen vehicle, he estimated that the maximum speed that he attained was between 20 and 25 miles per hour and that he continuously maintained

a distance between his dump truck and the Larsen vehicle of at least 60 feet. (R. 266).

AsMr. Dickey proceeded behind the Larsen car as both vehicles approached the intersection, he noticed the brake lights of the Larsen vehicle come on and then he made application of the brakes on the truck and stated that if he had had a couple of more feet his truck would have been stopped and there would have been no collision. (R. 273).

He also testified that as he proceeded behind the Larsen car it appeared to move over toward the right hand side of the lane of travel but that it did not slow down or speed up, but just continued to move in that position and he, consequently, had carefully watched the Larsen vehicle and kept his vehicle at such a distance that he could have avoided a collision no matter what the Larsen vehicle did. (R. 279).

Mr. David T. Hill testified for the plaintiff. His experience showed that he was an expert in the field of dump trucks and their braking systems. (R. 286-288). Mr. Hill testified concerning the mechanics of an air brakes system on a dump truck such as was involved in this accident and rendered the opinion that the brakes would be inadequate or faulty if they were incapable of locking the wheels and skidding the tires, particularly with an unloaded truck such as this.

Mrs. Marlene Orr was westbound in a motor vehicle and stopped in response to the stop sign at the

intersection in question. She looked to her right and observed the small car operated by the appellant and the dump truck aproaching the intersection from the North. She stated that she observed them only for a few seconds and observed that both appeared to be in the center of their lane and they were proceeding quite slowly. She observed the vehicle of appellant lurch several times and then it appeared to stop. At that point it was struck by the dump truck. She did not, however, recall that the appellant's vehicle was stopped at the time of the impact. She thought perhaps she was moving very slowly. (R. 308).

Mrs. Robert L. Breitling testified on behalf of the respondent corporation. Mr. Breitling testified as to the type an kind of truck involved and its condition. He indicated that his company maintained a service department and that the trucks were serviced if problems developed. This particular truck was a ten (10) wheel Reo dump truck equipped with air brakes to all wheels. He indicated that air brakes respond slightly slower than hydraulic brakes but that air brakes are safer brakes because they apply more pressure.

He testified that it was possible to skid the wheels of a truck such as this and that the truck would skid more readily at high speeds than at slower speeds. He clarified this by stating that a truck would be expected to stop rather than skid at slow speeds.

He testified on examination that if an air brake

system were functioning properly that the wheels on the truck would either stop or lock and skid when the brakes were fully applied (R. 319), and, although he was somewhat equivocal he did admit that if the braking system would not lock the wheels on the truck then the brakes would be defective. (R. 319).

## ARGUMENT

### POINT I.

### THE LOWER COURT ERRED IN FAILING TO AWARD TO PLAINTIFF A DIRECTED VERDICT.

At the conclusion of all the evidence the plaintiff moved for a directed verdict. (R.323). The Motion was denied and all issues were submitted to the jury. A verdict in favor of the defendant resulted.

The position of the plaintiff in this case is that the sole proximate cause of the accident and the injuries to plaintiff was the negligence of the defendant in either (1) following the vehicle of plaintiff too closely, and (2) failing to have an adequate brake system on the dump truck.

The testimony relied upon by plaintiff to support this proposition follows:

Brent Dickey:

Q. MR. GARRETT: "Do you have the question? Let me state it again: Was the braking system on that truck sufficient or adequate enough to lock the wheels? In other words, wheels that were attached to the brakes, was it adequate to lock those wheels a full application of the brake?

A. I have never been around the truck that air brakes would do this with the weight of the truck, so it would not skid.

Q. It would not. Now, you had driven this truck for a long period of time?

A. This particular truck?

Q. Yes.

A. Since June.

Q. You were, then, familiar with its braking system?

A. Yes.

Q. Very well. And had you had occasion to make full aplication of the brake on this truck?

A. Yes, sir.

Q. And it w a s n' t sufficient to lock the wheels; is that correct?

A. No, sir." (R. 265-266).

Additionally he testified that he was following the car of the plaintiff at a distance of at least 60 feet and traveling between 20 and 25 miles an hour. (R. 265-266).

