

1944

## Pearl Spencer v. Santa Fe Trail Transportation Co. and Leonard Rushing : Brief of Respondents

Utah Supreme Court

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Rich, Rich & Strong; Shirley P. Jones; Attorneys for Defendants and Respondents;

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# In the Supreme Court of the State of Utah

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PEARL SPENCER,

*Plaintiff and Appellant,*

vs.

SANTA FE TRAIL TRANSPORTATION  
Co., a Corporation, and LEONARD  
RUSHING,

*Defendants and Respondents.*

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## BRIEF OF RESPONDENTS

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## I N D E X

	Page
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	2
CRITICISM OF PLAINTIFF'S STATEMENT OF THE CASE.....	13
ARGUMENT .....	24
Proposition I .....	24
Proposition II .....	36

### Authorities Cited

#### Cases

B. T. Moran, Inc., vs. First Security Corporation, 82 Utah 316, 24 P. (2d) 384 .....	32
Campbell vs. Los Angeles & S. L. R. Co., 71 Utah 173, 263 P. 495 .....	35, 36
Ludlow vs. Los Angeles & S. L. R. Co., 73 Utah 513, 275 P. 592....	36
Schofield vs. Zion's Co-op. Mercantile Institution, 85 Utah 281, 39 P. (2d) 342 .....	33
Trimble vs. Union Pacific Stages, 142 P. (2d) 674 .....	36
Van Leeuwen vs. Huffaker, 78 Utah 521, 5 P. (2d) 714 .....	33

#### Statutes

Com. Laws Utah, 1917, Sec. 6622 .....	33
Utah Code Annotated 1943, Sec. 104-14-7 .....	31, 33
Utah Code Annotated 1943, Sec. 104-39-3 .....	32

#### Texts

3 Am. Jur. P. 583 .....	33
3 Am. Jur. Pp. 609-610, Sec. 1062 .....	36

# In the Supreme Court of the State of Utah

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PEARL SPENCER,

*Plaintiff and Appellant,*

VS.

SANTA FE TRAIL TRANSPORTATION  
Co., a Corporation, and LEONARD  
RUSHING,

*Defendants and Respondents.*

Case No. 6654

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## BRIEF OF RESPONDENTS

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We have read appellant's brief with astonishment. The facts have been so carelessly handled, that a complete picture cannot be acquired. We shall, therefore, make our own statement.

### STATEMENT OF THE CASE

This is the first of a series of lawsuits growing out of the same accident. In the second case, Maxine Anderson, the driver of the car in which the present plaintiff

was riding, is the plaintiff and these same defendants are the defendants. That case has already been tried before the same judge who tried the instant case, with the same attorneys, a verdict rendered against these defendants, and the appeal therein will undoubtedly be docketed in this court before this case is heard. A third case was brought by Rose Sorensen (variously denominated Mary Rosetta and Mary Rose Sorensen, but hereinafter called Rose Sorensen) the leading lady of the entire production, in the District Court of Sanpete County, from which court it was transferred to the United States District Court for Utah and is there now pending with the assurance of counsel in those cases (Mr. Benjamin Spence), that all additional cases, two or three in number, will be filed in that court, so that the remaining trials, if any, may be consolidated. However, at the time the instant action was tried, none of the other parties had brought suit in any court, all stating they were awaiting the test run of this case before taking action.

We feel that it will be very enlightening to this court and aid it materially in its consideration of this case to have before it the Anderson case, and for a proper solution of the Anderson case this court may desire to have before it and in mind many particulars, if not the entire record, in the instant case.

