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Marion G. Wright v. Theron W. Maynard : Brief of Respondent

Utah Supreme Court

McCullough, Boyce & McCullough; Attorneys for Plaintiff;

7566

IN THE SUPREME COURT
of the
STATE OF UTAH

MARION O. WRIGHT,
Plaintiff and Respondent,

— vs. —

THERON W. MAYNARD,
Defendant and Appellant.

Case No.
7566

RESPONDENT'S BRIEF

McCULLOUGH, BOYCE &
McCULLOUGH,
Attorneys for Plaintiff

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STATEMENT OF FACTS

Defendant at page 2 of his brief sets forth his "alleged" Statement of Fact. However, it is obvious that defendant has employed the wrong nomenclature and intends his misleading statements to be argument.

The facts of the case are as follows:

Plaintiff, Marion O. Wright, resided near the northerly outskirts but within the corporate limits of the City of Orem. (Tr. 106). His home was on the east side of Highway 91, north of a slight bend in Highway 91. Highway 91 was at that time a two-lane highway. (Tr. 7,

45, 80, 107). Immediately north of plaintiff's home was a garage owned and operated by plaintiff and referred to in the record as Wright's Garage. (Tr. 4, 106). Two separate driveways lead from Highway 91 easterly. One of the driveways leads to Mr. Wright's home, the other driveway leads into the garage. (Tr. 107-108). The exact distance between driveways does not appear in the record. The distance between Wright's Garage and the curve to the south was variously estimated by the witnesses at from 250 to 400 feet. (Tr. 47, 57, 83, 92, 148, 238).

At the time of the crash here involved, which was on January 14, 1949, plaintiff had in his employ, as an assistant, one Walter J. Mitchell. (Tr. 4, 109). The regular hours of operation of Wright's Garage were from 9:00 A.M. to 6:00 P.M. (Tr. 4, 109). At the conclusion of the working day and shortly after 6:00 P.M. on January 14, 1949, the garage had been locked. (Tr. 5, 109). Mr. Wright then remembered that he had to obtain some parts for a truck he was working on. His car was locked in the garage and Mr. Mitchell offered to drive him to the parts store. (Tr. 110, 35). Mr. Mitchell in referring to the conversation between him and Mr. Wright at that time testified on cross-examination as follows: (Tr. 35)

> "A. He asked me if I—or he says, 'I have got to go up to the parts house,' and he had his car in the garage, and I said, 'I will run you up.'
>
> Q. And you were going to bring him back?
>
> A. Yes."

(See also Tr. 110).

Mr. Mitchell owns his own automobile which was a 1938 Ford and which was a light gray or tan in color. (Tr. 6, 44, 101, 111, 149, 205). The car was parked in the driveway leading to the Wright home. Mr. Mitchell testified that he backed his automobile out of the driveway onto Highway 91 and then pulled forward slightly so that he was facing to the southeast. (Tr. 10). Just how far the automobile was backed onto Highway 91 is a matter concerning which there is a sharp dispute in the evidence. This will be discussed later. When Mitchell got the car on the road the automobile flooded out or stalled. (Tr. 29, 37). At about the same time the lights on the Mitchell automobile went out. (Tr. 37). Mr. Mitchell was not aware that the lights were out because a flood light of 300 candle power located on the corner of the garage flooded directly down on the driveway. (Tr. 37, 112, 113, 114). The plaintiff came from his house out to the road where the Mitchell car was stalled and told Mitchell to get the car off the road. (Tr. 11, 126, 136). Mr. Mitchell testified that he realized the car was in a dangerous situation where it was stalled. (Tr. 39, 40).

The defendant Theron W. Maynard was driving his Dodge automobile in a northerly direction along Highway 91 through the City of Orem and toward Salt Lake City. He had with him as passengers, his wife, Mr. and Mrs. Raymond Klauck, and Mr. and Mrs. M. W. Wiscomb. (Tr. 146, 147, 165, 232, 258, 274, 283, 293). Mr. Theron W. Maynard was driving; Mrs. Maynard, his wife, was in the center in the front seat, and Mr. M. W. Wiscomb

was on the right side in the front seat. In the back seat Mr. Raymond Klauck was in the center, Mrs. M. W. Wiscomb was on the right and Mrs. Raymond Klauck was on the left of the rear seat. (Tr. 232).

Defendant's wife, Mrs. T. W. Maynard, testified as follows: (Tr. 276)

> "A. As we were going on the outskirts of Orem, we were going along, and all at once a light colored car loomed right up square in front of us on our side of the highway."

The defendant, Mr. Theron W. Maynard, testified that it was approximately 260 feet from the Wright Garage south to the curve in Highway 91. (Tr. 148). Mr. Maynard further testified: (Tr. 173-174).

> "Q. Now tell us when you first—that automobile came within your vision, with reference to the curve of that road, when you first saw that automobile, where your car was.
>
> A. I would estimate the distance at a hundred feet.
>
> Q. You saw the automobile at a hundred feet?
>
> MR. CHRISTENSEN: Is that a hundred feet from the curve or a hundred feet from the automobile?
>
> A. A hundred feet from where I actually —where my lights actually revealed the automobile, at the time my lights revealed it to me, and I was conscious of it actually being there, I would say I was a hundred feet from it.
>
> MR. McCULLOUGH: In other words, you were a hundred feet south of the automobile, the Ford automobile, we will call it the Mitchell auto-

mobile, Ford Mitchell automobile, you were a hundred feet south, traveling on the right hand side of the road?

A. Yes, sir."

Mr. Raymond Klauck testified: (Tr. 303, 304).

"Q. So that your car when your car got around the turn, your lights picked this automobile up that was stalled on your side of the road, about 300 feet to the north, is that correct?

A. Well, approximately.

Q. And that's your best judgment?

A. Uh huh."

* * * *

"Q. So that your car then moved approximately 300 feet after you saw the lights light up this car, until the accident occurred? That is correct, isn't it?

A. I would say maybe it would be about that."

Mrs. M. W. Wiscomb testified: (Tr. 286).