David T. Hill:

Q. "Now, based upon your experience in the business — a knowledge of this subject — do you have an opinion as to whether or not a truck, where the wheels would not lock on application — full application of air — do you have an opinion as to whether or not that truck would have an ade-

quate brake system, or whether or not it would be a faulty brake system?

A. No.

Q. Do you have such an opinion?

A. Yes.

Q. What is your opinion?

A. My opinion is that the brake system, there was something wrong with it,at the time, for this reason; if you apply the air brake, fully, you can t h r o w yourself through the windshield, practically; you can lock all wheels up. This is the object — especially, with a loaded truck.

What I mean, empty truck, if you have got a loaded truck, it takes a little more pressure than that, depending on the angle, or if you are on level ground, or what doing. But, an empty truck, you definitely could lock all wheels, if this system were correct, and they would lock right up solid." (R. 288)

Robert Breitling:

Q. "Now, assuming as — assuming as a fact of this case, that, when Brent Dickey applied the brakes to this truck, and his wheels did not lock, that would be considered a defect in the brake system, wouldn't it?

A. No; depending what time you are talking about; I mean, got to give sufficient time to lock. I would say, if they didn't lock, at all — of course, if didn't stop, at all — the brake would be defective; but have to give sufficient time." (R. 319)

These facts came from Mr. Breitling, a principal of the defendant corporation, the driver of the vehicle of defendant and the expert called by the plaintiff. Mr. Hill, plaintiff's expert, and Mr. Breitling agree that when the air is fully applied to the brakes on a vehicle such as this, that the wheels will stop or lock and skid, depending upon the speed of the vehicle. This certainly is a matter of knowledge common to all of us. The driver of the dump truck disagrees. He states that the air on this truck was not sufficient to lock the wheels.

When the testimony of those most familiar with this truck and trucks in this category is fully considered, it is quite clear that the brakes on the truck were inadequate and it is difficult to conceive how anyone would permit a machine as potentially lethal as this one, to be on the road in such condition. We know as a matter of common knowledge that air brake system on trucks are designed to lock and skid the wheels. As drivers we observe these rubber marks on the highway frequently. They are produced by the locked and skidding wheels of a truck.

We conclude this matter of negligence by reference to the Utah State Statute of the subject: 41-6-144 Utah Code Annotated, 1953, provides in part:

> (6) The brake shoes operating within or upon the drums on the vehicle wheels of any motor (vehicle) may be used for both service and hand operation.
>
> (b) Performance Ability of Brakes. Every

> motor vehicle or combination of vehicles, at any (all) times and under all conditions of loading, upon application of the service (foot) brake, shall be capable of (1) developing a braking force that is not less than the percentage of its gross weight tabulated herein for its classification, (2) decelerating to a stop from not more than twenty miles per hour at not less than the feet per second tabulated herein for its classification, and (3) stopping from a speed of twenty miles per hour in not more than the distance tabulated herein for the classification, such distance to be measured from the point at which movement of the service brake pedal or control begins. Tests for deceleration and stopping distance shall be made on a substantially level (not to exceed plus or minus one per cent grade), dry, smooth, hard surface that is free from loose materials.
>
> . . . Stopping distance in feet of single units of an actual gross weight of 10,000 pounds or more, 40 feet.

The vehicle driver testified that he was traveling at least 60 feet behind appellant's vehicle at 20 to 25 miles an hour and yet he was unable to stop. The speed in this case is substantially equivalent to the statutory norm and it will be recalled that the accident occurred on a flat, level roadway.