## STATEMENT OF FACTS

On the evening of November 15, 1942, a Chevrolet automobile driven by one Rose Sorensen and contain-

ing as additional passengers Emma Jensen, Ina Sorensen, and Cleone Jensen, was proceeding south on U. S. Highway 89 between Gunnison and Redmond, Utah. Rose Sorensen and the other occupants of the Sorensen car were all employees of the Turkey Plant at or near Gunnison, Utah, and residents of Redmond, Utah, and had been riding back and forth to work together for several weeks in the Rose Sorensen car. These four ladies were not only lifelong friends and fellow employees and passengers, but Ina Sorensen is Rose's sister-in-law, Emma Jensen is Rose's sister (R. 170, 193). None of them had ever seen or heard of the plaintiff in this case or the driver of the car in which the plaintiff was riding, one Maxine Anderson, until the night of the accident (R. 160).

The four ladies in the Chevrolet automobile testified that as they proceeded south on U. S. Highway 89 on the evening in question, the Santa Fe bus driven by the defendant Leonard Rushing approached from the south going north, that approximately a mile and a half south of the Gunnison Sugar Factory and about opposite Avery Beck's home, the bus swerved or skidded or slipped or glided into the Chevrolet. They all testified that the left rear end of the bus hit the left front of the Chevrolet. Rose Sorensen testified that the bus skidded or glided into her car. The impact, however, was hard enough to knock her dazed (R. 112, 114, 116, 126, 127, 129). Cleone Jensen testified that the bus skidded into the front end of the Sorensen car and knocked the left front fender down onto the wheel so that the Chevrolet

car was thrown out of control. The blow was hard enough to make a dent in the fender and push it down on the wheel (R. 143, 154, 155, 156, 162). Miss Jensen also testified in answer to her counsel and on cross-examination as follows:

“Q. \* \* \* but you do know it was the bus that struck you?

A. Yes.

By MR. JONES:

Q. That is about the only thing you're sure of, isn't it?

A. Yes.

Q. You know if the bus didn't hit you that there is no excuse for Miss Sorensen running into Miss Spencer, don't you?

A. After the bus hit her?

Q. You know if the bus didn't hit you, there is no excuse for Miss Sorensen running into the Anderson car?

A. Yes.” (R. 168, 169).

Along this same line Miss Sorensen testified that it was solely due to the collision between her car and the Anderson car that the plaintiff was injured and that she, Miss Sorensen, told the plaintiff and Miss Anderson that the bus had hit the Sorensen car and that the only way Miss Spencer and Miss Anderson knew anything about the bus was from what she (Miss Sorensen) told them. She also testified that she had not sued the defendant company and that whether or not she did depended on how this present case came out (R. 134-136).

Ina Sorensen testified that the bus switched into them, or swerved into them, and hit them in the left front side and knocked her unconscious, so that she didn't know anything for eight or nine hours (R. 176, 177, 178, 186).

Emma Jensen testified that she is positive that the rear end of the bus hit the front part of the Sorensen car around the front fender hard enough to knock them dazed (R. 199, 200, 201, 209, 210).

Cleone Jensen was the only occupant of the car who was not knocked dazed (R. 143, 156).

The testimony of three of the ladies is to the effect that the impact with the bus was not so hard, although it knocked three of them dazed and threw the car completely out of control. Ina Sorensen, however, testified it was hard enough to knock her out for eight or nine hours. Rose said that the gentle gliding of the bus knocked her dazed until she came headon into terrific collision with the Anderson car, which headon collision brought her back to consciousness (R. 131). All of the four ladies testified that they customarily passed the bus on their way home in the evenings and that they were always nervous in passing it and had commented, "Well, we are past the bus again."

Although the witnesses were excluded from the courtroom and did not hear each other testify, the occupants of the Chevrolet car testified with significant unanimity that the left wheels of the bus were two feet over or to the left of the yellow line marking the center of the high-



way and that as a result, their car went over on to the shoulder of the highway so that their right wheels were two feet off the highway. This unanimity of mathematical accuracy in designating the various distances as two feet, and in other significant testimony, might indicate preliminary rehearsals and was commented on by us to the jury. This court may find it interesting when it reaches a perusal of the Anderson record to note the disappearance of this unanimity.