"Q. And as you went around the bend your lights—the lights of the car you were riding in, by the lights you saw this Ford stalled in the road?

A. Yes.

Q. The car was stopped?

A. Yes.

Q. And there was a person on the south side of it, or the right hand side of it, or the south side of it as far as you are concerned, waiving his arms?

A. Yes."

Mr. M. W. Wiscomb testified: (Tr. 238).

"Q. Then you stated, Mr. Wiscomb, that there was a curve or a bend in the road?

A. Uh huh.

Q. Some distance south of the Wright Garage, is that correct?

A. That's right.

Q. I think you stated that it was about where the old road goes down to Geneva?

A. The old Geneva resort, not the Geneva plant.

Q. The Geneva resort?

A. Yes, uh huh.

Q. That would be about how far south, in feet, about how far south of the Wright Garage?

A. Oh, possibly 300.

Q. 300 feet. That's your best judgment?

A. Uh huh.

Q. And it is quite a—really isn't a curve, it is more of a bend?

A. That's right, it is more of a bend in the road.

Q. And you recall coming around that bend?

A. Uh huh.

Q. And when you got to that bend, as you came around, your lights showed up the Wright Garage, did they not?

A. Showed up the automobile in the middle of the road."

Mr. M. W. Wiscomb further testified: (Tr. 239, 240).

"Q. You were sitting on the right hand side of the front seat, were you not?

A. That's right.

Q. When you went around the turn, about three hundred feet south of the Ford automobile,

your lights showed the Ford automobile out there in the road?

A. Maybe not just as we made the turn, but they did show it as we came upon it.

Q. How far would you say you were when you first saw the Ford, as you went around this bend, how far south were you from the Ford?

A. Oh, possibly 200, 250 feet, maybe—

Q. Between 200 and 250 feet?

A. Possibly that far.

Q. And did you see the party who was later referred to as Mr. Wright out on the right hand side of the car, waiving his hands?

A. That's right. There was no lights on the car, as apparently he was trying to show us."

At the time the Mitchell automobile was first observed plaintiff was wearing white coveralls. (Tr. 91, 142, 261, 287, 295). He was standing at the right, or south side, of the Mitchell automobile facing southerly, in the direction from which defendant's automobile was approaching, and waiving his arms. (Tr. 151, 176, 234, 260, 276, 284, 287, 291, 295). *Defendant applied his brakes but could not stop.* Defendant Maynard testified as follows: (Tr. 153).

"A. As I said, I played my brakes when it was obvious that if I held them intact I would slide directly broadside into the stalled automobile. So I merely played them to pull myself to the right and avoid the accident."

Mr. Maynard further testified: (Tr. 152)

"A. I had to make a mental decision on what to do. There was traffic coming from the north.

I couldn't go to the left without crashing head-on. I had five passengers in my car to consider besides the man standing at the side of the car. I applied the brakes and my car slid directly at the stalled car. And I felt that if I continued in that course I would pin that man between the two cars, between the front end of my car and the side of the stalled automobile. So I pulled my car to the right, and played my brakes, to give me some traction to get to the right of that stalled automobile, and my car took hold, and I went to the right."

Mr. Raymond Klauck testified: (Tr. 304, 305, 307)

"Q. What was the next movement of the car?

A. Well, then I knew that he had applied his brakes, because he was saying, 'My God, I can't stop.' "

* * * *

"MR. McCULLOUGH: Q. After the brakes were applied and Mr. Maynard said, 'I can't stop on the ice,' then you saw the car—observed the car move over to the right?

A. Yes."

* * * *

"Q. So that if the car hadn't turned to the right 20 feet before it got to the Ford it would have went right into the Ford?

A. That's right."

Mr. M. W. Wiscomb testified: (Tr. 234).

"* * * Evidently he (plaintiff) was trying to get to the snowbank on the side of the road, to get out of the path of it (Maynard vehicle) be-

cause had he have not let upon his brake, and the transmission took hold so that he could make a slight turn to get away from this car, he would have hit head-on into the car and probably pushed him. And as we hit him, it picked him up and carried him on, and he fell off into the side as we hit the snowbank."
(Explanation added).

Mr. M. W. Wiscomb further testified: (Tr. 243).

"Q. In other words, you could feel the brakes being applied?
A. Yes, you could feel it take.
Q. Then it started sliding?
A. Uh huh.
Q. Directly towards the Ford?
A. Right towards the Ford.
Q. Then did you feel any other movement of the car?
A. Well, as I recall, as I previously stated, he let his foot off the brake pedal, thereby giving him a little additional purchase on the road, and that's what changed our direction.
Q. In other words, you presumed that's what he did?
A. That's right.
Q. In other words, you figured that he probably eased up on his brakes, because the car apparently started veering to the right?
A. That's right—no, no, it didn't start veering to the right, it started sliding directly into him."

The plaintiff, Mr. Marion Wright, when he saw defendant's car coming directly toward him and that the driver was not stopping, ran to the east to get off the

road and was struck by the defendant Mr. Maynard, as Mr. Maynard swung to the right. Mr. Wright testified: (Tr. 115, 116)

> "Q. And as you stood there at the side of the Mitchell automobile, did you observe an automobile which you later learned was driven by Mr. Maynard?
>
> A. Well, the first thing that I observed was the side of that car lit up just like a house.
>
> Q. The side of which car?
>
> A. The side of the car I was standing by, light up just as bright as could be.
>
> Q. What lit the side of the car?
>
> A. The headlights of Mr. Maynard's car.
>
> Q. And which direction was that coming?
>
> A. That was coming from the south.
>
> Q. Will you describe what you observed from there on?
>
> A. Well, I turned around, and waved my arms, or waved my hand; I don't know what I did.
>
> Q. You turned around. Which direction did you face?
>
> A. Turned around and faced the south.
>
> Q. Facing this on-coming automobile?
>
> A. Yes. And the first thing that entered my mind was that he was going to hit me against the side of this car. So I took off. That's all I remember.
>
> Q. Which way did you go?
>
> A. Brother, I took off. I took off for the snowbank on the east side of the road, towards my house."

