

1940

H. M. Gribble v. Emma Cowley : Abstract of Transcript

Utah Supreme Court

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W. D. Beatie; Attorney for Plaintiff;

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In the Supreme Court of the State of Utah

H. M. GRIBBLE,
Plaintiff and Appellant,

vs.

MRS. EMMA COWLEY,
Defendant and Respondent.

APPEAL FROM SEVENTH DISTRICT COURT OF
SANPETE COUNTY, UTAH

HONORABLE JOHN A. HOUGAARD, JUDGE

Abstract of Transcript

W. D. BEATIE,

Attorney for Plaintiff.

FILED

MAY 9 1943

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COMPLAINT

1

JUDGMENT ROLL

(Filed Mar. 18, 1938).

(TITLE OF COURT AND CAUSE).

Plaintiff complains of defendant, and for
cause of action, alleges:

I.

That the plaintiff is now, and at all times herein mentioned was, the father of William Hale Gribble, deceased.

II.

That the defendant is a resident of Sevier County, State of Utah.

III.

That there is now and at all times hereinafter mentioned there was, a certain paved public highway extending through Sanpete County between Richfield, Utah, and Nephi, Utah, that said highway is known and called, "U. S. Highway 89," and the paved portion thereof is 18 feet in width, and on each side thereof, is a shoulder varying in width from three to four feet, that on said highway, especially at the place where the grievance hereinafter alleged occurred, was a cement bridge, commonly known as the "San Pitch Bridge," built into said highway, which said bridge has a cement walk on both sides of said highway, and which said bridge is used extensively for vehicles and pedestrians traveling, that said highway, at the place where the grievance hereinafter alleged occurred, was running North and South in Gunnison, within Gunnison City limits.

IV.

That at all times herein mentioned, there was in full force and effect in said Gunnison City, Utah, certain ordinances as follows:

“Revised Ordinances, Gunnison City, Utah, 1933:

Section 301. “ACCIDENTS. The driver of any vehicle, within this city, involved in any accident resulting in injury or death to any person or damage to property shall give his name, address, and the registration number of his vehicle and exhibit his operator’s or chauffeur’s license to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person. Any violation of this section shall constitute a misdemeanor.”

Section 302. “DUTY TO REPORT ACCIDENTS. The driver of any vehicle involved in an accident, within this city, resulting in injury or death to any person or property damage to the apparent extent of fifty dollars or more shall, within twenty-four hours, file a written report of such accident with the city marshal. Whenever the original report is insufficient in the opinion of the marshal, he may require drivers involved in accidents to file supplemental reports of accidents. All accident reports made to the marshal of this city shall be without prejudice, shall be for the information of the police of this city and shall not be open to public inspection. The fact that such reports have

been so made shall be admissable in evidence solely to prove a compliance with this section, but no such report or any part thereof or statement contained therein shall be admissable in evidence for any other purpose in any trial, civil or criminal, arising out of such accident.

“The justice of the peace of this city shall make a report to the commissioner with respect to any death, within this city, found to have been the result of a motor vehicle accident.”

Section 304. “RECKLESS DRIVING.

(a) Any person who drives any vehicle upon a highway within this city carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due cause and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving * * *.”

* * * *

Section 305. “RESTRICTIONS AS TO SPEED. PENALTY. (a) On all public streets or highways within the limits of this city, it shall be unlawful for any person to drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the hazard at intersections and any other conditions then existing.

“Nor shall any person drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease speed or to stop as may be necessary to avoid colliding with any person, vehicle or other conveyance upon or entering the highway in compliance with legal requirements and with the duty of drivers and other

persons using the highway to exercise due care, provided, that this provision shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.”

* * * *

“(b) Any person who drives a vehicle upon a highway at a speed in excess of that indicated as follows for the particular district or location, and who, while so driving, violates the basic rule set forth in subdivision (a) or any provision of sections 310 to 321, both inclusive, * * *.”

“Said indicated speeds are as follows:

“1. Fifteen miles per hour:

“a. When passing a school building or the grounds thereof during school recess or while children are going to or leaving school during opening or closing hours, provided that the city council may require a complete stop before passing a school building or grounds at any of said periods or

* * * *

“2. Twenty miles per hour:

“a. In any business district as defined herein, or

* * * *

“3. Twenty-five miles per hour:

“a. In any residence district as defined herein, or”

* * * *

Section 310. “DRIVING ON RIGHT SIDE OF HIGHWAY. (a) Upon all highways, within this city, the driver of a

vehicle shall drive the same upon the right half of the highway except when the right half is out of repair and for such reason impassable or when overtaking and passing another vehicle subject to the limitations set forth in section 313.

“(b) In driving upon the right half of any said highway the driver shall drive as closely as practicable to the right hand edge or curb of the highway except when overtaking or passing another vehicle, or when placing a vehicle in position to make a left turn.”

Section 312. “OVERTAKING A VEHICLE. Except as otherwise provided in section 313 the following rules shall govern the overtaking and passing of vehicles within this city:

“(a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle.

“(b) The driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on suitable and audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.

“(c) In the event vehicles on a street or highway are moving in two or more substantially continuous lines the provisions of subdivisions (a) and (b) of this section shall not be considered as prohibiting the vehicles in one line overtaking or passing the vehicles in another line either upon the right or the left, nor shall the provisions of subdivisions (a) and (b) of this section be construed to prohibit a driver overtaking and

passing upon the right another vehicle which is making or about to make a left turn.”

Section 314. “FOLLOWING TOO CLOSELY. (a) The driver of a motor vehicle within this city, shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicles and the traffic upon and condition of the highway.”

Section 330. “HORNS AND WARNING DEVICES. (a) Every motor vehicle when operated upon a highway, within this city, shall be equipped with a horn in good working order, capable of emitting sound audible under normal conditions from a distance of not less than two hundred feet, and it shall be unlawful, except as otherwise provided, in this section, or for any vehicle to be equipped with, or for any reason to use upon a vehicle, any bell, siren, compression or exhaust whistle, or for any person, at any time, to use a horn otherwise than as a reasonable warning or to make any unnecessary or unreasonably loud or harsh sound by means of a horn or other warning device.”

V.

That on or about the 13th day of December, 1937, at about the hour of 3:15 P. M. the said defendant, Mrs. Emma Cowley, was then and there operating a certain automobile in a Northerly direction along and upon said highway, aforesaid, and at a point within Gunnison City, and on what is known as the San Pitch Bridge, approximately 1000 feet North of the Gunnison High School, and, plaintiff alleges that the said

defendant, Cowley, was, at the time she was operating said automobile, aforesaid, and at the time of the grievance herein alleged, driving and operating said automobile carelessly and negligently in the following particulars; to-wit: that she, the said defendant, Cowley, then and there drove and operated said automobile along and upon said highway at a great, excessive and unlawful rate of speed, to-wit: in excess of 40 miles per hour, and then and there carelessly and negligently failed to keep a careful, or any lookout for persons, along and upon said highway, and then and there carelessly and negligently failed to have said automobile under control, and then and there carelessly drove and operated said automobile with sufficient clearance to the left of the deceased, but drove said automobile to the right hand side of said highway, and carelessly and negligently failed to give any signal whatsoever, of her intention to pass said deceased upon his left, and carelessly and negligently in passing said deceased failed to proceed as required by law and ordinances hereinbefore referred to, and well knowing a great many vehicles and pedestrians travelled along and upon said bridge, and plaintiff says that at the time aforesaid, one William Hale Gribble, was then and there travelling on a bicycle in a Northerly direction along and upon the East portion of the said highway crossing the San Pitch Bridge approximately in the center, and about one foot West of the East

edge of the paved portion of the highway on the said bridge, and was then and there exercising due care and caution for his own safety, and that the said defendant, Cowley, by reason of her aforesaid negligence, caused said automobile to strike upon and against the bicycle of William Hale Gribble, and the body of the said William Hale Gribble, and the said William Hale Gribble was, by reason thereof, thrown and hurled a considerable distance, and was then and there bruised in and about his head, face and body, and was so badly injured that he languished a short time, and then and there upon the 15th day of December, 1937, so languishing, died.