Appellant believes that it is patently clear that the defendant was negligent and that such negligence proximately caused the accident in question, and,

hence, the point will not be labored. The more important consideration at this point is whether the appellant was guilty of any negligence and, if so, was such negligence a *proximate contributing cause* of the accident. Testimony as to what the appellant was doing up to the point of accident came from appellant, her passenger, the truck driver and the witness. The testimony conflicts in some points. The appellant testified that she was driving down the road at a moderate speed and was slowing down preparatory to making a left turn when she was struck in the rear. This evidence is corroborated by her passenger.

The truck driver stated that as they were proceeding South on the roadway in question, the appellant's vehicle had moved to the right of the lane and then as they aproached the intersection, she pulled to the center of the lane and appeared to be suddenly stopping. The witness testified that she saw both vehicles moving down the road very slowly, was not aware of any movement from one part of the lane to the other, but did testify that the movements of the appellant's car were somewhat jerky as if the car were a standard transmission and the clutch were engaged and disengaged too rapidly.

The truck driver did testify that the vehicle ahead of him appeared to be making a sudden stop. He admitted, however, that as soon as he saw her brake lights, he put his brakes on.

(R. 273)

"Only indication I ever saw was, the brake lights were on.

Q. You saw them come on?

A. That is when I hit my brakes."

Appellant is mindful of the Rule that if a vehicle makes a sudden stop or suddenly decreases its speed in normal traffic movement, that that would be negligence, and if it were a proximate cause of the accident, the preceding driver could not recover. However, the important issue on this Appeal is the matter of causation.

At the trial appellant established beyond any question that the braking system on the truck was deficient. The brakes would not stop the truck in the distance allowed by the Law of the State of Utah. That was the sole efficient cause of this accident and that conclusion is inescapable when the testimony of the truck driver is reviewed.

At Page 278 and 279 of the Record, the driver states that he was super-alert to the vehicle ahead of him and that he was maintaining a sufficient distance between the two vehicles that he could have avoided anything that the driver ahead did. And, at Page 273 of the Record he states that had he had a couple of more feet there would have been no accident. This testimony clinches the proposition that the sole cause of this accident was the negligence of the defendant in not being able to control the truck and stop it in the distance required by Law.

Appellant recognizes the oft repeated phrase in automobile cases that negligence, contributory negligence, and proximate cause, are matters for a jury. (Certainly the respondent will dwell on that proposition in its Brief). Certain cases, and this is one, require a higher degree of judicial discernment. Appellant could not find too many cases analogous to the factual situation involved here but those Courts that have had such a situation, rule that the proximate cause of the accident was the negligence of the following driver.

In the case of *Kent vs. Freeman*, 345 South West 2nd 252 (Tenn.), the Court states the following:

> "There is no contention whatsoever that there was any negligence on the part of Mr. Kent except his alleged failure to give a signal of his intention to turn right into Douglas Lane. The evidence is without dispute that he did turn on his blinker signal. The only point of dispute is as to whether or not this blinker signal worked so as to be visible to the driver of the truck.
>
> "As we have seen hereinabove, defendant Harrison saw this car in front of him all the way from the time he came over a small hill some 3/10's of a mile away and continued to have it in plain view all the time, hence, it would appear that the sole proximate cause of this accident was the negligence of the driver of the truck in failing to keep his vehicle under proper control, and the negligence of the driver and owner thereof, in operating an overloaded truck which could not be stopped in the space and time prudence required."

The case of *Foreman vs. American Auto Insurance Company*, 137 South 2d, 728 (La.) concerned a front to rear collision between two trucks. The evidence pointed to the fact that the lead truck made a sudden stop and the following truck had defective brakes.

After discussing the conflicting testimony concerning the above matters, the Court stated:

> "Regardless of the distance which was required for Morgan to bring his truck to a stop after his brakes were applied, however, it seems to us that if the brakes on the following truck had been functioning properly, Whiteheadwould have been able to stop his truck within aproximately the same distance, since both trucks were the same type and were carrying identical loads."

Whitehead testified that:

> "When I first hit my brakes, I was traveling approximately 30 or 40 yards behind him."