The defendant's automobile came to rest in a snowbank a short distance past the point of impact. The

plaintiff was discovered lying in the snowbank to the right of defendant's vehicle with one foot under the right running board. (Tr. 30, 41, 60, 153, 154, 186, 263, 271, 272 295).

Mr. Mitchell testified: (Tr. 40)

> "A. When—oh I seen his lights. It was just a little ways from my car, yes.
>
> Q. How far away?
>
> A. I don't know for sure, because I just looked up and just a glare hit me right in the eye."

The plaintiff, Mr. Wright, testified that the lights of defendant's automobile lit up the side of the Mitchell car from a distance of about 250 to 300 feet. (Tr. 133). Mr. Wright on cross-examination testified as follows: (Tr. 132-135).

> "Q. I see. Now where was the Maynard vehicle when you first observed it?
>
> * * * *
>
> A. I'd say it was 50 to 60 feet from me, coming right along the snowbank.
>
> MR. CHRISTENSEN: Q: Coming right along the snowbank. That was the first time you saw it?
>
> A. *I saw headlights until then, then all I saw was wheels splashing water, and then I ran.*
>
> Q. Where were the headlights when you first saw them?
>
> A. I can't tell you how far up the road, but they had the car lit up, so I imagine it would be 250, 300 feet. I can't tell you. If they were on

high beam, they should be 300 feet, or 50, something like that.

Q. But the car was lit up so 50 feet away you knew there was a car coming?

A. Well, I sure knew there was something coming that had lights on it.

* * * *

A. I turned around and done this to him. I don't know; it didn't take him long to travel 250 feet, I will tell you that.

Q. You were waiving your arms, weren't you?

A. I was waiving one arm or something. I can't tell you whether I was waiving one arm or both arms or what.

* * * *

Q. So that he must have traveled for at least 300 feet along the shoulder of the road, that is, the unsurfaced portion?

A. I think so.

Q. And seeing him come along in that fashion, you ran directly into his path?

A. I didn't see him coming; all I saw was lights coming, man, and they were coming.

Q. And you ran directly into his path?

A. I ran off the road like any sane person would do."

Trooper Neldon S. Evans of the State Highway Patrol, one of the investigating officers, testified there were some wheel tracks leading back approximately from the front of the Maynard vehicle, but not from the front wheels, about 52 feet to the rear. (Tr. 210). The right track was visible, however, the left track was only visi-

ble in spots; part of the time you could see it and part of the time you could not. (Tr. 212, 213). Trooper Robert G. Ingersoll of the Highway Patrol, the other investigating officer, testified to substantially the same thing. (Tr. 255).

As plaintiff was standing on the south side of the stalled Ford automobile, the side of it was lit up by the headlights of the defendant's car. (Tr. 115, 116). The events that took place at this time are cogently set forth in the testimony of the various witnesses both for plaintiff and defendant.

Mr. Mitchell testified on cross-examination as follows: (Tr. 39, 40).

> "Q. Now Mr. Wright came out to your car and did he come up by the right hand door?
> A. Yes.
> Q. Did he get in?
> A. No.
> Q. What did he do?
> A. *I guess as soon as he got up there he seen that car, and started waiving it down.*
>
> * * * *
>
> Q. And then Mr. Wright ran to the front of your car, didn't he?
> A. Yes.
> Q. Right into the path of Mr. Maynard's automobile?
> A. Yes.
>
> * * * *
>
> Q. Mr. Maynard's car didn't strike your car at all, did it?
> A. No, not that I know of."

The plaintiff, Mr. Wright, testified on direct examination: (Tr. 116)

> "A. Well, the first thing that I observed was the side of that car lit up just like a house.
>
> * * * *
>
> Q. What lit the side of the car?
> A. The headlights of Mr. Maynard's car.
>
> * * * *
>
> A. Well, I turned around, and waived my arms, or waived my hand; I don't know what I did.
> Q. You turned around. Which direction did you face?
> A. Turned around and faced the south.
> Q. Facing this on-coming automobile?
> A. Yes. And the first thing that entered my mind was that he was going to hit me against the side of his car, so I took off. That's all I remember.
> Q. Which way did you go?
> A. Brother I took off. I took off for the snowbank on the east side of the road, towards my house.
> Q. Did you observe where the Maynard car was traveling in relation to the concrete highway?
> A. It was clear off the highway the only time I saw it.
> Q. And that's off which direction?
> A. That's off east of the highway."

Mr. Wright, plaintiff, on cross-examination, further testified: (Tr. 133, 135)

> "Q. Where were the headlights when you first saw them?

A. I can't tell you how far up the road, but they had the car lit up, so I imagine it would be 250, 300 feet. I can't tell you. If they were on high beam, they should be 300 feet, or 50, something like that.

* * * *

Q. And seeing him come along in that fashion, you ran directly into his path?

A. I didn't see him coming; all I saw was his lights coming, man, and they were coming.

Q. And you ran directly into his path?

A. I ran off the road like any sane person would do.

Q. Into his path?

A. I didn't run into his path, he run over my path.

Q. Your paths intersected, didn't they?

A. They certainly did, and I got the blunt of it."

Defendant Maynard testified on direct examination: (Tr. 152, 153).

"A. I had to make a mental decision on what to do. There was traffice coming from the north. I couldn't go to the left without crashing head-on. I had five passengers in my car to consider besides the man standing at the side of the car. I applied my brakes and my car slid directly at the stalled car. And I felt that if I continued in that course, I would pin that man between the two cars, between the front end of my car and the side of the stalled automobile. So I pulled my car to the right, and played my brakes, to give me some traction to get to the right of that stalled automobile, and my car took hold, and I went to the right.

Q. When you say your car took hold, what do you mean by that?

A. The steering apparatus took hold, and I veered to the right and avoided hitting the car broadside.

Q. Now did anything else happen at that time?

A. At about—at the point I got almost to that automobile, I had pulled to the right, and was avoiding it, Mr. Wright broke from in front of it and jumped right in front of my automobile.