VI.

Plaintiff further alleges that at the time of said grievance, aforesaid, he was the father of the said William Hale Gribble, who was then and there of the age of 14 years, and who was then and there living with and was supported by this plaintiff as one of his family, and the said William Hale Gribble was, at the time of his death, healthy, vigorous, intelligent, promising and of an attractive and affectionate character and disposition, and of great assistance and comfort to the plaintiff, and that by reason of the death of said child, so caused by the carelessness and negligence of said defendant, Cowley, as aforesaid, the plaintiff has been and will continue to be deprived of the aid, assistance, satisfaction and

comfort of said child, and has thereby sustained great damage, to-wit: in the sum of \$30,000.00.

VII.

Plaintiff further alleges that by reason of the injuries sustained by said child, as aforesaid, this plaintiff was compelled to and did employ physicians and surgeons to wait upon him, and that he expended therefore, the sum of \$180.00, and that by reason of the death of said child so occurring, as aforesaid, this plaintiff expended as funeral expenses the sum of \$225.00, all of which plaintiff alleges were reasonable charges for the same, and that by reason thereof, he sustained further damage in the sum of \$405.00.

WHEREFORE, plaintiff prays judgment against the said defendant for the sum of \$30,405.00, and for his costs herein expended.

W. D. BEATIE,

Attorney for Plaintiff.

(Duly verified March 16, 1938).

(TITLE OF COURT AND CAUSE).

10

ANSWER OF THE DEFENDANT,
MRS. EMMA COWLEY

(Filed May 9, 1938).

Comes now the defendant in the above entitled action, and for her answer to the complaint

of the plaintiff herein admits, denies and alleges as follows, to-wit:

1. Answering paragraphs I, II, and III, defendant admits the same.

2. Answering paragraph IV, defendant alleges that she has no information sufficient to form a belief as to the truth or falsity of the allegations therein contained, and therefore denies the same and the whole thereof.

3. Answering paragraph V, defendant admits that she was on the 13th day of December, 1937, at about the hour of 3:15 P. M. operating a certain automobile in a northerly direction along and upon said highway, aforesaid, but specifically denies that she was at said time operating or driving said automobile carelessly and negligently, at a great, excessive and unlawful rate of speed, in excess of 40 miles per hour, or that she carelessly or negligently failed to keep a careful or any lookout for persons along and upon said highway, or that she then and there carelessly and negligently failed to have said automobile under control. This defendant further denies each and every allegation, matter or thing therein set forth save and except the fact that the automobile in which this defendant was driving and operating did strike upon and against the body and bicycle of William Hale Gribble, and that William Hale Gribble was, by reason thereof, thrown and hurled a considerable distance and that upon the

15th day of December, 1937, the said William Hale Gribble died, from injuries received thereof; defendant denies specifically that the said accident was caused by the neglect or wrongful regard for the safety and lives of others or that this defendant was operating the said car in violation of any rule or regulation of the highways prescribed by the Statutes of the State of Utah, or at all.

4. Answering paragraph VI, defendant admits that plaintiff is the father of the said William Hale Gribble, but defendant has no information as to the age of the said William Hale Gribble, or as to his health and intelligence, his character and disposition, and whether he was of great assistance and comfort to the plaintiff, and therefore denies the allegations to that effect therein contained; admits that the plaintiff has been and will be deprived of the aid, assistance, satisfaction and comfort of said child, but denies specifically that the death of said child was caused by any carelessness and negligence of this defendant, and that the plaintiff has sustained great damage in the sum of \$30,000.00, by any wrongful, careless, negligent or unlawful acts of this defendant.

5. Answering paragraph VII, this defendant has no information as to the allegations contained therein and therefore denies the same.

6. This defendant denies specifically each and every other allegation, matter or thing not

hereinbefore specifically admitted, and defendant denies generally and specifically that she was negligent or that she was driving in a reckless or negligent manner upon said highway, or that she did not have her car under control, or that she was driving the same without due regard to the traffic of said road, or that she carelessly and negligently failed to keep a careful lookout for persons along and upon said highway or that she failed to observe any traffic rule or regulation required by law.

WHEREFORE, this defendant prays that the plaintiff take nothing by his complaint and that this defendant may have judgment against the plaintiff for no cause of action upon said complaint and for her costs of suit herein.

J. VERNON ERICKSON,
Attorney for Defendant.

(Duly verified May 7, 1938).

31

INSTRUCTION TO JURY NO. 14

You are instructed that the sole issue in this case is a question of whether the defendant was negligent as alleged in the plaintiff's complaint, or was not negligent, and if you find and believe from a preponderance of the evidence introduced before you that the defendant, Mrs. Emma Cowley, was negligent, as defined in these instructions, then you shall render a verdict for the

plaintiff and against the defendant, and determine the amount of his damage if any; otherwise, if you find that the defendant is not chargeable with any act or acts of negligence alleged within the complaint, then you shall render a verdict for the defendant, no cause of action.

65 (TITLE OF COURT AND CAUSE)

VERDICT

(Filed September 27, 1938)

We the jury impaneled in the above entitled cause find:

The issues in favor of the defendant and against the plaintiff, no cause of action.

J. LAWRENCE LOWRY,
Foreman.

Dated September 27, 1938.

66 (TITLE OF COURT AND CAUSE)

JUDGMENT OF THE COURT UPON THE VERDICT OF THE JURY

(Filed September 27, 1938).

This action came on regularly for trial on Thursday, September 22, 1938, before the above entitled court. The said parties appeared by their

attorneys, W. D. Beatie, counsel for plaintiff and J. Vernon Erickson, counsel for defendant. A jury of eight persons were regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the court, the jury retired to consider their verdict, and subsequently returned into court and returned a verdict in favor of the defendant for no cause of action.

WHEREFORE, by reason of said verdict and of the premises aforesaid, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing by this action, and that the defendant do have and recover from said plaintiff, her costs and disbursements incurred in this action.

Dated this 27th day of Sept., A. D. 1938.

JOHN A. HOUGAARD,
Judge.

67 (TITLE OF COURT AND CAUSE)

Order dated the 1st day of October, 1938, granting the plaintiff to and including October 10, 1938, within which to prepare, serve and file a motion for new trial.

69 Notice of Intention to move for new trial.

(Served October 8, 1938).

(Filed October 10, 1938).

MOTION FOR NEW TRIAL

(Filed October 17, 1938).

Comes now the plaintiff, H. M. Gribble, in the above entitled action, and moves this Honorable Court for a new trial in the above entitled action upon the following grounds:

1. Misconduct of the jury.
2. Insufficiency of the evidence to justify the verdict, and that the verdict is against the law.

This motion is based on the affidavits attached hereto and on the records and files in this action.

WHEREFORE, this plaintiff prays that he be granted a new trial in the above entitled action.

W. D. BEATIE,
Attorney for Plaintiff.

(Affidavit of Service).

AFFIDAVIT

State of Utah, }
County of Sanpete } ss.