The ladies say that after the left rear end of the bus hit the left front fender of their car, instead of knocking it to the west, their car skidded or zig-sagged to the east and almost completely across the highway, so that they collided headon with the Anderson car, a Plymouth, in which the plaintiff was riding. The Anderson car was proceeding north following the bus, and after the accident the Sorensen car was headed southeast and the Anderson car north both on the east side of the road. As a result of the impact between the Sorensen Chevrolet and the Anderson Plymouth, the plaintiff sustained the injuries in question. As the two cars stood together after the impact, a milk truck coming from the south sideswiped both of them (R. 547), sideswiping the left side of the Plymouth and the right side of the Chevrolet but not causing any of the damage to the left fender of the Sorensen Chevrolet car. This appears from the entire record, and particularly the testimony of State Highway Patrolman Embley (R. 451-454). Nor did the collision with the Anderson car cause the damage to the left front fender of the Sorensen car (R. 217, 218).

The highway at the scene of the accident and for several miles on either side is straight. The paved surface is 18 feet wide (R. 367), with a shoulder  $2\frac{1}{2}$  feet wide to the east and  $1\frac{1}{2}$  feet wide to the west (R. 429). The bus is 8 feet wide (R. 352) and the Chevrolet is 5 feet wide (R. 483). The distance from the road to the highest point of the underside of the arc or beading of the left front fender on the Chevrolet is 29 inches and to the top of the fender, 5 inches higher (R. 482). The dent in the fender supposed to have been caused by the bus is above the arc or beading (Ex. 4). The distance from the ground to the bottom of the back bumper on the bus is  $19\frac{1}{2}$  inches and the bottom of the bumper and the bottom of the body of the bus are the same distance from the ground. The distance from the ground to the top of the top bumper is  $27\frac{1}{4}$  inches. The bumpers are flush with the body and do not project at all from the body (R. 379, 380). From the center of the wheel housing of the rear wheels of the bus to the end of the bus is 8 feet 7 inches and it is impossible for the bus to make a quick slip or turn or swerve so as to throw the rear end around, the bus being 39 feet 6 inches long and weighing between eleven and twelve tons empty (R. 352-353).

Although Miss Sorensen and Miss Anderson state that Miss Sorensen claimed to Miss Anderson that the bus had hit her and that that was the reason for the collision (R. 115, 229), Pearl Spencer (the plaintiff), herself, testified that that night there were a dozen different stories of how the accident happened (R. 250).

Miss Anderson and Miss Spencer both testified at the trial that as they were proceeding north on the afternoon or evening in question, a Santa Fe bus passed them going north, a half a mile from the accident and about thirty seconds before it happened, that they followed a short distance behind the bus, and that its clearance lights were visible to them at the time the headlights of the Sorensen Chevrolet appeared and the Chevrolet came across the highway and collided with them, that the bus had passed the Sorensen car before they ever saw the Sorensen car, that they didn't see the bus hit any car and never attributed any accident to the bus until Miss Sorensen told them about the bus (R. 232, 234, 278), that anything they know about the bus is what Miss Sorensen told them. At this point it is interesting to note that when Highway Patrolman Embly questioned Miss Anderson in the presence of Miss Spencer in Manti on the Wednesday following the accident, Miss Anderson stated that they hadn't seen any bus that evening, that had a bus been ahead of them she would have noticed the numerous rear lights and been able to detect it, that he was trying to find out if the bus was involved in the accident and asked Miss Anderson, "If there was something ahead of you (referring to the bus), Maxine, don't you think you would have known it was the bus?" She said, "Yes, I imagine I would." (R. 413 et seq., 445). The purpose of Officer Embley's visit to Miss Anderson was to find out if a bus was involved in the accident and she told him she didn't see the bus at all. Miss Spencer was

present at the conversation and made no contrary declarations.

The defendant driver of the bus knew nothing of any accident, stated that he was not involved in any accident, did not drive on the wrong side of the road, did not skid or swerve, that it would be impossible with this bus to make it suddenly skid or swerve, and that in order to make a turn to throw the rear end of the bus to the west it would be necessary to head the bus so to the east that the bus would be occupying the entire highway and completely off of it to the east at least half the length of the bus.

