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IN THE SUPREME COU
OF THE STATE OF UT

ZONA LARSEN,

Plaintiff and Appellant,

vs.

BREITLING BROTHERS
CONSTRUCTION COMPANY,
a corporation,

Defendant and Respondent

RESPONDENT

Appeal from Judgment of the
Salt Lake
Honorable Merrill

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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

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action for personal injuries alleged to have resulted from an automobile collision.

DISPOSITION IN LOWER COURT

The lower court entered a judgment on a jury verdict in favor of the defendant, no cause of action.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmance of the lower court judgment.

STATEMENT OF FACTS

The parties will be referred to in this brief as they appeared in the court below. Because plaintiff's statement of facts states the evidence in a light most favor-

able to her position rather than most favorable to the jury verdict, that statement is not accepted. Defendant offers instead the following:

Plaintiff, a 63-year-old woman, was at the time of the accident on August 6, 1968 driving under a learner's permit (R. 163). Prior to receiving her learner's permit she had not driven since 1928 (R. 187).

As plaintiff traveled south on 3200 West in Granger, Utah intending to turn left onto 3650 South, a street on which her daughter lived, she was aware of defendant's truck following her (R. 190). The truck, driven by defendant's employee Brent Dickey maintained an interval of about 60 feet behind the plaintiff's automobile at all times (R. 266). Mr. Dickey had driven the same truck for defendant all summer and its brakes were in good condition (R. 268, 321, 322). Mr. Dickey's father owned trucks of the same type and he had a full familiarity with such equipment and had driven trucks of this size owned by his father for several years (R. 269).

As plaintiff drove south on 3200 West she pulled to the far right side of the lane as if to make room for the truck to pass (see transcript of proceedings, page 116, line 10 — an unnumbered page between pages R. 274 and R. 275), then without any warning, and without giving any signal for a left turn (R. 273, 302, 308, 309) she suddenly pulled back into the left-hand portion of the lane, abruptly hit her brakes and jerked to a sudden stop (R. 273, 282, 308). Mr. Dickey immediately hit his brakes upon seeing plaintiff's brake lights go on (R. 270,

273) and the truck had almost come to a stop when it struck the rear of plaintiff's automobile (R. 273, 302).

In explaining her curious driving behavior to the police officer investigating the accident plaintiff stated that she had moved to the far right and then suddenly to the left as part of her effort to make a wide left turn because 3650 South, the road she intended to turn onto, was a narrow road (R. 250). Plaintiff had previously told Mr. Dickey, however, that she had pulled to the right to make room for him to pass her (R. 274).

ARGUMENT

POINT I

THE LOWER COURT PROPERLY REFUSED TO DIRECT A VERDICT FOR THE PLAINTIFF.

Plaintiff's brief presents essentially a jury argument. It disregards the cardinal rule that on appeal the evidence and whatever inferences can fairly and reasonably be drawn therefrom must be viewed in a light most favorable to the verdict. *Memmott v. U. S. Fuel Co.,* 22 Utah 2d 356, 453 P.2d 155 (1969).

Plaintiff argues in her brief that defendant's conduct was the sole proximate cause of the accident. In her argument she even infers that if defendant was guilty of *any* negligence then she should be allowed to recover. No explanation is offered as to why the doctrine of contributory negligence which was pleaded and submitted to the jury should not apply under the facts here presented.

The evidence most favorable to the verdict is that Mr. Dickey was free of any negligence and that the accident was caused by the plaintiff's own negligent conduct. Plaintiff at the trial attempted, of course, to show to the contrary but the jury chose to find in defendant's favor. Whether either party was guilty of or free from negligence could only have been for the jury where, as here, the evidence was in conflict.

> "The trial court properly submitted to the jury the questions of negligence, contributory negligence and proximate cause, which this court has held are ordinarily jury questions." *Jensen v. Taylor,* 2 Utah 2d 196, 271 P.2d 838, 842 (1954). See also *Hayden v. Cederlund,* 1 Utah 2d 171, 263 P.2d 796 (1953).

Plaintiff states in her brief at page 8 that the lower court erred in failing to direct a verdict in her favor because of the accident. The negligence of defendant is alleged to be either following plaintiff's vehicle too closely or failing to have adequate brakes on its dump truck. However, to support this position plaintiff relies exclusively upon the evidence favorable to her and wholly disregards the very strong and credible evidence which supports the jury verdict for defendant. This she is not entitled to do.