MRS. GLADYS NIELSON, being first duly sworn, upon oath, deposes and says:

That on the evening of September 26, 1938,
at about the hour of 9:30 o'clock P. M., of said

day, she was walking in company with her sister-in-law, Mrs. H. M. Gribble, in the Court House grounds at the Southwest corner of the County Court House, at Manti, Utah, while the jury was deliberating in the case of "H. M. Gribble, plaintiff, vs. Mrs. Emma Cowley, defendant," and that during the deliberations of the jury in the above entitled case, that she heard statements made within the jury room through the open windows of the said jury room in substance and effect as follows:

That even though the plaintiff, H. M. Gribble, was entitled to recover, Hale Gribble was more negligent than Mrs. Cowley at the scene of the accident and that the plaintiff because of the negligence of said Hale Gribble, was not entitled to recover.

That statements were likewise made which came from said jury room to the effect that Hale Gribble had been more negligent than Mrs. Cowley.

That statements were made that the cause of the accident was the negligence of Hale Gribble turning into the car of Mrs. Emma Cowley.

MRS. GLADYS NIELSON.

Subscribed and sworn to before me this 13th day of October, 1938.

D. E. BORG,
Notary Public,
Residing at Gunnison.

AFFIDAVIT

State of Utah,
County of Sanpete } ss.

MRS. H. M. GRIBBLE, being first duly sworn, upon oath, deposes and says:

That on the evening of September 26, 1938, at about the hour of 9:30 o'clock P. M. of said day, she was walking in company with her sister-in-law, Mrs. Gladys Nielson, in the Court House grounds at the Southwest corner of the County Court House at Manti, Utah, while the jury was deliberating in the case of "H. M. Gribble, plaintiff, vs. Mrs. Emma Cowley, defendant," and that during the deliberations of the jury in the above entitled case, that she heard statements made within the jury room through the open windows of the said jury room in substance and effect as follows:

That even though the plaintiff, H. M. Gribble, was entitled to recover, Hale Gribble, was more negligent than Mrs. Cowley at the scene of the accident and that the plaintiff, because of the negligence of said Hale Gribble, was not entitled to recover.

That statements were likewise made which came from said jury room to the effect that Hale Gribble had been more negligent than Mrs. Cowley.

That statements were made that the cause

of the accident was the negligence of Hale Gribble turning into the car of Mrs. Emma Cowley.

MRS. H. M. GRIBBLE.

Subscribed and sworn to before me this 13th day of October, 1938.

D. E. BORG,
Notary Public,
Residing at Gunnison.

-
- 74 Order denying motion for new trial
(Filed June 19, 1939).
- 75 Order dated July 14, 1939, granting the plaintiff to and including the 15th day of October, 1939, within which to prepare, serve and file Bill of Exceptions.
- 76 Same Order dated October 11, 1939, granting the plaintiff to and including December 18, 1939.
- 77 Same Order dated December 15, 1939, granting the plaintiff to and including the 10th day of January, 1940.

- 78 NOTICE OF APPEAL
(Served December 15, 1939).
(Filed December 15, 1939).

- 78-a CLERK'S CERTIFICATE
Dated January 24, 1940.

TRANSCRIPT FILED

January 24, 1940.

Bill of
Exceptions

79

BILL OF EXCEPTIONS

Served December 15, 1939.

115 (TITLE OF COURT AND CAUSE).

STIPULATION FOR AMENDMENT OF
BILL OF EXCEPTIONS

IT IS HEREBY STIPULATED AND AGREED by and between W. D. Beatie, attorney for the plaintiff, and J. Vernon Erickson, attorney for the defendant in the above entitled action, that the Bill of Exceptions presented to the attorney for defendant in the above entitled action, may be amended to include the full testimony of Paul Christensen, as attached hereto, and that with said testimony included the said Bill of Exceptions shall be allowed, signed and settled as a true and correct Bill of Exceptions in the above entitled cause.

Dated this 26th day of December, A. D. 1939.

W. D. BEATIE,

Attorney for Plaintiff.

J. VERNON ERICKSON,

Attorney for Defendant.

CERTIFICATE OF JUDGE SETTLING BILL OF EXCEPTIONS

Whereas, it appears that the above and foregoing has been proposed by the plaintiff as his Bill of Exceptions in said cause, and,

Whereas, it appears that the same contains all of the evidence adduced on the trial of said action, either in narrative form, or the official transcribed notes of the Court Reporter, together with all proceedings, orders, rulings and exceptions, made and taken in said cause, and made during the trial thereof, and,

Whereas, it appears that the same was proposed within the time allowed by the orders of the court, and was duly served upon the attorney for the defendant within the time allowed by said orders of said court,

NOW, THEREFORE, I, the Judge who tried said cause, do hereby certify that the foregoing Bill of Exceptions in the above entitled cause, contains a full, true and correct transcript of all the evidence adduced at the trial thereof, either in narrative form, or the official court reporter's transcribed notes, together with all orders, rulings and proceedings and exceptions made and taken during the trial thereof, and the same is hereby allowed, signed and settled as and for a true and correct Bill of Exceptions in the above entitled cause, and do hereby order that the same shall be

made a part of the record and become a part of the Judgment Roll in said cause.

Dated this 4th day of January, 1940.

JOHN A. HOUGAARD,
Judge.

BILL OF EXCEPTIONS

Filed January 4, 1940.

1 The above entitled cause came on for trial before the Honorable John A. Hougaard on the 22nd day of September, 1938, sitting with a jury.

1 PLAINTIFF'S EVIDENCE

H. M. GRIBBLE, a witness called by the plaintiff testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

That William Hale Gribble was a freshman at the Gunnison High School, age 14 years, and weighed 140 pounds. That decedent had associated with his father for several years in the purchasing of cattle and assisted his parents with work in and about the home. The witness at the time of the accident was unloading cattle and upon finishing that work, started toward Gunnison, and when about a mile and a half from town, he met his brother, Burt Gribble, who informed him of the injuries to his son. The witness im-

mediately drove to town and went to Dr. Rees's office where the doctor was treating the wounds of his son. The deceased had two injuries, both in the back of the head. He stayed there until about eight o'clock, when he went home to do some chores and then returned to the doctor's office. The boy regained consciousness at about 9:00 o'clock P. M. and spoke to the witness. The deceased was at the doctor's office from approximately 3:15 P. M. of December 13, 1937, until 10:00 A. M. of the following morning, when the deceased was taken to Salt Lake for attention at the L. D. S. Hospital. The deceased died on the 15th of December, 1937, between 8:00 and 9:00 A. M. Deceased was riding a new bicycle to school on the morning of the accident and the bicycle was in good working condition when the deceased left home that morning. The witness stated the costs of hospitalization and costs of burial of the deceased. The witness knew the location of the San Pitch Bridge, and that the Gunnison High School was located about one-half mile South of the San Pitch Bridge.

2 MISS FAYE LARSON, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION
(By Mr. Beatie)

That she has left the Gunnison High School about 3:00 P. M. on December 13, 1937, and was

walking toward Gunnison with Mildred McIff and Enid Olsen. As the three girls proceeded along the West side of the San Pitch Bridge, Faye Larson was talking with Enid Olsen, and Mildred McIff was either in front or back of the two girls, when Vearl Pickett hollered at the witness at the time the witness was about in the center of the West side of the San Pitch Bridge, and the witness turned toward the Southeast in response to the call from Vearl Pickett and observed Hale Gribble coming down the road. She observed Hale Gribble in the center and on the East side of the bridge when she turned to talk to Enid Olsen, who was on her left. She saw the car strike Hale Gribble when they were at a point directly West of Hale Gribble. She did not follow the path of the car after it struck Hale Gribble. During the entire time the witness was on the San Pitch Bridge, she did not hear the honk of any horn. She started out into the highway toward the point where Hale Gribble was lying, and then returned to the sidewalk. The bicycle of Hale was lying North of the spot where his body was. She observed the automobile which struck Hale, return to the scene of the accident and stop on the West side of the highway. The witness came voluntarily and freely as a witness to the trial.