> "Whitehead, therefore, had 90 to 120 feet, plus the remaining distance traversed by Morgan before his truck stopped, within which to stop after his brakes had been applied, and we have already concluded that Morgan's stop was not as abrupt as contended by the plaintiff and intervenor. We are convinced that the accident would not have occurred if the brakes on the Whitehead truck had been functioning. Since Whitehead, with p r o p e r l y working brakes had ample time within which to stop his truck before the accident occurred, we think any negligence which may be attributed

to Morgan for bringing his truck to a stop suddenly cannot be construed as constituting a proximate or contributing cause of the accident."

Appellant seeks a reversal of this case on the reasoning set forth in the Foreman case, supra. Where, as here, the truck driver could have stopped his vehicle in time to have avoided the collision had the truck been equipped with adequate brakes, then, even if we accept respondents theory of sudden stop, such stop could not be a proximate cause of the accident.

## POINT II

## THE TRIAL COURT ERRED IN ITS JURY INSTRUCTIONS

Instruction No. 13 given by the Trial Court is the "sudden peril doctrine" (R. 119) and is verbatim JIFU Instruction No. 15.4. Appellant duly excepted the giving of this Instruction on the grounds that it was inappropriate under the facts of this case. The truck driver was not suddenly confronted with any peril or emergency — he had followed the vehicle of Mrs. Larsen for a considerable distance and was super-alert to that vehicle and was following at such a distance, according to his own testimony, that he could have avoided her vehicle no matter what she had done.

The driver simply applied his brakes in response to the application of brakes from the car ahead of him and were it not for the fact that his brakes were

not adequate, the accident would not have occurred. This is not a situation of sudden peril where alternative choices might have been taken. There was no imminent threat to the truck driver because he obviously thought he could avoid the collision.

Compare the Utah case of *Howard vs. Ringsby Truck Lines*, 2 Utah 2d, 65, 269 Pac. 2d, 295, where the doctrine is discussed and applied.

In the case of *Gittens vs. Lundberg*, 3 Utah 2d, 392, 284 Pac. 2d, 1115, the Court stated:

> "The plaintiff also complains of the trial courts refusal to give a requested instruction on a sudden emergency. It is our opinion that no error was committed. The request did not properly state the Law because it did not cover the requisite element that the emergency must be one which arose without fault on the part of plaintiff. Where the plaintiff creates the peril by his own fault, he may not thereafter urge the sudden emergency doctrine to protect himself from the charge of contributory negligence. It was defendant's theory and his evidence showed, that the plaintiff ran in front of defendant's vehicle when the latter was too close to avoid striking him. Under plaintiff's own testimony he admitted observing the car from the North no less than three times before he entered the intersection."

The defendant created the peril in this case by putting a truck on the road with defective brakes. When the defendant created this peril it should not expect to profit from the doctrine.

Appellant excepted to the Courts Instructions No. 18, 19 and 22 (R. 124, 125 and 128). These Instructions read as follows:

Instruction No. 18:

> Under the laws of Utah no person shall turn a vehicle unless the vehicle is in a proper position upon the roadway so that the turn or movement can be made with reasonable safety.
>
> Under no circumstance shall any person turn any vehicle without giving an appropriate signal either by the hand or arm or a turn signal lamp indicator.
>
> Before a turn is made a signal of intention to turn either right or left shall be given continuously during the last 100 feet traveled by the vehicle prior to the start of the turn.

Instruction No. 19:

> The law requires that no person shall turn a vehicle upon a public highway unless such movement can be made with reasonable safety. This does not mean, however, that the driver of a motor vehicle, before making a turn, must know there is no possibility of an accident. It means that before starting to turn a vehicle and while making a turn, the driver of the vehicle must use such precaution as would satisfy a reasonable and prudent person acting under similar circumstances that the turn could be made safely.