On the evening in question the bus reached Gunnison about 6:40 or 6:45 and proceeded over the Levan cutoff on Highway 28, then back onto the main road into Santaquin where the driver disembarked his passengers and baggage, loaded them onto a leased Utah Transportation Company bus for carriage on into Salt Lake City, and bus 392, the bus in question with a new driver, turned around and went back over the road it had previously traveled. He and his passengers then proceeded on into Salt Lake City and 392 went back to Phoenix (R. 296-297). The reason for the change of passengers was that one of the Santa Fe buses had broken down some time prior to November 15 at Redmond, Utah, and that it was necessary to lease a bus from the Utah Transportation Company in order to maintain the Santa Fe schedule; that on the 14th and 15th of November passengers had been changed from the Santa Fe bus to the leased bus,

on the 14th at Payson and on the 15th at Santaquin (the leased bus on both days left Salt Lake City before the time of the claimed collision), and the fact that this change would be made had been communicated to the passengers of bus 392 when they boarded the bus on the 15th and long before the time of the claimed accident (R. 342-347, 465, 466, 500, 512, 513, 519). On the 15th of November bus 392 stopped at Remond before the claimed collision and discharged parts for the broken down bus there and then proceeded on its way (R. 348-349). This broken down bus at Redmond was also seen by Miss Anderson and Miss Spencer and the passengers on the bus.

Bus 392, the bus driven by Mr. Rushing on the 15th of November, returned to Phoenix on the 16th, had the regular two thousand mile service, which consisted of putting on the winter radiator cover and the brakes and heater checked, left Phoenix on the 17th, and on the 18th was proceeding over Highway 89 on the same route as it had traversed on November 15th (testimony of Mr. Griffith, R. 299-338). This bus was also driven by Rushing on the 18th and was stopped and examined by Highway Patrolman Embley on the Levan cutoff, Highway 28, about four miles south of Levan. As already stated, the driver knew nothing of any accident, there were no repairs made on the bus, and there were no marks on it indicating that it had been in an accident such as described by the occupants of the Sorensen car. The material of which the bus is constructed would readily show any collision, both by indentations in the material itself

and by loss of paint, and could not be repaired without patching or removing of a panel and repainting, all of which would be readily discovered upon examination (Griffith and Embley testimony).

When Mr. Rushing first learned of the claimed accident a day or so later, he immediately contacted the ticket agents along his route to determine the names of the passengers on his bus on the 15th of November, and as a result of this investigation secured the names of several passengers, every one of whom that could be discovered and subpoenaed, was subpoenaed and testified in the case. None of them knew of any accident, had ever heard of any accident, felt any skid, swerve, jolt, impact, or anything else to indicate anything unusual on November 15th. All of them and the bus driver stated that they did not drive on the wrong side of the road, that the trip was very uneventful and peaceful, that they were none of them acquainted with the driver and were present at the trial solely by reason of subpoena. All of them testified that the driver drove in a proper and careful manner, so that the trip was very restful and uneventful.

It is interesting to note that all four occupants of the Sorensen car and the plaintiff, Pearl Spencer, described the bus with great positiveness and particularity and stated that it was a light color at the bottom and dark color at the top described by some as a cream color at the bottom and orange-red at the top and that they could positively not be mistaken in this. As a matter of fact,



bus 392 and all the Santa Fe buses are colored in just the opposite way, orange-red at the bottom and cream color at the top (Griffith testimony, R. 316-317 and Exhibits 1 and 2).

It will be interesting in examining the Anderson record to note the squirmings and wriggings and twistings of counsel to account for the color scheme attributed to the bus by the same witnesses in the Spencer case.