3 MISS ENID OLSEN, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

She resides at Fayette and was attending the Gunnison High School and had left the High School right after 3:00 o'clock, walking toward Gunnison, accompanied by Faye Larson and Mildred McIff on her way home. She heard the impact and turned toward the East and the first thing she observed was Hale Gribble lying on the ground with the bicycle ahead of him and the car going up the road. The car stopped, turned around and came back. The witness took several steps toward the direction where Hale Gribble was lying and then returned to the sidewalk. She heard no conversation between the occupants of the automobile and any other person.

4 MRS. H. M. GRIBBLE, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

That she was the mother of Hale Gribble, deceased, and was at the doctor's office during the time that Hale Gribble was being treated for his injuries and heard certain conversation between the defendant, Mrs. Emma Cowley, and Mr. Paul Christensen, the highway patrolman.

MRS. GLADYS NIELSON, a witness called by the plaintiff, testified, as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

That she was at Dr. Rees's office and heard certain conversation between the defendant, Mrs. Emma Cowley, and Mr. Paul Christensen. That Mrs. Cowley became confused in answering questions of Mr. Christensen and stated that the door handle had been broken off of her automobile on the left side. Mr. Christensen left the doctor's office and went to the car located on Main Street and then returned to the doctor's office.

The witness then made the following statement:

"He asked her, however, before he left, how fast she was going and she stopped a few seconds and hesitated, and Mr. Cowley was just behind her, spoke up, and said: 'We were going fifty' — she turned angrily to him and said: 'I was not. I had been but I slowed down through Centerfield.' "

MR. W. J. GRIBBLE, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

That he went to the San Pitch Bridge on the morning of December 14, 1937, with Elmer Nielson in an automobile. The car was stopped on

the West side of the highway and they walked to the East side of the highway where they saw a pool of blood, which was about 20 feet North of the San Pitch Bridge, and about 2 feet from the East edge of the highway. That there was a black line running across the center of the bridge and that between 15 and 18 inches off of the East side of the bridge, the witness picked up a small six-cornered burr. That a similar burr to the one picked up by the witness was on the boy's bicycle, and he pointed to "Exhibit A" and designated a similar burr as to the one that he had picked up at the scene of the accident. That he saw Elmer Nielson pick up a bolt 4 or 5 feet North of the place that he had picked up the burr, and that he and Elmer Nielson tried to fit the bolt into the burr, but that the threads were stripped on both the bolt and the burr. That the last time that the bolt and burr were seen by the witness was in the County Attorney's office, when the bolt and burr were on the table in that office.

The witness then was asked the following questions and gave the following answers:

"Q. Did you discern any tire marks on the bridge during the examination of the 14th?

A. There was tire marks, — I would say about where I picked up the burr — there was just one tire mark that turned off and went into the cement block on the East — a bicycle tire.

Q. How far would you say that the bicycle tire mark extended North of the center of the bridge, Mr. Gribble?

A. I would say about 4 or 5 feet.

Q. And was there an abrupt end to it, or how did it happen? What is your best recollection?

A. It was out—I would say—it was out about 18 inches, from the cement block and went Northeast 4 or 5 feet, and there was no more mark of it.

Q. Upon some later occasion than you have related, the last date being the 14th of December, 1937, did you take this bicycle and make marks with the tire in mud along side of the road?

A. The same day. The same day that I picked up this burr, when we went over to look at the bicycle, the ground was wet on the North of his house, and where the bicycle stood and we took an imprint of the tire and it looked the same as that on the bridge.

Q. Who was present when you took those imprints, Mr. Gribble?

A. Elmer Nielson and Burt Gribble.

Q. Was Mr. Pierce present, also?

A. Yes.

Q. Have you any opinion as to the tire marks that you made at the North of Mr. Pierce's

house as to whether or not they compare with the tires which are on this "Exhibit A?"

A. I would say they did compare.

Q. And the comparison of the imprint left by this tire on the North of the house, would refer to the comparison of the imprint which you made with that which was left on the bridge?

A. Yes, sir."

7 MILO PIERCE, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

That he lives in the first house North of the San Pitch Bridge on the East side of the road, and he heard an impact near the Bridge while he was working on the South side of the house. He looked up and saw a body lying on the ground and a car was going North on the highway. The car came to a stop very close to his driveway and then continued North to the next neighbor's driveway where the car turned around and came back. He ran out intending to get the license number of the car, but when he saw the car stop, he ran up toward the Bridge, and observed where the boy was lying on the cement. He indicated the position of the bicycle and boy as North of the San Pitch Bridge. Mr. Peterson came from the South in the mail truck and was at the scene of

the accident when the car returned. The mail truck stopped just past the boy's body and to the North of it. He assisted Mr. Peterson in placing the boy in the mail truck and held the boy while Peterson drove the mail truck to the doctor's office. He returned to the scene of the accident and picked up the bicycle and took it to his place of residence, having previously moved the bicycle from the point on the highway in which it was lying to a position against the railing of the bridge. He identified "Exhibit A" as being in the same condition that he took the same from the scene of the accident. The bicycle remained in his possession until Elmer Nielson came and took the bicycle away.

8 BEN PETERSON, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION
(By Mr. Beatie)

That he had the mail contract and was travelling in his mail truck North along the highway toward Gunnison, and in driving over the San Pitch Bridge, saw the boy's body from 12 to 15 feet North of the Bridge on the East side of the road. That he arrived at the scene of the accident about the same time as Milo Pierce. That Mr. Cowley asked if the boy could be taken to the doctor's office in the truck, and that he helped

place the boy in the truck and then drove to the office of Dr. Rees.

8 W. J. GRIBBLE, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

That the spot of blood was about 20 feet North of the Bridge, and he then related that he picked up the burr at a spot theretofore mentioned on the Bridge and that he saw Mr. Nielson pick up a bolt located about 18 inches from the cement block on the East side of the Bridge. That he picked up the burr about 18 inches from the East side of the Bridge where the burr was resting on sand about 1½ inches deep, and at a spot where there was very little travel as most all traffic did not come closer to the East edge of the bridge than 2 feet.

8 ELMER NIELSON, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

That he went with W. J. Gribble to the scene of the accident on the morning of December 14, and then returned to Gunnison where he picked up Burt Gribble and then returned to the scene

of the accident. That he went with W. J. Gribble and Burt Gribble to the home of Milo Pierce where they took "Exhibit A," the bicycle, and made imprints of the tire mark in the mud, and then compared the imprint in the mud, with the marks of the bicycle tire on the bridge and stated that in his opinion they were the same.

9 BURT GRIBBLE, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION
(By Mr. Beatie)

That he went to the scene of the accident with Elmer Nielson on the morning of December 14, 1937, and then in company with W. J. Gribble, went to the home of Milo Pierce where they took "Exhibit A," the bicycle, and made imprints of the tire mark in the mud, and then compared the imprint in the mud with the marks of the bicycle tire on the bridge, and stated that in his opinion they were the same.

9 LILLIE KEARNS, a witness called by the plaintiff, testified as follows:

DIRECT EXAMINATION
(By Mr. Beatie)

That her home is located as the first house South of the San Pitch Bridge on the East side

of the street, and that she was working out in her yard when she heard a crash and looked up and saw a bicycle in the air, and thought that it had fallen off of the back of a truck.