Instruction No. 22:

> It was the duty of Zona Larsen to use reasonable care under the circumstances in driving her vehicle to avoid danger to herself and

others and to observe and be aware of the conditions of the highway, the traffic thereon, and other existing conditions; in that regard, it was her duty to observe due care in each of the following particulars:

(a) To exercise reasonable care to keep a lookout for other vehicles ahead and behind her and other conditions reasonably to be anticipated.

(b) To keep her car under reasonable, safe and proper control.

(c) Not to suddenly stop or decrease her speed without first ascertaining that she could do so with reasonable safety and, if other vehicles would be affected by such movement, not without first giving an appropriate signal to the driver to the rear by the extension of the hand and arm downward if there was a reasonable opportunity to give such signal that such movement is to be made.

(d) To not turn her vehicle upon the highway from a direct course or move right or left upon the roadway if other vehicles would be affected by such movement, until and unless such movement could be made with reasonable safety.

(e) To approach the intersection where she intended to turn left in the extreme left-hand lane lawfully available to traffic to begin her left turn.

(f) To give signal of intention to turn left continuously not less than the last 100 feet traveled by the vehicle before turn-

ing, if other vehicles would be affected by such movement.

These Instructions set forth among other things the legal theories of turning automobiles. (It will be recalled that the independent witness called by the defendant did not testify to any turning movement on the part of the vehicle of appellant.) The only evidence in the case as to the turn came from the truck driver who stated the vehicle of appellant moved from the outside of the lane to the center of the lane directly in front of him and was slowing down, converging to a stop.

The appellant testified that she was approaching the intersection preparing to turn left. However, the left turn law could not possibly enter into this case because the accident had happened before the appellant ever reached the intersection.

Furthermore, the legal statement concerning turning automobiles is not relevant to the issues. The fact is that the roadway in question was a two lane road; that the truck was a minimum of 60 feet behind the Larsen vehicle and if in fact, she did move within the confines of her own lane of travel, certainly the truck wa s unaffected and appellant had a legal right to move in her own lane of travel. Under the foregoing Instructions however, the jury could easily have been confused and could have found that she had no right to move in her lane of travel; had violated the left turn law; and, therefore, had no right to recover

in this action. The Instructions are clearly prejudicial.

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Appellant excepted to the Courts Instruction No. 23 (R. 129). The Instruction reads:

> "You are instructed that as a matter of law a brake light signal which is given simultaneously with a sudden stop or decrease of speed of an automobile without more is not in compliance with the duty to give an appropriate signal, and any such signal, if any was given, without more, would not be an appropriate signal of suddenly stopping or decreasing speed. If you find from a preponderance of the evidence that the plaintiff, Zona Larsen, suddenly stopped or decreased the speed of her vehicle and that the only signal she gave was a brake light signal simultaneously with the sudden stop or decrease of speed, then you are instructed that such signal, if any, would not be an appropriate signal and that such action on her part would be negligence."

The Instruction is deceptive. It states that as a matter of law a brake light signal is not sufficient when coupled with a sudden stop or decrease in speed and that the appellant would be negligent if she did so.

The truck driver was not surprised. He was super-alert to the movement of the plaintiff's car and applied his brakes immediately upon seeing her brake light. Certainly the appellant could not be guilty of negligence as a matter of law as this Instruction implies under those facts. To be a complete statement of

the Law, the Instruction should have contained a statement in substance that such actions would not be negligent unless such actions unreasonably interferred with the following traffic.