Plaintiff admits in her brief at page 14 "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." Such

was the evidence here upon which the jury found in favor of the defendant. There was strong evidence to support the jury's finding that plaintiff's improper driving behavior prior to the accident was the proximate cause of the accident. The jury could properly have found, as it probably did, since plaintiff was driving on a learner's permit (R. 163) and drove in a highly erratic fashion, that she failed to meet the standard expected of the average driver. She told the investigating officer that she had moved first to the right edge of the road, then to the left and then hit her brakes (R. 248). Thus, the jury could, and probably did, find that the truck driver could not reasonably have expected that, because of her inexperience and lack of skill she would make a wide and improper turn, then suddenly stop as she admitted doing to the investigating officer (R. 250).

An independent eyewitness to the accident testified to plaintiff's curious driving behavior and the abrupt and erratic movement of her car when she "slammed on her brakes" (R. 301, 306, 307, 308).

The evidence showed that Mr. Dickey, the driver of the truck which struck plaintiff, as contrasted with plaintiff's driving behavior at the accident scene, had driven trucks for several years and was considered by his employer to be "a very good driver; very capable as a driver of trucks." (R. 316). He hit his brakes as fast as he could upon seeing the brake lights flash on on plaintiff's automobile and the truck brakes fully applied (R. 270).

Plaintiff attempts on this appeal to reconstruct the evidence and impute negligence to the defendant by citing to the plaintiff's testimony of having made a left turn signal prior to her abrupt movement. Her testimony, however, was strongly disputed on this point by the independent witness, Marlene Orr, as noted above, thereby creating a jury question as to whether or not in fact Mr. Dickey had a reasonable warning or any warning at all that plaintiff would decide to turn left without signaling and then abruptly stop. The jury quite obviously found that there was no left-turn signal and that Mr. Dickey did not have reason to anticipate the improper driving of Mrs. Larsen. The jury also quite obviously chose to disbelieve the testimony of plaintiff and her passenger that the left-turn signal was applied 100 feet prior to the intersection where the turn was to be made.

The case of *Kent v. Freeman,* 345 S.W. 2d 252 (Tenn. 1960) cited by plaintiff is not factually similar to the present case. The evidence in the *Kent* case was undisputed that the plaintiff had turned on the directional signal for a considerable length of time prior to being struck. There was a dispute only as to whether it was visible to the following driver. The evidence there was that the defendant's truck which failed to stop was greatly overloaded as a result of which the brakes were inadequate to stop within a normal interval. The court stated:

> "Defendant was driving a 1½ or 2 ton truck loaded with 7½ tons of asphalt which *admittedly,* it was not properly equipped with brakes to safely handle." *Id.* at 255 (Emphasis added.)

The court there concluded that the admittedly faulty brakes, combined with the fact that the defendant had seen the vehicle in front stopping in sufficient time to bring his truck to a safe stop, had the brakes been in repair, made defendant's negligence the sole proximate cause of the accident.

That case has no value as authority to the totally different facts of the present case. The second case cited by plaintiff, *Foreman v. American Auto Insurance Co.*, 137 So.2d 728 (La. 1962), is also factually dissimilar to the present case. In *Foreman* as in *Kent* the evidence showed without question that the lead vehicle was struck solely because the rear vehicle had faulty brakes. There was no evidence in that case, as there is here, that the lead vehicle had been driven in an unlawful, erratic or deceptive manner, since it had simply stopped for road repairs. *Id.* at 730.

The court noted:

> "The evidence establishes that the brakes on the Whitehead truck were not in working order at the time of the accident." *Id.*
>
> * * *
>
> "Whitehead, in fact, acknowledges that he had 'plenty of time' within which to stop if his brakes had been operating, and in other parts of his testimony he verifies the fact that he had ample time within which to do so." *Id.* at 731.

The evidence in the present case contrasts sharply with that in both the *Kent* and *Freeman* cases. Mrs. Orr, the independent eyewitness stated that she saw no left

signal light on plaintiff's car which she would readily have seen if it in fact had been turned on (R. 302, 308, 309). Mr. Dickey saw no turn signal from his position at the rear of plaintiff's automobile (R. 273). The testimony of Mrs. Orr and Mr. Dickey that no directional signal was given was far more credible to the jury than the self-serving testimony of the plaintiff and her passenger that the signal was given.

Plaintiff's argument that as a matter of law the brake's on defendant's truck were inadequate totally disregards substantial, credible evidence to the contrary. Plaintiff's entire argument hangs on the fact that the truck's wheels did not lock and skid before the impact. Plaintiff's own witness — the investigating officer — testified that a truck of this type with dual wheels and dual brakes is the best braking system available and that, even when operating properly, it may not leave skid marks:

> "Q. You mean, the fastest stop may not create a skidmark?
>
> A. This is right." (R. 251).