14 MRS. EMMA COWLEY, a witness called by the defendant, testified as follows:

DIRECT EXAMINATION

(By Mr. Erickson)

Q. Would you state your name to the jury?

A. Emma Cowley.

Q. And you are the defendant in this action?

A. Yes, sir.

Q. And where do you reside, Mrs. Cowley?

A. I live at Richfield.

Q. Calling your attention to the 13th day of December, 1937, when did you leave Richfield?

A. We went up—we left home about twelve-thirty.

Q. Can you recall what time you left Richfield, Utah?

A. I imagine it was right around fifteen minutes to two.

15 Q. About fifteen to two, and I will ask you, where were you going that particular day?

A. We were going to Salt Lake.

Q. To Salt Lake City. I will ask you, how were you travelling?

A. We were in an automobile, a sedan, Dodge.

Q. And that day who was driving the automobile?

A. I was driving.

Q. I will ask you, what was the condition of the automobile at the time you left Richfield? What was the mechanical condition of the car?

A. It was in good condition.

Q. And you proceeded and left Richfield, and you left Richfield about a quarter to two, is that right?

A. Well, as near as I can remember, but we didn't really look at the time, so I don't know exactly.

Q. Didn't look at the time. Now, I will ask you, did you arrive at near Gunnison, and what time did you arrive at Gunnison, what it known as the San Pitch Bridge?

A. Well, I guess it was around about fifteen minutes after three. It was right when the mail truck came along.

Q. Now, would you tell the jury what took place, something unusual that took place there? Just describe it to the jury.

A. Well, we were travelling north —

Q. On what side of the highway now?

16

A. On the east side of the highway—and there was some girls around the bridge, and all of a sudden I saw a boy, and I don't know where he came from on this wheel or on a wheel on the edge of the bridge, and I imagine I was about—I am just estimating the distance—about fifty feet back when I saw this boy, and I sounded the horn. He just come up, it seemed like he come from a side road, because the first I saw him he was on the edge of the bridge, and he was kind of wobbling, and I sounded my horn, and he straightened right up and went along the east side of the road, so I took—I am scared to death of boys on bicycles, so when he got within the distance that I thought I was going to pass him, I took the West side of the road and was going along the west side of the road, and he was practically over, I guess he was about two feet and a half maybe over on the cement going along just as nice as could be, and when I got just past the bridge, just on the other side north of the bridge a little bit, I saw the handlebars of his wheel turn, and Mr. Cowley, screamed, “My God” and I whirled the car out this way, and it was over just that quick.

Q. It was over just that quick?

A. I didn't have time to get out of his way.

Q. All right, Mrs. Cowley, tell the jury what was done after.

17 A. And I heard the impact, but it was a stormy day and we had our windows up and I didn't think the impact was loud enough that anything had really hapened. Of course, the first thought I thought was to see, and I looked up through my little glass, and I said, "Oh, my God, he is laying on the ground," and so I went down, I had to go a little bit farther to turn around or else I had to back back, and by this time I was trembling so I couldn't back back, and so I went down to a side road and turned around back up on the cement, and I went right out to the side there where it is sandy and stopped my car, and we got out. By this time there was two men there, one was the mail driver, and I didn't know who the other fellow was, and I asked, "Oh, who is it?", and the girls they said "It is Hale Gribble," and I says, "Oh, Heavens, hurry and get him to the doctor, do something," and I says, "What can we do?" By this time the mail carrier had got out of his car and they all got together and lifted him in the car and took him down to the doctor. I was, of course, all excited, and I was just about crazy, and the girls says, "You musn't get so excited, you couldn't help it."

Q. Who said that, do you remember?

A. There was four girls on that side. The one was Nedra Farr. I have got my names in

my purse. I asked them for their names, and they gave them to me willingly.

Q. Nedra Farr.

A. Nedra Farr was one.

Q. Geneva Childs?

A. No. There was a Childs girl there.

Q. Norma Edwards?

18 A. I have the names in my purse. I could easily get them and read them to you. Bring my purse please.

23 Q. Now, will you describe, as near as you can, just the condition of the car after the accident?

A. On the front fender, right down to the far bottom, that fender almost covers the front wheel, there is a tiny little marred place along there, and then the handle was gone, and then there was a little dent something like that in the back fender.

Q. How many dents then in the car?

A. How many dents?

24 Q. Yes.

A. That is all, I guess.

Q. That is all. Now, Mrs. Cowley, what have you done to the car since the accident in the way of repairing those marks or dents?

A. I haven't done a thing. I wanted the jury, if there come any trouble—

25 Q. Now, do you know how fast you were driving along the highway from Richfield, Mrs. Cowley? About how fast were you driving?

A. Well, at several times during the trip I looked at my speedometer, and I wasn't exceeding forty, because I very seldom go up to fifty, because when I do it is on a long stretch and a good road. I am not a fast driver, and it was stormy that day. When we left Richfield there
26 was a blinding snow, but as we come farther along the line it had turned into kind of a sleety rain. At the time of the accident, I don't believe it was storming only that it was muddy.

28 Q. Do you recall, Mrs. Cowley, just about the time you saw William Hale Gribble there on the bicycle before the impact took place?

A. About the first I saw him?

Q. Yes.

A. Well, he was just starting onto the bridge.

Q. Just coming onto the bridge?

A. He come, it seemed to me—there was a sidewalk along from the schoolhouse, and the jury will know after they have seen the bridge, there is a little place kind of uphill, and as he went up this hill, he swayed around by kind of

29 wiggling, and I honked the horn, and he took to the side of the road, and I thought, of course, he heard me.

CROSS EXAMINATION

(By Mr. Beatie)

31 Q. As you left Richfield, Utah, did you have your windows up, Mrs. Cowley?

A. Yes.

Q. And the windows were up during the entire period as between Richfield and Gunnison?

A. I had mine down about that far, (indicating), for a little air. It was storming.

Q. As a matter of fact, you didn't have your windows up, did you?

A. We did. By the time we got there we had them all up.

32 Q. Where did you put your windows up?

A. When we got down to the other side of Salina it was raining, and the rain was beating through, and I just put my window up.

33 Q. Am I correct in understanding you then that the other side of Salina and the point of the accident, the car was entirely closed with the windows?

A. Yes, sir.

34 Q. How many miles would you say it was from the point at which you turned your windshield wiper off until the point of the accident?

A. Maybe two miles. I don't know just the amount of the miles there is in there, so I couldn't say exactly.

35 Now, as you approached Centerfield from the south proceeding north, how fast would you say you were going as you struck the city limits of Centerfield?

A. Well, I imagine I was right around forty.

Q. How fast did you proceed through Centerfield?

A. I am not prepared to say just exactly what I was doing, because I didn't—I don't remember of looking, but I know I slowed down for Centerfield.

Q. Did you slow down any more than two miles an hour?

A. Oh, yes. Two miles an hour, you wouldn't even notice you slowed down.

Q. I see. How many miles an hour did you slow down?

A. I imagine I slowed down about five or more. I don't know what I slowed down. I couldn't tell.

Q. You slowed down five or miles coming through Centerfield. Now, between Centerfield

and the Sanpitch Bridge, had you maintained a constant speed?

36 A. I don't know that I had, just constant speed.

44 Q. When you passed this point at the north end of the bridge, Mrs. Cowley, where was Hale Gribble?

A. Well, he was about here too, just a little bit ahead of me.

Q. That is the point at which he was when you went off the north end of the bridge. How far did you proceed north from this point until the point of impact?