Q. Did your automobile strike Mr. Wright?

A. My automobile struck Mr. Wright.

Q. Were you continuously applying your brakes during the time that this transpired?

A. As I said, I played my brakes when it was obvious that if I held them intact I would slide directly broadside into the stalled automobile. So I merely played them to pull myself to the right and avoid the accident."

Mr. Maynard further testified on direct examination:

"Q. * * * Did you see Mr. Wright when you hit him?

A. When he lunged in front of me, I definitely hollered as loud as I could, 'No, No, No,' just before the point of impact.

Q. How far were you away then, when you hollered, 'no, no, no?'"

A. I was practically to the car, and he dashed in front of me, as I hollered it out.

Q. In other words he ran toward the side of the road?

A. That's right, from his position."

Mrs. Amy Klauck testified on direct examination as follows: (Tr. 260, 261).

> "A. Well, as we were traveling north, we came around a very small bend in the road. It wasn't a sharp bend, but it was a curve in the road. And our headlights picked up a car that was stalled broadside this way. He was standing to the south of it waiving his arms and Mr. Maynard tried to turn * * *
>
> * * * *
>
> A. Tried to turn. There was on-coming traffic from the north, and had we turned in the usual left hand to pass, trying to get around that, we would have hit the on-coming traffic as he turned to the left. As we got to the car * * *
>
> Q. Just a moment.
>
> A. Or to the right, I beg your pardon. We turned to the right and as we got to the car, this man jumped in front of us."

Mrs. Alta Maynard, wife of defendant, testified as follows: (Tr. 276)

> "A. We didn't go to the left. There was traffic coming, so we turned to the right. And just as we got in—just before we went in front of the car, Mr. Wright jumped in front of us."

Mr. M. W. Wiscomb testified on direct examination: (Tr. 233, 234)

> "A. And as he applied his brakes, he started to slide right towards the car. Then as he got a little closer, he let up on his brakes and that more or less had a tendancy to give him a little more

purchase on the road, as the ignition took hold, and he turned and passed this car on the east, just missing it, and at the same time there was a man in front of this car waiving his arms in this manner (indicating), attempting to have us see it, because there was no lights on the car. And as he made this slight turn and went in front of this car, it creased his hind fender, just ticked it. And just before we passed this car, the man who was waiving his hands in front of there jumped, jumped right in front of us. Evidently he was trying to get to the snowbank on the side of the road, to get out of the path of it, because had he have not let up on his brake, and the transmission took hold so that he could make a slight turn to get away from this car, he would have hit head-on into the car and probably pushed him. And as we hit him it picked him up and carried him on, and he fell off into the side as we hit the snowbank."

Mrs. Dorothy Wiscomb testified on direct examination as follows: (Tr. 284).

"A. Well, there was a slight turn in the road where this happened and just as our lights caught the—coming around the bend, there was a car straight across the road, cross-ways and a man standing to the side of it. And when I first saw him, he was turned around and started waiving his hands at us to stop. And apparently Mr. Maynard tried to stop, but the road being slick, we were sliding right towards him. And just before we got to the car, he managed to turn out to the left into—or to the right, into the snowbank. And just at that time the man run from the car right in front of us."

Mr. Raymond Klauck testified on direct examination as follows: (Tr. 295).

> "A. What I saw happen, there was a car parked directly across the road, and a man standing in his white coveralls waiving his hands up and down. We attempted to stop—I know the brakes were applied. That's only natural. You know that being in the car.
>
> Q. Was there any change in the movement, or feeling in the automobile?
>
> A. Yes, naturally—well, we wasn't going at a very good rate of speed. The change would be slow on ice and all of a sudden the car just took over to one side.
>
> Q. And when did it take over to one side?
>
> A. Oh, I would say approximately 10 or 15 feet before we approached the front of the car, or maybe a little bit further.
>
> Q. I see. What else occurred at that time if anything?
>
> A. Well, the—Mr. Wright had jumped out in front of our car, and of course we caught him with the front of our bumper.
>
> * * * *
>
> Q. Then what happened?
>
> A. Well, then because the car was on the angle, we hit the snowbank and went into the snowbank."

Mr. Raymond Klauck testified further on cross-examination: (Tr. 305, 306).

> "Q. After the brakes were applied and Mr. Maynard said, 'I can't stop on the ice,' then you saw the car—observed the car move over to the right?
>
> A. Yes.

Q. And how far did the car—how far was the car from the Ford when he turned to the right, as you stated?

A. Oh, I would say approximately 20, 25 feet."

Mr. Raymond Klauck who was sitting in the middle in the back seat testified that from his observations it was his opinion that the headlights of the defendant's automobile were on low beam. (Tr. 298). The defendant, Mr. Maynard, testified that he did not know whether his lights were on high beam or low beam. (Tr. 148). Mr. M. W. Wiscomb who was sitting on the front seat on the right side testified that the lights were in good condition; that they showed the Ford automobile of Mr. Mitchell about 200 to 250 feet away. (Tr. 239).

Passengers in the Maynard automobile estimated the speed from 20 to 25 miles per hour, with most of them fixing the speed from 25 to 30 miles per hour. (Tr. 173, 249, 259, 275, 284, 298). They estimated the speed at the time the Maynard car came into contact with the snowbank from 8 to 10 miles per hour. (Tr. 248, 249). No testimony was offered by plaintiff or witnesses for plaintiff with respect to the speed in miles per hour of the Maynard automobile.

It is undisputed that the Maynard car came to rest in a snowbank in such fashion that the front and right side of the car were embedded in the snow. Witnesses on behalf of plaintiff testified that the car was completely into the snowbank except for the left rear wheel. (Tr. 41, 55, 79, 96). Witnesses on behalf of defendant testified

that the left side of the car and rear wheels were entirely free of the snow bank. (Tr. 153, 155, 208, 222).

Byron Jensen testified that on June 8, 1949, he examined the lights of defendant's car for purposes of the state inspection law and found them to be in good order and in compliance with state requirements. (Tr. 254). A foundation for his testimony was laid by testimony of defendant that his lights had not been adjusted, replaced or repaired between January 14, and June 8, 1949. (Tr. 163).