Appellant duly excepted the Courts Instruction No. 24 (R. 130 and 131). This Instruction reads:

> Even if you find the two propositions in the foregoing Instruction in favor of the plaintiff Zona Larsen, she, nevertheless may be barred from recovery by contributory negligence.
>
> Before contributory negligence would preclude a recovery by said Zona Larsen you must find from a preponderance of the evidence that each of the following propositions are true:
>
> Proposition No. 1:
>
> That the said plaintiff Zona Larsen was negligent in the operation of the Larsen automobile just before the impact in one or more of the following particulars:
>
> (a) In failing to exercise reasonable care to keep a lookout for other vehicles ahead and behind her and other conditions reasonably to be anticipated; or,
>
> (b) In failing to keep her vehicle under reasonable safe and proper control, or
>
> (c) In suddenly stopping or decreasing her speed without first ascertaining she could do so with reasonable safety and, if other vehicles would be affected by such movement, without first giving an appropriate signal to the driver to the rear by the ex-

tension of the hand and arm downward if there was reasonable opportunity to do so, or

(d) In turning her vehicle upon the highway from a direct course or moving right or left upon the roadway if other vehicles would be affected by such movement at a time when such movement could not be made with reasonable safety, or

(e) In failing to approach the intersection in the extreme left-hand lane lawfully available to traffic to begin her left turn, or

(f) In failing to give a signal of her intention to turn left continuously for at least the last 100 feet traveled by the vehicle before turning if other vehicles would be affected by such movement.

Proposition No. 2:

That the said negligence of the plaintiff, Zona Larsen, if any, was a proximate and contributing cause of the occurrence. If you find those two propositions against the plaintiff, Zona Larsen, she cannot recover even though you found in favor of the plaintiff, Zona Larsen, and against the defendant on the issue stated in the foregoing Instruction.

The Instruction starts out by stating that:

"Even if you find the two propositions in the foregoing Instruction in favor of the plaintiff, Zona Larsen, she, nevertheless may be barred from recovery by contributory negligence." (R. 130)

The foregoing Instruction is No. 23 and as quot-

ed above in this Brief that Instruction does not contain two propositions. It treats the subject of signal by brake light and bears no relationship to Instruction No. 24.

The Instruction concludes by stating:

> "If you find those two p r o p o s i t i o n s against the plaintiff, Zona Larsen, she cannot recover even though you found in favor of the plaintiff, Zona Larsen, and against the defendant on the issue stated in the foregoing Instruction."

The net effect of this Instruction is to hopelessly confuse the jury.

Furthermore, when we compare Instruction No. 24 with Instruction No. 22 we see that the Court is stating the same propositions in a slightly different manner. In Instruction No. 22 the duty of the plaintiff is set forth and in Instruction No. 24 it is stated in substance that she would be guilty of contributory negligence if she violated those duties. Instruction No. 22 puts issues before the jury on the matter of turning that were not relevant to the facts of the case, and Instruction No. 24 compounds the error by re-emphasizing those matters. In addition, the jury is directed to the foregoing Instruction which does not contain two propositions although this Instruction states that it does, and then concludes by indicating that plaintiff cannot recover if the two above issues are found against her even though they found in her favor on the issue stated in the foregoing Instruction.

A lay juror could only approach this case with bewilderment in view of these Instructions and the resulting confusion deprived the appellant of a fair trial.

## CONCLUSION

1. That the Lower Court erred in not granting appellant a direct verdict on the issue of liability, and,

2. That the jury Instructions of the Court were erroneous and prejudicial.

As to No. 1 above, the evidence clearly shows that the brakes on the dump truck were defective and would not lock the wheels. The truck driver testified that he was sufficiently far from the vehicle of appellant that he could have avoided her no matter what she did and that had he had a few more feet there would have been no impact. It is apparent from this testimony that the sole proximate cause of the accident was the negligence of the defendant in putting a vehicle such as this (potentially dangerous in the best condition and lethal with defective brakes) on the roadways of this community.

As to No. 2, appellant has detailed in this Brief, those portions of the Court's Instructions deemed to be erroneous and prejudicial. The Court injected issues before the jury that were not warranted by the facts such as the law regarding a turning vehicle, and the Instructions cited above and considered as a

whole, are confusing, erroneous and deprived the appellant of a fair trial.

This case should be reversed and the District Court ordered to enter a directed verdict on the issue of liabiilty for the plaintiff. Alternately appellant requests a new trial on all issues.

Respectfully submitted,

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