In an attempt to account for the damage to the left front fender of the Chevrolet car, the defendant Rushing recalled that he passed a truck going north immediately after he had left Redmond and that this truck had a projecting body about the height of the damage to the fender. Plaintiff's counsel examined witness after witness on behalf of the plaintiff as to the presence of any truck and all of them denied that any truck was in the vicinity of the accident. Then the plaintiff's counsel, toward the end of the case, called as his witness a Mr. Whitlock previously subpoenaed by the defendants but not used, and this witness definitely testified that there was a truck traveling in a northerly direction immediately in the vicinity of the accident and that it almost hit his car and was running without any signal or clearance lights. True, Mr. Whitlock stated that the truck was ahead of the bus instead of behind it, but the detailed accuracy of his memory can be ascertained by this court on an examination of the Anderson record wherein Mr. Whitlock testified at that trial that the truck had clearance lights on it.

The left front fender of the Sorensen (Chevrolet) car was not produced or offered in evidence at the trial. Two or three weeks before the trial, Mr. Wilkinson, one of plaintiff's attorneys, had the fender removed from the car at Centerfield, Utah, and took it away with him, but it never appeared in the court room in the trial of this case. Neither did plaintiff offer any pictures of either the fender, the Chevrolet car, or the defendant's bus. In fact, when defendants offered photographs of the fender and the Chevrolet car as they appeared after the accident (Exhibits 3 and 4), plaintiff strenuously objected to the offer (R. 383-387) and they were received in evidence over plaintiff's objection, although it was established without dispute that they correctly represent the condition of the fender on November 15th after the accident (R. 393). We commented on these matters to the jury, apparently effectively.

We have stated the evidence somewhat in detail in an effort to give this court some idea of the skepticism we felt that plaintiff's evidence created at the trial of this case and resulted in the verdict of no cause of action.

### CRITICISM OF PLAINTIFF'S STATEMENT OF THE CASE

Inaccuracies, contradictions and dubious insinuations are encountered through appellant's brief. We comment on them as they appear seriatim in the brief:

On page 2 plaintiff says with reference to defendants: "However, they do admit that the bus was in the exact



location of the accident at the approximate time the injuries complained of occurred," as though there were something sinister in the presence of the bus on the highway and some attempt of concealment on our part. There is no question of any admission. Anyone could determine from the published schedules where on Highway 89 the Santa Fe bus would be at any approximate time. Many other vehicles were in the exact location of the accident at the approximate time the injuries complained of occurred. That is no admission that they were involved in plaintiff's accident.

Plaintiff states on page 2 that the testimony of the occupants of the Sorensen car is undenied except on one point. This is highly inaccurate. The only material thing that is undenied in their evidence is that they collided with the Anderson vehicle. It is emphatically denied that the bus was traveling on the wrong side of the road, that it skidded, slid, swerved or glided suddenly or otherwise.

It is established, in the face of plaintiff's witnesses' denial to the contrary, that there was a truck so constructed as to be capable of causing the damage to the left front fender of the Chevrolet on the highway at the time and place in question, and the physical facts make it extremely improbable, if not impossible, for the bus to have collided with the Chevrolet car as described by the occupants of that car. There are no marks whatever on the bus to indicate such a collision, there is nothing on the bus that could have caused the damage to the Chevrolet fender, and it is absolutely impossible for the

bus to make a sudden swerve or glide in one direction so as to come in contact merely with one portion of the other car. The highest part of the bus bumper is several inches below the lowest part of the crease in the Chevrolet fender, the bumper does not project beyond the body of the bus and could not cause the crease in any event. This crease was the main point of comment throughout the trial. In the Anderson trial at the end of his final argument to the jury, plaintiff's counsel abandoned any claims as to this crease and declared the point of collision was at the bottom of the front of the fender.