With respect to the width of the road plaintiff and certain witnesses called on his behalf testified that the main portion of the road was 27 feet wide and an additional 4-ft. paved shoulder on each side. (Tr. 107). Plaintiff and witnesses who testified on his behalf also testified that the shoulder of the road had been cleared to a distance of 12 to 15 feet east of the easterly edge of the paved portion of the highway. (Tr. 80, 93, 118). There is no dispute that there was a large snowbank running along the east edge of the road approximately 3 to 3½ feet high and some distance east of the east edge of the paved portion of the road.

Officers Evans and Ingersoll, members of the State Highway Patrol, who had investigated the accident, were called and testified on the part of the defendant. They stated that by tape measurement the width of the paved portion of the road was 27 feet. (Tr. 207, 210, 214, 215, 219, 223). They estimated that the distance at the side of the road cleared of snow at 10 or 12 feet. (Tr. 210, 215, 216, 218, 224). Klauck estimated the cleared distance

at 7 to 8 feet. (Tr. 305). *Defendant Maynard testified that the snow had been cleared "beyond the paved edge of the highway no more than 2 or 3 feet."* (Tr. 151).

There is also a sharp dispute in the evidence as to the condition of the road at the time of the accident. Witnesses called on behalf of plaintiff testified that the highway was either dry, or damp, or wet. They testified that generally there was no ice on Highway 91 except in spots, and a strip down the center where the cars had not cut in, and that generally the paved portion of the road was free of hard packed snow. Mr. Wright testified that there had been some thawing and that there was slush at the sides of the road. (Tr. 33, 47, 60, 65, 67, 72, 98, 117, 135). Occupants of the Maynard vehicle and the patrolmen who investigated the accident testified that the roads were entirely covered with a sheet of glare ice and that they were extremely slick and slippery. (Tr. 147, 167, 209, 219, 222, 223, 224, 227, 229 232, 237, 259, 260, 265, 275, 280 283, 284, 285, 293, 300, 301).

There is a dispute in the evidence as to how far the Mitchell vehicle extended onto Highway 91 from the driveway leading into the plaintiff's home. Witnesses for plaintiff testified that the Mitchell car was somewhere near the east edge of the paved portion of the road. Mitchell testified that the rear wheels were just over the east edge of the paved portion of the highway. (Tr. 10, 38). Plaintiff testified that the rear bumper of the Mitchell car was about even with the west edge of the east 4-ft. paved shoulder of Highway 91. (Tr. 10, 38, 45, 90, 114, 115).

Mr. Robert Wright testified that on the evening of the crash he passed the Wright Garage while driving his car north and saw Mr. Wright standing on the south side of the Ford Mitchell automobile. The Ford automobile was out on Highway 91 facing to the south at about a 45° angle. In passing to the rear of the Ford Mitchell automobile it was not necessary for him to swing to the left, but he passed the Ford by driving in his own right hand lane. (Tr. 90, 91).

Mr. Lee Schoell testified that on the evening of the crash he passed the Wright Garage while driving Highway 91 going north to American Fork to attend a basketball game. Mr. Schoell passed the Ford Mitchell automobile which was headed in an angle to the south. He also noticed another car in the snowbank opposite the highway and north of the Ford Mitchell automobile. In driving past the rear of the Ford Mitchell automobile he remained in his own lane of traffic. He testified that the only difficulty was that he, "had to slow down a little bit in order to do it, as you will, if you approach a car that is on the edge of the highway." (Tr. 44, 45, 46).

Mr. Merle Paulk testified that after the Maynard vehicle had crashed off the road into the snowbank, that he passed Mr. Mitchell's Ford automobile, which was protruding onto Highway 91, by driving on his own side of the paved portion of the road. It was not necessary that he drive out around to the left in order to pass the Mitchell automobile. (Tr. 71).

Occupants of the Maynard automobile, testified that the Mitchell automobile was squarely astride the right

hand or northbound driving lane of Highway 91, completely blocking passage of northbound traffic. (Tr. 150, 233, 260, 283, 295).

It was stipulated by counsel for plaintiff and defendant that the length of the Mitchell automobile was approximately 15 feet. (Tr. 131). The Maynard automobile passed between the front end of the Mitchell automobile and the snowbank directly to the east of Highway 91. The left rear fender of the Maynard automobile scraped against the bumper of the Mitchell automobile in passing in front of it, otherwise there was no contract between the two vehicles. (Tr. 41, 131-132).

There is conflict in the evidence as to whether there was on-coming traffic from the north at the time the collision occurred. Plaintiff and Mr. Mitchell testified they looked to the north immediately prior to the accident and there was no traffic approaching from the north at that time. (Tr. 32, 115, 135). Mr. Merle Paulk testified that he pulled onto the highway south of the Wright Garage and followed behind the Maynard automobile until it crashed off the highway into the snowbank, and that there was no traffic approaching from the north at the time of the accident. (Tr. 69). Defendant and several passengers in his car testified there was oncoming traffic from the north making it impossible for them to pass to the left of the Mitchell automobile without crashing into the southbound traffic. (Tr. 149, 162, 261, 275, 294, 298).

Defendant testified that plaintiff stated to him that he, the plaintiff, did not hold him, the defendant, in any way responsible for the accident. Mr. Reese James Wil-

liams, who was a patient in the same room in the hospital as the plaintiff, testified to a similar statement made by the plaintiff. (Tr. 161, 201, 202). This testimony was denied by plaintiff (Tr. 328). Mr. Reese James Williams also testified that he was an intimate acquaintance of Mr. Maynard and had known him for about 14 years and was frequently in Mr. Maynard's home. (Tr. 202, 203).

At the conclusion of the trial, both parties made motions for directed verdicts. (Tr. 335, 336, 337). The motion of the defendant was denied. After argument, the motion of the plaintiff was granted. The jury returned a verdict, in favor of the plaintiff, in the sum of $1,004.44 (R. 44). The jury allowed plaintiff $480.00 for general damages. The items of special damages claimed by plaintiff were cut in half by the jury although there was no dispute in the evidence as to most of the items of special damages claimed by plaintiff. (R. 44).