Similarly the owner of the truck also testified that even though the brakes were operating properly the wheels would not be expected to skid at the speed the truck was traveling at the time of the accident (R. 314, 316).

There was clear, substantial and credible evidence that the brakes were in proper working order at the time of the accident. Mr. Dickey had driven this same truck

all summer and testified the brakes were in good condition (R. 268, 321, 322). Full-time mechanics kept all of defendant's equipment in proper repair, including the truck Mr. Dickey was driving (R. 312).

Plaintiff's efforts to prove that there was something wrong with the brakes were based upon very unsatisfactory testimony. Plaintiff relied heavily upon the testimony of her expert who was not at the accident scene and never examined the truck in question (R. 289). His testimony was not binding on the jury where his conclusions were strongly and convincingly contradicted by defendant's witnesses. The jury was entitled to disbelieve plaintiff's contentions in this regard and accept instead the testimony of defendant's witnesses that the brakes were in good operating condition at the time of the accident and that the accident resulted from the plaintiff's own substandard driving. *Universal Investment Co. v. Carpets, Incorporated,* 16 Utah 2d 336, 400 P.2d 564, 566 (1965).

Plaintiff claims that under Section 41-6-144(6)(b), Utah Code Annotated, the truck's brakes on defendant's vehicle were inadequate as a matter of law since the statute requires that this truck have:

> (1) An equivalent braking force of 43.5%, and
>
> (2) A deceleration rate of 14 feet per second, from a stop begun at a speed no more than twenty miles per hour, and
>
> (3) A stopping distance of no more than 40 feet after the brake pedal is applied at 20 miles per hour.

Such a claim was not made nor was the statute referred to in the lower court. Nor was proof presented with regard to the truck's performance in terms of the standards contained in the statute. Nor did plaintiff's requested jury instructions contain any reference to this statute. Plaintiff's own expert had made no tests on defendant's truck to determine braking force, deceleration rate, or stopping distance. Thus it is incredible that such a claimed violation of this statutory standard would be raised for the first time on this appeal. Plaintiff's contention that the statutory standard was violated is based solely upon the lack of skid marks and the fact that an accident occurred. Neither is sufficient to show even negligence much less a violation of statute.

Plaintiff appears to argue that her expert's opinion was binding on the jury. The jury was instructed in Instruction No. 7 that they were entitled to give opinion testimony the weight to which they felt it was entitled. No objection was made to Instruction No. 7. Further, even the case of *Gittens v. Lundberg,* 3 Utah 2d 392, 24 P.2d 1115, 1117 (1955) — upon which plaintiff relies — held that "[t]he jury may evaluate the testimony of witnesses and accept those parts which they deem credible. . . ." Finally, the evidence showed that the vehicle had a current safety inspection which inspection must carry a presumption that the brakes met the statutory standard and were adequate. (See R. 313).

POINT II

THE INSTRUCTIONS TO THE JURY WERE PROPER.

Plaintiff claims reversible error in Instruction No. 13 on the "sudden peril doctrine." The instruction is alleged to be improper because inappropriate under the facts of this case. This court stated in *Kryger v. Turner,* 479 P.2d 474, 477 (Utah 1971), as regards the sudden peril doctrine instruction:

> "Had there been evidence of a sudden or unexpected situation arising without fault on the part of the defendant, the instruction would be proper."

Here there was substantial evidence that the onset of plaintiff's erratic driving movements immediately before the accident was sudden and without warning.

Plaintiff argues that Instruction No. 13 was improper because Mr. Dickey was "super alert" and thought he could avoid the collision but did not do so.

The fact that a driver is alert to conditions on the roadway does not clothe him with the ability to foresee and avoid the unexpected. Nor does it place upon him a greater burden than to exercise reasonable care, like any other driver, if faced with an emergency.

Plaintiff's argument that because Mr. Dickey believed he could avoid the accident, he was negligent if the accident occurred is contradicted by the case of *Howard v. Ringsby Truck Lines,* 2 Utah 2d 65, 269 P.2d

295 (1954), relied upon in appellant's brief. That case held that the showing of a mere possibility that an accident might have been avoided is insufficient to show actionable negligence. Such is the fact here. Under the evidence presented the lower court would have erred had it failed to give Instruction No. 13 relating to sudden peril.