A. Oh, around maybe twenty-five feet.

Q. Twenty-five feet. What direction?

A. North.

Q. That would be twenty-five feet then, wherever it may be? We will mark it twenty-five feet. How fast were you travelling as you went off the north end of the Sanpitch Bridge.

A. I don't think I was going more than twenty-five at the very most. Twenty or twenty-five.

Q. Twenty or twenty-five. Would you say that your speed had been constant across the bridge?

A. Yes.

46 Q. Do you recall that at the time of the deposition that you were asked the following question: "How far south of the Sanpitch Bridge did you observe William Hale Gribble?"

MR. ERICKSON: What page is that on?

MR. BEATIE: Page seven.

MR. ERICKSON: Thank you.

MR. BEATIE: Third from the last line; to which you answered: "How far. What do you mean? Q. How far south? A. Of the bridge? Q. Of the bridge did you observe this Gribble boy? A. When I seen him? Q. Yes, when you first saw him? A. Just a little ways back, and as soon as I saw him I honked my horn; that would be the same thing as honking the horn.

Q. What is your best recollection; you are the only one that knows. A. I would say maybe fifty yards, something like that." Did you so
47 testify?

A. Well, if I said yards, I meant feet.

Q. Now you wish to explain it you meant feet?

A. You can easily get confused in yards and feet.

Q. You don't mean to say you first observed the Gribble boy when he was coming out of the road leading from the schoolhouse?

A. There was some girls standing on the bridge, and I had my eye on them, and the first thing I knew there was a boy on a bicycle on there.

48 Q. You would say at that time you were fifty yards south of the bridge, when you observed the Gribble boy? A. As near as I can tell you." Did you answer that question in this deposition?

A. I guess I did.

57 How did it happen, Mrs. Cowley, that you were observing Hale Gribble so noticeably at that particular point?

A. I wasn't noticing him any more than I notice all the boys on bicycles. I very seldom take my eye off from them.

Q. You did take your eyes off Hale though as you went across the bridge, didn't you?

A. I don't suppose I was just gopping at him every second.

Q. As a matter of fact, during the period in which he was progressing north across the bridge, you took time enough to observe there were four girls, two in front and two in the rear of the Sanpitch Bridge, didn't you?

A. Yes, I did.

Q. What other things did you observe on that bridge as you were proceeding north across the bridge?

58 A. I didn't observe anything else. I remember those girls, and that is all I do remember, and the boy on the bicycle.

Q. There were no children whatsoever on the bridge, were there, Mrs. Cowley?

A. If there was, I didn't see them.

Q. If there had been children in this position which they have testified to, you would have seen them, wouldn't you?

A. I might have seen them at the time, but I don't even remember about it.

67 Q. Your best judgment is that you were making between twenty and twenty-five in front of the Gunnison School?

A. That is what I say.

Q. If you were making twenty-five miles an hour, and the speed limit was fifteen, you were exceeding the speed limit in that school zone, weren't you?

A. I don't know, because I don't know what speed I was making in there, because it was twenty or twenty-five to my best imagination. It might have been—

68 Q. Didn't you answer before twenty or twenty-five miles? If your best judgment is that, as a minimum you were making twenty miles an hour, you were exceeding the speed limit, were you not?

A. If I was making that, I was. I can't tell you how fast I was—

70 Q. In response to a question on page 8 of
the deposition, which question is as follows:
“Q. Yes. When did you see him, or, at what
71 point was he when you first saw him, with rela-
tion to the Sanpitch Bridge? A. I think he
was just starting to cross the bridge; I believe
he came from the side, that is the first I saw him.
I think he came down that sidewalk and just made
a dart upon the bridge, right from the side; I
don't believe he was on the bridge until—” Did
you so answer?

A. Yes.

72 Q. Mrs. Cowley, didn't you answer me yes-
terday, you didn't see the girls on the bridge?

A. I don't remember of seeing any girls on
the bridge. I had my eyes on that boy on the
bicycle. There was people around there, but I
couldn't tell you just exactly the spots they were.

Q. In response to a question on page 9 —
the question: “You don't mean to say you first
observed the Gribble boy when he was coming out
from a road leading from the schoolhouse?
A. There was some girls standing on the bridge,
and I had my eye on them, and the first thing
I knew there was a boy on a bicycle on there.”
Did you so answer?

A. Yes; I saw those girls on the bridge before I ever did see the boy. I saw somebody along there, and I knew it was school children, but I can't tell you just exactly the spots they were, and then this boy come up on the bicycle, and then I watched him.

73 Q. What direction did you turn your wheels when you designated yesterday that you turned sharply? Designate it by your hands.

A. I turned, when I saw him turn toward the car. I turned out toward the west.

Q. Did you turn your wheels as sharply as you possibly could with your physical strength?

A. Sure, I turned as fast as I could.

Q. Did you apply your brakes, Mrs. Cowley?

A. I tried to get away from him. There wasn't much time to do anything.

Q. At that particular point at which you started to swerve your car, your car was traveling between twenty and twenty-five miles an hour, according to your best judgment?

A. That is what I said.

74 Q. Your car didn't veer very far to the left if it was less than a second?

A. I couldn't tell you how long it was.

Q. You just pulled your car around to the west side as hard as you could?

A. I just grabbed it this way (indicating).

75 Q. How far south of the south entrance of the Sanpitch Bridge had you travelled on the west side of the road?

A. How far south? I hadn't travelled on the west side of the road south of the Sanpitch bridge, until I got to the bridge.

Q. You didn't; In response to that exact question in your deposition on page 10, I will ask you if you answered—the question being: “How far south of the south entrance of the Sanpitch Bridge had you been travelling on the west side of the road? A. Just before I got to the bridge, just in time to get out of his way. I was on the east side of the road until I seen him, and he went over on the east side of the road, and everything would have been just swell, we would have got by just as fine as could be, but he just darted over into my car, and I was over on the west side of the road.” Now, you made that statement, didn't you?

A. Yes.

76 Q. That you were on the west side of the road before you got to the bridge?

A. I might have made that statement; I can't tell you just exactly where I turned. I guess I turned just as I said, in time, to get away from the boy.

Q. In time to get away from the boy?

A. In time that I could pass the boy right good.

Q. All right. You come and draw your path of your automobile, if you wish to correct it.

A. I guess that is about as correct as I could draw it; if I did say before I turned before I got onto the bridge. I can't remember whether I got onto the bridge before I turned on the west side of the bridge, but I turned on the west side of the road before I got to the boy, so as to give him plenty of room on his bicycle.

77 Q. Why did you say in your deposition that you were south of the bridge, then, when you went to the west side of the road, when you didn't know?

A. I should have said I didn't know. I guess I went in plenty of time that he had plenty of room on that side of the road. He was ahead of me all the time.

78 Q. Mrs. Cowley, did you have your car under complete control from the moment of the impact until you brought your car to a stop north of the scene of the accident?

A. I did.

Q. You didn't apply your brake, did you?

A. I tried to get away from him, by going out this way, as I have told you. (Indicating).

Q. How far would you say that the car veered to the left of the highway when you made this swerve to avoid hitting the Gribble boy?

A. I couldn't say how far it went.

Q. Did it go off the cement highway?

A. I couldn't tell you that. I guess it did.

Q. Well, if it did, how far did it go off the cement highway.

A. I can't tell you.

Q. Do you know whether your right front wheels went off the cement highway?

A. No; I couldn't tell you. All I thought about was seeing what happened.

82 Q. Did Mr. Christensen, while in the doctor's office, tell you he had been out to the scene of the accident and measured the tracks?