STATEMENT OF POINTS

I.

DEFENDANT WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

A. THE EVIDENCE CONCLUSIVELY ESTABLISHES THAT DEFENDANT COULD NOT STOP HIS AUTOMOBILE WITHIN THE RANGE OF HIS VISION, i.e., THE DISTANCE ILLUMINATED BY HIS HEADLIGHTS.

B. THE "ASSURED CLEAR DISTANCE RULE" AS EXPRESSED IN DALLEY VS. MIDWESTERN DAIRY PRODUCTS CO. (80 Utah 331, 15 P. 2d 309 [1932]) AND IN THE CASES DECIDED BY THIS COURT SUBSEQUENT TO THE DALLEY CASE, IS THE LAW OF THIS STATE.

C. THE RULE OF LAW AS LAID DOWN IN THE DALLEY CASE, AND THE CASES DECIDED SUBSEQUENT THERETO, IS APPLICABLE TO THE FACTS OF THIS CASE.

II.

DEFENDANT'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

III.

PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT.

IV.

THE JURY COULD NOT HAVE FOUND THIS TO BE AN UNAVOIDABLE ACCIDENT, THEREFORE, NOT CHARGEABLE TO THE NEGLIGENCE OF EITHER PARTY TO THE ACTION.

ARGUMENT

I.

DEFENDANT WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

A. THE EVIDENCE CONCLUSIVELY ESTABLISHES THAT DEFENDANT COULD NOT STOP HIS AUTOMOBILE WITHIN THE RANGE OF HIS VISION, i.e., THE DISTANCE ILLUMINATED BY HIS HEADLIGHTS.

The lower court held that defendant, because he did not have his car under control, so as to be able to stop it within the range of his vision, i.e., the distance illuminated by his headlights, was guilty of negligence as a matter of law. The court's finding is supported by the testimony of defendant himself and defendant's witnesses, who were riding in the car with defendant.

Defendant's statement (P. 17, 18 of defendant's

brief), "It is clear from the testimony of the defendant and the passengers in his car, that no all out effort was made by the defendant to bring his car to a complete stop," is erroneous. Defendant makes no reference to the record to support such a statement.

Plaintiff has set forth in some detail the testimony of defendant and defendant's witnesses regarding this point in his statement of fact (see pages 7, 8, 9), therefore, only short excerpts of testimony are inserted here.

Mr. Maynard: (Tr. 153, 152).

> "* * * I played my brakes when it was obvious that if I held them intact I would slide directly broadside into the stalled automobile * * *"
>
> "* * * I applied my brakes and my car slid directly at the stalled car, and I felt that if I continued in that course I would pin that man between th two cars, between the front end of my car and the side of the stalled automobile * * *"

Mr. Raymond Klauck: (Tr. 304, 305, 307)

> "Well, then I knew he had applied his brakes, because he was saying, 'My God, I can't stop.' "

Mr. Wiscomb: (Tr. 234)

> "* * * Evidently he (plaintiff) was trying to get to the snowbank on the side of the road, to get out of the path of it (defendant's car), because had he have not let up on his brakes, and the transmission took hold so that he could make a slight turn to get away from this car, he would

have hit head on into the car and probably pushed him * * * '' (explanation added).

The testimony is conclusive that defendant could not stop his car within the range of his vision, i.e., the distance illuminated by his headlights.

B. THE "ASSURED CLEAR DISTANCE RULE" AS EXPRESSED IN DALLEY VS. MIDWESTERN DAIRY PRODUCTS CO. (80 Utah 331, 15 P. 2d 309 [1932]) AND IN THE CASES DECIDED BY THIS COURT SUBSEQUENT TO THE DALLEY CASE, IS THE LAW OF THIS STATE.

This court in the Dalley case set down the following rule of law: (P. 310 P. 2d)

> ''In this jurisdiction the doctrine is established, 'that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him.' ''

This court in subsequent cases, which plaintiff will discuss, has clarified this rule to conform to emergency conditions, sudden changes in circumstances, etc., *but it has not abrogated this rule.*

In HANSEN V. CLYDE, et al, 89 Utah 31, 56 P. 2d 1366 (1936), a similar rule of law was laid down by this court: (P. 37 [Utah])

> ''* * * When a driver upon a public highway with his light equipment cannot see more than 50

> feet ahead of him, it is his duty to stop within that distance * * *''

Defendant seems to take great comfort in the dissenting opinion of Mr. Justice Wolfe in the Clyde case (P. 39 Utah). Defendant cites the ninth example given by Mr. Justice Wolfe in his dissent to sustain his position that defendant was not negligent and that the so-called "assured clear distance rule" is no longer the law of this state. Plaintiff is unable to understand defendant's conjurations at this point.

Mr. Justice Wolfe concedes that the law of this state is as set forth in the Dalley case. The examples he cites in his dissent deal with the question of causation, remoteness and intervening causes. Mr. Justice Wolfe states (P. 42 Utah):

> "* * * Be that as it may, at this juncture the state of the law in this jurisdiction is that Bosone was negligent. The logic of the rule is that he must be able to stop within the distance he can see objects on the road; not out in the field * * *"

(P. 43 Utah):

> "We next come to the difficult question as to whether the negligence concurred to contribute to the accident * * * The decisions use such terms as 'too remote,' 'proximate,' 'immediate,' efficient' and 'concurrent' causes, * * *"

In the case of NIELSEN V. WATANABE, 90 Utah 401, 62 P. 2d 117, immediately prior to the accident the brilliant lights from a car coming from the opposite di-

rection completely blinded and destroyed the vision of the driver and there was an instant period of darkness which rendered it impossible for him to see any object upon the highway and that during that instant the accident occurred.

The court stated at page 119 (P. 2d):

> "If the truck could not, because of some obstruction, be seen as plaintiff and her husband approached it prior to the time they were blinded, *and if plaintiff's husband was driving at a lawful rate of speed an automobile properly equipped with lights and brakes and without any reason to believe the headlights of another automobile would suddenly or unexpectedly blind him, that while so blinded the collision occurred without time for him to reduce his speed or stop his automobile, the rule announced in the cases relied upon by defendant and heretofore cited in this opinion would not apply.*" (Referring to Dalley case, etc.).