Plaintiff claims error in Instructions Nos. 18, 19 and 22 on the basis that they were not relevant to the issues. Plaintiff argues with regard to Instruction No. 18 that the "left turn law could not possibly enter into this case because the accident had happened before the appellant ever reached the intersection." Under that logic the "left turn law" rule could apply only after the turning vehicle entered the intersection, even though that vehicle braked suddenly and without warning before reaching the intersection but in anticipation of the intended turn. Such an argument disregards the purpose of the requirement that a signal be given 100 feet before the turn is begun, which is to give a warning to traffic behind, as well as ahead, that a turn is going to be made.

There is no dispute in the evidence but what plaintiff intended to and was preparing for a left turn when the accident occurred (R. 167, 192, 250). Yet if plaintiff's "upon entering the intersection" argument were accepted she would be forgiven the duty to signal *before* making the turn or to position her automobile properly upon the roadway *before* preparing to turn (required by Instruction 18), take precautions to avoid an accident *before*

starting and while making a turn (required by Instruction No. 19), or keep a lookout for other vehicles on the roadway and avoid making movements which are unreasonable, unsafe, or deceptive to other traffic *until* she entered the intersection (required by Instruction No. 22).

Clearly Instructions 18, 19 and 22 were relevant. The law governing left turns is as much if not more concerned with what is done prior to the turn as with what is done while making the turn. See Section 41-6-66, et seq., Utah Code Annotated, 1953. Because evidence of plaintiff's failure to take proper precautions before making the turn was so prominent in the case, Instructions 18, 19 and 22 were proper and essential to a fair consideration of the issues.

Plaintiff also complains of Instruction No. 23. The instruction states that a brake light signal given *simultaneously* with a sudden decrease in speed is negligence. Plaintiff states the instruction is defective for lack of a statement that such conduct would be negligent only if it "unreasonably interfered with the following traffic."

Instruction No. 23 was merely a restatement of Utah Code Annotated Section 41-6-69(c), 1970:

> "No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in a manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal."

The argument that the brake lights themselves give the warning required by this statute ignores the very

language — "without *first giving* an appropriate signal" — in the statute.

Plaintiff was required to comply with the statute. There was substantial evidence that her stop was without any prior warning whatsoever, and that it did in fact unreasonably interfere with the traffic behind.

The statutory requirement that persons driving automobiles give advance warning of turns and stops by appropriate signals is purposed to increase safety upon public highways and prevent accidents. Failure to give proper warning of a turn or stop, particularly a *sudden* stop, is unlawful and a misdemeanor by virtue of Utah Code Annotated Section 41-6-12 (1970).

Plaintiff objects to Instruction No. 24 because of the language in the first sentence:

> "Even if you find the two propositions in the foregoing instruction in favor of the plaintiff . . . ."

Instruction No. 24 was defendant's offered Instruction No. 28. The first sentence of the instruction referred to defendant's offered Instruction No. 27 which contained the two propositions to which the above language refers. When Judge Faux refused defendant's offered Instruction No. 27 the above quoted language was not eliminated from its offered Instruction 28. Neither Judge Faux nor counsel was aware of this oversight and no objection was made by counsel on the ground of the above quoted language when the instruction was given verbatim as jury Instruction No. 24 (R. 328).

Though it may have been more accurate to correct the instruction it surely was not reversible error to fail to do so. Defendant suggests that the test of whether an instruction is confusing to the jury depends upon how it would be understood by a jury composed of ordinarily intelligent laymen. See *Edwards v. Harris,* 397 P.2d 87 (Wyo. 1964). The above 16 words could not possibly have confused the jury when considering the 31 instructions as a whole. The instructions as a whole very clearly and accurately set forth correct principles to aid the jury in deciding the case.

CONCLUSION

Seven fact witnesses were called at the trial and the testimony was on many material points disputed and contradictory. On the whole, the evidence preponderated in favor of the defendant on all material issues and the jury, in its role as a finder of facts, so decided. The disputed issues were fully and fairly presented and, in view of the clear dispute in the evidence the matter was properly submitted and argued to the jury.

Plaintiff now claims that the jury should have found in her favor and she points to the fact that the jury disregarded the evidence and permissible inferences therefrom, which were favorable to her claims. She completely disregards, however, the credible substantial and material evidence which was favorable to defendant on every material issue. It would appear from reading plaintiff's brief that no evidence favorable to defendant was adduced and that the jury's verdict was not based upon sub-

stantial evidence. Such is simply not the fact. The jury's verdict and the judgment entered thereon were not only proper but supported by a clear weight of the evidence. The verdict and judgment should be affirmed.

Respectfully submitted,

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