A. Yes.

83 Q. Do you know that anyone had been by there between the time of the accident and the time Mr. Christensen went down to the scene of the accident?

A. I don't know what had went by.

Q. You hadn't applied your brakes at all, Mrs. Cowley, so there would be any skid marks or burn marks, did you, Mrs. Cowley?

84 A. As soon as I looked up through the glass I did, to stop myself.

Q. How far north of the bridge then, did you first start to apply your brakes?

A. I couldn't tell you how far north.

Q. You know, however, that you applied your brakes north of the bridge?

A. Sure. I tried to stop so I could turn around and go back.

92 MILDRED McIFF, a witness called by the defendant, testified as follows:

DIRECT EXAMINATION

(By Mr. Erickson)

93 Q. What is your name?

A. Mildred McIff.

94 Q. All right. Did some other person call there and ask you to make a signed statement?

A. Yes; they called at the high school.

Q. At the high school. Now, Mildred, tell the jury what took place at the high school.

A. They called me out of class and asked me all about the accident, and I told them everything that I knew, what I saw.

Q. Just talk a little louder, Mildred.

A. They called me out of class and I told what I had saw, and all about the accident, and

the man wrote it down on a piece of paper and I signed it.

95 Q. Now, Mildred, will you tell the court and jury in your own language—First, I will ask you this: Did you see a certain accident that occurred at Gunnison, on the 13th day of December, 1937: It that right?

A. Yes.

Q. Three-fifteen. Now, will you just relate to the jury, in your own language, what you saw?

A. Well, I was coming along the sidewalk on the bridge, and walked along just north of the bridge with the three other girls, and I just turned and looked at Hale just as he came to the north end of the bridge, and the car, just then the car came, and Hale turned into the car, and the car passed, and I don't know what happened. And the car went on down a ways and turned around and came back; and then Mr. Pierce came up the road, and then Mr. Peterson come in the car and took Hale over to the doctor.

97 CROSS EXAMINATION
(By Mr. Beatie)

99 Q. In other words, you were just walking along, and all of a sudden you turned around, did you?

A. Yes.

Q. And you saw Hale Gribble in about that position?

A. Yes.

Q. Did you hear any automobile horn?

A. No; not that I recall.

101 Q. Now, when did you first see this automobile, Miss McIff?

A. Just before it hit.

Q. Just before it hit, and that was merely momentarily, wasn't it, just a flash of a car?

A. Yes.

Q. What part of the automobile did Hale turn into, Miss McIff?

A. Just this side of the fender. The front fender, just by the door there.

Q. Did he turn his handlebars to the left?

A. Yes, he turned them.

103 Q. You signed a statement, did you, Miss McIff?

A. Yes.

Q. With Faye Larson?

A. Yes.

Q. And you subsequently signed a typewritten statement, did you not?

A. No.

Q. Didn't you? Didn't you sign a typewritten statement?

A. No. I can't remember.

Q. You can't remember? I hand you this, which has been marked for identification, plaintiff's proposed Exhibit F. Is that your signature?

A. Yes.

104 Q. It is your signature, isn't it? Is it correct when you say in this typewritten statement, which is Exhibit F, that "My name is Mildred McIff. I reside at Gunnison, Utah; that on the afternoon of December 13th, at about three-fifteen P. M., I was walking over the Sanpitch Bridge north of the High School when Hale Gribble was struck by a northbound automobile as he was riding north over the bridge on his bike, and I saw Hale as he was riding the bike over the bridge, and when he was near the center of the bridge and on the extreme east edge of the highway as it goes over the bridge, a northerly-bound car travelling average speed, struck Hale's bike as he was still near center of bridge and on extreme east side of highway." Did you sign that statement?

A. I did.

Q. She says he turned into the car a little further up than the center of the bridge. You further say that there was no warning signal given

to warn Hale of the approach of the northerly bound car before it struck him; is that correct?

A. I didn't hear any.

108 Q. Miss McIff, isn't it a fact that if you were standing here and the front of the automobile there, Hale Gribble is in back of the automobile; he is out of your vision?

A. No; I seen him just over the engine, over that part.

109 Q. What you saw then—Is this a fact, that what you saw of the accident, you saw over the hood of the automobile?

A. Just kind of over it.

Q. You can't see through it, could you, Miss McIff?

A. No.

Q. You had to look over the hood, didn't you?

A. Yes, sir.

110 Q. The west side of the car was running along the west side of the center of the highway, wasn't it? This line running down here, Mildred, is the center of the highway. That is the line they designate, the yellow line running in the middle of the highway. Wasn't the west side of Mrs. Cowley's car even with that yellow line?

A. No, it was over about half.

Q. Half on the east side and half on the west side?

A. Yes.

Q. Did you see the automobile when it crossed the center of the bridge going north?

111 A. No.

Q. Did you see it when it crossed the three-quarter mark going north?

A. I don't know. I guess just about right in there was when I saw it.

Q. The first you saw of the car was when it was three-quarters over the bridge going north, wasn't it?

A. Just before it hit.

Q. Just instantaneously before it hit; you saw the automobile, isn't that a fact?

A. Yes.

112

RE-CROSS EXAMINATION

(By Mr. Beatie)

Q. Mildred, didn't you draw this path of the automobile as being this line, as it proceeded north? Did you or didn't you?

A. I drew that line.

Q. Now, you want the Court and jury to understand you saw the automobile from the time it came on the bridge?

A. No, I didn't see it until it come up here.

Q. Then do you want to take that line out you have drawn?

A. Yes.

117 PAUL CHRISTENSEN, a witness called by the defendant, testified as follows:

DIRECT EXAMINATION

(By Mr. Erickson)

Q. Your name is—

A. Paul M. Christensen.

Q. And what is your vocation?

A. Why, I am a State Highway Patrolman.

118 Q. Were you a State Highway Patrolman on December 13, 1937?

A. Yes.

Q. Do you know where you were in the afternoon of December 13, 1937?

A. I was in Gunnison, Sanpete County.

Q. Would you just relate to the jury in your own words, what you did in relation to it?

119 A. I helped her some with the report, and it got down to where it was for her to give her version of just what happened, and at this time I told her to fill that out, she would have to do that

herself; and the Sheriff come out of the other room, and we proceeded to the scene of the accident. At that time it was storming and quite wet. I don't know what time that was; I imagine it was probably a half-hour after the accident had taken place. There we sized the situation up, and looked for marks on the highway, and stepped off some distances, and then we returned to the doctor's office, and the Sheriff was called away at this time. I finished, or I received the statement from Mrs. Cowley and released her to go on her way if she desired.

121 Q. Have you your notes with you of this accident?

A. I have notes.

122 CROSS EXAMINATION
(By Mr. Beatie)

Q. Just one question, Mr. Christensen. You showed the accident report to Mrs. Gribble in the office, did you not?

A. Yes.

Q. And in that accident report, the speed Mrs. Cowley had set down was between thirty and thirty-five miles an hour, is that correct?

A. That is correct.

MRS. H. M. GRIBBLE, a witness for plaintiff on motion for new trial, testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

Q. Your name is Mrs. H. M. Gribble?

A. Yes, sir.

Q. Now, calling your attention to the night or the evening of September 26th, 1938, at about the hour of nine-thirty o'clock P. M., were you walking in company with your sister, Mrs. Gladys Nielson in the courthouse grounds at or near the southwest corner of the courthouse here at Manti while the jury empanelled in the case of H. M. Gribble, Plaintiff, vs. Mrs. Emma Cowley, Defendant, were deliberating in that case?