The logic of the rule necessarily implies that sudden changes, emergencies, etc., which could not be foreseen would limit the use of the rule. The court is merely stating something which is necessarily implied.

In the case of MOSS V. CHRISTENSEN-GARDNER, INC., 98 Utah 253, 98 P. 2d 363 (1940), the same question was presented as in the Watanabe case heretofore discussed. In this case plaintiff had reduced his speed because of an accumulation of smoke and mist in the vicinity, suddenly the glare of the headlights of an approaching vehicle impaired his visibilty until it was im-

possible for him to see an unlighted and unmarked barricade. The court stated. (P. 364, P 2d)

> "However a case recently decided by this court, Nielsen v. Watanabe, * * * is, in our opinion, conclusive of the question here presented."

The court in clarifying the application of the rule is merely reiterating what is already necessarily implied that unforeseeable changes, emergencies, conditions, constitute a legal excuse for not being able to stop within the driver's vision or lights. Mr. Justice Wolfe in concurring expresses the same idea.

Defendant cites a portion of the dissenting opinion of Mr. Justice Larsen wherein he states (p. 367, P 2d):

> "I think the Dalley case should be overruled, or the doctrine thereof modified so as to make possible a realistic approach to the problem."

I think all that need be said here is that the rule has already been modified or clarified and that this clarification or "modification" to render the rule applicable to modern-day traffic does not involve "super refinements in reasoning and hair-splitting in logic."

In the case of TRIMBLE, et ux, V. UNION PACIFIC STAGES, et al, 105 Utah 457, 142 P. 2d 674 (1943), this court followed the same rules that it laid down in the cases of Nielsen v. Watanabe (cited supra), Moss v. Christensen-Gardner, Inc. (cited supra). The court stated at page 676 (P. 2d):

> "Appellant argues that since defendant's bus was moving at such a speed after entering the fog

that it could not be stopped within the driver's range of vision the driver and principals, the defendants, were guilty of negligence as a matter of law. Thus in effect the appellants ask this court to say that one driving on a highway at night is bound to anticipate that there will be fog, smoke, or some other obstruction which will reduce the driver's vision, and that therefore all must drive at such speed that should they meet with such an obstacle they can stop their automobile within the range of their vision as it is limited by this obstruction. We do not believe this to be the correct rule of law, or the situation to which the rule laid down in the Dalley case, supra, was intended to apply. In Nielsen v. Watanabe, 90 Utah 401, 62 P. 2d 117, 119, there was a situation similar to the one in this case * * *''

In HORSLEY V. ROBINSON, 112 Utah 227, 186 P. 2d 592 (1947), this court had before it the question of the duty a driver of a passenger vehicle owes to his passengers. Justice Wade in the course of his opinion stated (p. 597 [P. 2d]):

> ''In Nikoleropoulos v. Ramsey, 61 Utah 465, 214 P. 304, the defendant was driving his car at night during a heavy rain storm at about 12 miles per hour; in the distance the lights of oncoming cars reflected on the wet pavement into his eyes so that at the time of the accident he was unable to see the plaintiff walking on the pavement in front of him until he was within 6 feet and then it was too late to avoid running him down. We held that defendant was negligent as a matter of law, no matter how dark and stormy the night or how bad the visibility, if he drove at such a rate of speed that he was unable to avoid running plain-

tiff down within the distance plaintiff could be seen walking ahead of defendant's car on the highway. To the same effect see: Dalley v. Midwestern Dairy Products Co., 80 Utah 331, 15 P. 2d 309; Haarstrich v. Oregon Short Line RR Co., 70 Utah 552, 262 P. 100; O'Brien v. Alston, 61 Utah 368, 213 P. 791.

"The Nikoleropoulos v. Ramsey case is in substance a holding that it is negligence to operate a vehicle on the highway at any time without having it under sufficient control so that others using the highway will not be unreasonably endangered thereby, regardless of how slow it is required to travel to accomplish that end. If that is the rule where visibility is involved, it follows that the same rule applies where the lack of control which endangers others is the result of slippery roads and stormy conditions * * *"

In the case of HICKMAN V. UNION PACIFIC RR CO., ---- Utah ....., 213 P. 2d 650 (Jan. 1950), this court had before it the question of the use of this rule in an instruction by the lower court to the jury. The lower court instructed:

"* * * You are instructed that when a railroad company is using its right-of-way in a careful and lawful manner, the employees in charge of its trains have a right to presume that motorists approaching on streets or highways which cross the railroad track will proceed carefully and lawfully, and the railroad company's employees have a right to presume that motorists on the highway will drive with their cars under such control as to be able to stop within the distance at which they can see objects ahead."

This court there held that where the driver's view was unobstructed ahead and on either side and nothing to impair his vision, that the rule was clearly applicable.

Mr. Justice Wolfe concurring in the result pays particular attention to the use of this rule. He states:

> "* * * So it comes down to this, that in any case unless a moving object has come onto the roadway at such a distance before an approaching automobile so as to be illuminated by the lights of the said automobile when by their power they would first catch a stationary object, instructions as to the speed-light range relationship are not applicable but confusing. Put in another way, where a moving object intrudes itself into the cone of light made by the lights of an automobile at a point nearer to the car than the total distance in which its lights will first reveal objects, instructions as to the speed-light range relationship are not applicable."

It is interesting to note the statement of the Utah rule as expressed by the United States Court of Appeals, Tenth Circuit, MARAGAKIS V. UNITED STATES, 172 F. 2d 393, 394 (1949). Judge Murrah states:

> "The later Utah cases have rationalized the rule to allow an area of discretion under conditions 'suddenly and unexpectedly' arising within the clear vision ahead, which with the exercise of due care the driver could not have avoided the collision * * *"

See also the case of GATTON V. F. J. EGNER & SON INC. 73 NE 2d 812 (Dec. 1946) where the Ohio

Court of Appeals had before it a case involving the "assured clear distance ahead" statute which has been enacted in Ohio as well as a number of other states. The Ohio court unhesitatingly cites the Dalley case (cited supra) as authority for the rule.

Defendant, by the statements made in his brief would have us believe that the "assured clear distance ahead" rule, or by whatever name it may be called, is a disreputable rule and has been rejected by most of "our sister states." Defendant from page 32 through page 44 of his brief cites and quotes from a "basketfull" of cases which he contends uphold his statements. The rule as relied upon by plaintiff has been discussed and debated before this Utah court on numerous occasions. It can serve no purpose to rehash an argument which has already been determined. Of the cases cited by defendant, many compare with decisions of this court in Nielsen v. Watanabe (cited supra); Moss v. Christensen-Gardner, Inc., (cited supra); and Trimble v. Union Pacific Stages (cited supra).

Defendant cites and quotes at page 35 of his brief the California case of Sawdey v. Rasmussen, 290 P. 684, to sustain his position that California has rejected the rule. Defendant should look to the later California case of JONES V. HEDGES, 123 Cal. App. 742, 12 P. 2d 111, 115, which impliedly accepts the rule.

C. THE RULE OF LAW AS LAID DOWN IN THE DALLEY CASE, AND THE CASES DECIDED SUBSEQUENT THERETO, IS APPLICABLE TO THE FACTS OF THIS CASE.

Defendant testified that it was approximately 260

feet from the Wright Garage south to the curve in Highway 91. (Tr. 148). Defendant stated that his headlights revealed the stalled Ford Mitchell automobile to him when he was 100 feet from it. (Tr. 173-174). At the time the stalled Ford Mitchell automobile was first observed, plaintiff was standing on the south side of the Ford waiving his arms. (Tr. 91, 142, 176, 261, 287, 295, 151, 234, 260, 276, 284). Defendant and witnesses called on his behalf testified that the defendant could not stop the car. (Tr. 152, 153, 304, 305, 307, 234, 243). (See also pages 7, 8, 9 of plaintiff's brief).

The essence of defendant's own testimony and of the witnesses who testified on his behalf is that defendant did not have his car under control and could not stop it within the range of his vision, i.e., the distance illuminated by his headlights. At the time the crash occurred it was night time, however there was no fog. (Tr. 32, 58, 73, 79, 147) no low hanging clouds, no rain or snow. (Tr. 48). The view from the curve in Highway 91 north to where the stalled Ford was situated was unobstructed. (Tr. 48, 59). The lights on defendant's automobile picked up the stalled Ford automobile either as the car approached within the distance illuminated by them, or as the car rounded the curve they swept into view the Ford automobile. (Tr. 148, 173-174, 303, 304, 386, 238, 239, 240). (See also pages 4, 5, 6, 7 of plaintiff's brief).

The facts of this case are squarely within the rule and defendant was negligent as a matter of law.

II.

DEFENDANT'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

III.

PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT.

IV.

THE JURY COULD NOT HAVE FOUND THIS TO BE AN UNAVOIDABLE ACCIDENT, THEREFORE, NOT CHARGEABLE TO THE NEGLIGENCE OF EITHER PARTY TO THE ACTION.

(Points II, III, and IV will be argued together).

Defendant rounded the curve in Highway 91 and proceeded down the road. Defendant did not have his car under control as by his own admission he could not stop within the distance illuminated by his headlights as the lights picked up the stalled Ford automobile and the plaintiff. (Tr. 153, 152, 304, 305, 307, 234, 243).

The plaintiff upon seeing the lights of defendant's automobile approximately 250-300 feet away began waiving his arms. (Tr. 132-135). When it was obvious that if he, plaintiff, remained where he was standing he would be crushed between the two cars he acted as any reasonably prudent man would act and ran for the side of the road to the east. (Tr. 116, 152, 153, 185).

Defendant Maynard testified (Tr. 153, 155):

> "Q. When you say your car took hold, what do you mean by that?

A. *The steering apparatus took hold, and I veered to the right* and avoided hitting the car broadside."

Mr. Wiscomb stated (Tr. 233, 234):

"* * * Evidently he (plaintiff) was trying to get to the snowbank on the side of the road, to get out of the path of it (Maynard vehicle), because had he not have let up on on his brake, and the transmission took hold so that he could make a slight turn to get away from this car, he would have hit head-on into the car and probably pushed him. And as we hit him it picked him up and carried him on and he fell off into the side as we hit the snowbank."

Mrs. Wiscomb testified (Tr. 284):

"And just before we got to the car he managed to turn out to the left into—*or to the right, into the snowbank.*"

Mr. Klauck stated (Tr. 295):

"A. Yes, naturally—Well, we wasn't going at a very good rate of speed. The change would be slow on ice *and all of a sudden the car just took over to the right.*

Q. And when did it take over to the right?

A. Oh, I would say approximately 10 or 15 feet before we approached the front of the car, or maybe a little bit further."

Plaintiff acted as a reasonably prudent man would act, faced with the same situation. Defendant sliding and skiding toward plaintiff, about to crush him between two

cars, must foresee and expect that his intended victim will attempt to get out of the way, and the only logical and reasonable place for him to go is off the road. The plaintiff did not suddenly jump under defendant's vehicle. Defendant saw plaintiff and the stalled Ford when he was 100 feet away and traveling 30 m.p.h. (Tr. 173, 176).

Mr. Raymond Klauck, who was riding in the middle of the rear seat of the Maynard vehicle saw the stalled Ford when they were 300 feet from it (Tr. 303).

Mr. M. W. Wiscomb, who was riding on the right hand side of the Maynard vehicle saw the stalled Ford and plaintiff waiving his arms when they were 200 to 250 feet away. (Tr. 239, 240).

Defendant, from his unsupported statements, would have us believe that defendant casually drove his car to the right with the situation entirely under control and without the slightest degree of danger to anyone. It is evident that defendant has no faith in his argument for he makes no reference to his "undisputed" testimony to support it.

CONCLUSION

Judgment for plaintiff should be affirmed.

Respectfully submitted,

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