A. Yes, sir.

Q. What was the substance and effect, or as near in words as you can give, the statement which you heard issue from the windows of the jury room?

A. Well, we could hear the jury talking, and some of the voices said that they thought Hale had turned into Mrs. Cowley, had turned his bicycle into Mrs. Cowley, and some of the jurors said this couldn't be possible because the back wheel of his bicycle was broken, and if he had turned into her, the back wouldn't be broken.

Q. Was any statement made there in substance or effect as you have set forth in your affidavit, that even though H. M. Gribble was entitled to recover, Hale Gribble was more negligent than Mrs. Cowley at the scene of the accident, and that the plaintiff because of the negligence of Hale Gribble, was not entitled to recover?

A. Yes, we heard them say that.

Q. Did you further hear any statement in substance or effect as follows: "That Hale Gribble had been more negligent than Mrs. Cowley at the scene of the accident on that particular evening?"

A. Yes, we heard them say that.

133 Q. Now, at that particular time, Mrs. Gribble, did you make any statement to your sister-in-law, Mrs. Nielson, with reference to hearing that statement made?

A. Yes, we talked about it.

Q. You discussed the fact that the statement had been heard?

A. Yes.

134 MRS. GLADYS NIELSON, a witness for plaintiff on motion for new trial, testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

135 Q. While the jury was deliberating in the case of H. M. Gribble, Plaintiff, vs. Mrs. Emma Cowley, Defendant, and that during the deliberations of the jury in that case, you heard certain statements made within the jury room through the open windows of the jury room with reference to this particular case?

A. Yes, sir.

Q. Did you hear a statement issue from those windows in substance and effect that even though the plaintiff, H. M. Gribble, was entitled to recover, Hale Gribble was more negligent than Mrs. Cowley at the scene of the accident, and that the plaintiff, because of the negligence of said Hale Gribble, was not entitled to recover?

A. Yes, sir.

Q. Did you further hear a statement in substance and effect that Hale Gribble had been more negligent than Mrs. Cowley at the scene of the accident?

A. Yes, sir, I did.

136

CROSS EXAMINATION

(By Mr. Erickson)

Q. Repeat, if there was different voices and so forth, repeat now what was said.

137 A. It was said even though Mr. Gribble is entitled to recover, Hale Gribble was just as negligent as Mrs. Cowley.

138 ALONZO KING, a witness for plaintiff on motion for new trial, testified as follows:

DIRECT EXAMINATION

(By Mr. Beatie)

Q. Your name is Alonzo King?

A. Yes, sir.

Q. And you were one of the jurors duly empanelled in the case of H. M. Gribble vs. Mrs. Emma Cowley?

A. Yes, sir.

Q. Was there any statement or any discussion had by and between any of the jurors empanelled with reference to the negligence of the deceased, William Hale Gribble, in this case?

A. Yes.

139 Q. Isn't it a fact, Mr. King, that the discussion from the time, the bulk of the discussion from the time you returned from dinner on that evening at the Savoy Hotel was taken up as between the jurors in discussing the relative items of the negligence of Mrs. Cowley as compared with the negligence of William Hale Gribble?

A. Yes.

Q. Isn't it a fact, Mr. King, that is almost the entire discussion that was had on that evening in the jury room?

A. Yes, sir.

140 J. LAWRENCE LOWRY, a witness for the plaintiff on motion for new trial, testified as follows:

DIRECT EXAMINATION
(By Mr. Beatie)

Q. First of all, I am sorry we had to call you, Mr. Lowry. Your name is J. Lawrence Lowry?

A. Yes, sir.

Q. You were one of the jurors duly empanelled to hear and did hear the case and render a verdict in the case of H. M. Gribble vs. Mrs. Emma Cowley?

A. I was.

Q. As a matter of fact, you were designated as Foreman of that particular jury, were you not?

A. I was.

141 Q. I will ask you, Mr. Lowry, if it isn't a fact that there was discussions within the jury room with reference to the relative negligences as between William Hale Gribble and Mrs. Emma Cowley on that particular evening?

A. There was some.

Q. I will ask you this then: Isn't it a fact that most of the time during the deliberations of the jury on that particular evening was the discussion as between the fact that William Hale Gribble was negligent and that Mrs. Cowley was also negligent, and that William Hale Gribble was more negligent than Mrs. Cowley was?

A. No, sir, that is not a fact. The most of the discussion was as to whether Mrs. Cowley was negligent or not.

Q. It is a fact, however, there was a discussion as to the negligence of William Hale Gribble?

A. A little discussion, but no ballots taken.

Q. Five or six. Immediately — Withdraw that. The request was made by the jurors in that particular case for further instruction, was it not, on that night or the following morning?

142 A. Well, we called to inform him we weren't together.

Q. Immediately after the discussion or the information by which the Judge informed you that you would have to read the instructions and decide the case thereupon, or something to that effect, a jury verdict was reached, was it not?

A. Yes, sir.

Q. Isn't it a fact, Mr. Lowry, that the ballot had stood five to three for no cause of action upon the previous ballots, other than the last ballot?

A. Yes, sir.

143 ALONZO KING, recalled.

DIRECT EXAMINATION

(By Mr. Beatie)

Q. Was it not a fact that immediately after the Court, or immediately after the jury had requested further instructions, or some instruction from the Judge, that a ballot was taken upon this particular verdict, and that it was eight to nothing at that time?

A. Yes.

144 CROSS EXAMINATION

(By Mr. Erickson)

Q. You voted in the negative? You voted with the Gribble's stand up to the last, didn't you?

A. Yes, sir.

Q. You were the juror that hung out, weren't you.

A. I was one of them.

ASSIGNMENT OF ERROR

Comes now the appellant and says that there is error in the record and proceedings of this cause, and assigns said errors, as follows, to-wit:

1. The evidence is insufficient to justify the verdict in the following particulars:

That there was no issue of contributory negligence in this trial and the jury was instructed that the sole issue in the cause was whether or not the defendant was negligent as alleged in plaintiff's complaint; and that there was no evidence of negligence on the part of William Hale Gribble, the decedent, which said negligence might be imputed to his father, the plaintiff in this action.

2. Misconduct of the jury in the following particulars:

(a) Considering in the jury room and discussing the negligence of the defendant and the contributory negligence of the plaintiff's deceased son, when the court had given instruction No. 14, which instruction stated that the sole issue in the cause was the negligence of the defendant. (Abs. 131-144).

(b) That the jury, in their jury room discussion, stated that the defendant was guilty of negligence in causing the death of the decedent, and by deciding that the defendant, Mrs. Cowley, was negligent, it then became the duty for the jury

to determine just one matter, to-wit: what amount of damages was sustained by the plaintiff and render a verdict in that amount. (Abs. 139, 141).

(c) That the jury considered facts outside of the scope of the pleadings, and trial, namely, contributory negligence of the decedent, when the sole issue in the case was, the negligence only of the defendant. (Abs. 131-144).

(d) That the jury sent word to the Judge in the cause that they wished further instructions in the case, and upon being informed that the jury was to read the instructions and decide the case accordingly, that the jury voted on the verdict and three jurors changed their verdict so that the vote was 8 to nothing for "No Cause of Action," and that the last vote of the jurors was influenced by the information sent the jury by the Judge in the cause.

WHEREFORE, the plaintiff prays that the verdict in this action be reversed, and that the plaintiff be granted a new trial, and for all further and proper relief, together with costs of this appeal.

W. D. BEATIE,
Attorney for Plaintiff.

Received copy of the foregoing Assignments of Error this 10th day of February, 1940.

J. VERNON ERICKSON,
Attorney for Defendant.