It is also interesting to note that from the plaintiff's own evidence her portion of the street is nine feet wide. If the bus was over the center line two feet, that would still leave seven feet of pavement. The Chevrolet is five feet wide and it would have a space of at least two feet to pass the bus without leaving the pavement. Plaintiff's witnesses say the Chevrolet went off the pavement two feet, which would leave a space of four feet between the bus and the Chevrolet, according to plaintiff's own witnesses. The bus projects eight and a half feet beyond the rear wheels. It would be utterly impossible for this huge bus to make a four-foot skid with the rear end alone without violently affecting the remainder of the bus. If the bus was turned suddenly to make such a swerve, the whole front part of it would be entirely off the pavement and into the barrow pit on the east. Also, if this huge bus made a four-foot flip into the plaintiff's car, plaintiff's car would not

have been knocked to the east but would have been knocked violently a considerable distance to the west. It just doesn't happen that a bus of this size and weight goes up and down the highway flipping its rear end back and forth like a cow infested with gad flies, and certainly not to the complete oblivion of all the passengers, who were not only unaware of the tail flipping propensities of their conveyance but of the fact that it was traveling upside down with the cream colored part at the bottom and the orange-red at the top. And so for the plaintiff to say that the story of the occupants of the Sorensen car is undenied except in one point is to imitate the ostrich hiding its head in the sand in the belief that other vulnerable portions are likewise concealed.

On page 4 plaintiff states that there were three separate collisions on the highway and "this is also admitted." How can counsel say that we admit that there were three separate collisions when on page 2 they expressly state: "Defendants deny that the Santa Fe bus struck the Sorensen car." Counsel should be more meticulous in examining their statements to see that they are not inconsistent. As a matter of fact, we do not believe, and neither did the jury, that our bus ever had anything to do, either by way of collision or otherwise, with plaintiff's accident. So counsel is entirely in error in stating that we admit that there were three collisions.

Also on page 4 of their brief counsel state that Maxine Anderson's story is substantially the same as the plaintiff's. We have already pointed out that Maxine

Anderson testified that they were following the bus, could see its lights, saw its lights pass the Sorensen car, saw no collision with the Sorensen car, and after the bus had passed the Sorensen car that car careened across the highway and collided with her automobile. Officer Embley testified that three days later Maxine Anderson, with the plaintiff herein acquiescing by her silence, stated she had not seen the bus and did not know what was in front of her.

On page 6 of their brief counsel drag out of thin air and attach to the plaintiff a lisp and state that the record doesn't reveal her age but that she is a young girl in her twenties. Neither of these facts is of any importance except for the purpose of showing counsel's disregard for the record. Mr. McCullough at the trial asked the plaintiff if the lisp that she had was caused by the accident and on cross-examination defendants' counsel wondered what lisp was meant and asked her what impediment she had. The plaintiff said her words were slurry and her s's were terrible, but it was not apparent to anyone listening to her and we were unable (and apparently the jury also) to detect that her words were slurry and her s's were terrible. Also, on page 248 of the Record plaintiff testified that she was twenty-six years old.

Again on page 7 counsel uses the verb "admitted" in describing the presence of the bus in the vicinity of the accident and impliedly again assert that all we con-

tended was that we didn't run into the Sorensen car. We have already covered these points.

Probably the most glaring misstatement is found on page 8 and again on page 10 of appellant's brief as follows:

"The reason for changing passengers at Santaquin and returning to Phoenix without going to Salt Lake City was unexplained. This was especially peculiar in view of the fact that the defendant claimed that the bus had been undamaged."

and

"Why did not the bus come to Salt Lake City?"

These two statements lead us to believe that someone other than counsel whose names are subscribed to appellant's brief participated in the preparation of the brief, since certainly none of those attorneys would have the temerity (or would they) to think they could get away with that in this court. Page after page of the record is devoted to that very fact. In Mr. Rushing's testimony and also in the testimony of every one of the passengers except Leah Cherrington the reason for the change appears, and the fact that the change would be made was known long before the time plaintiff claimed the accident occurred. The day before this accident, a similar change of buses was made at Payson. On the day of the accident a change was made at Santaquin and the reason for the change was that one of the buses had broken down and was waiting for repairs at Red-

mond, and on this very trip, before bus 392 ever reached the scene of the accident, it had stopped at Redmond and left repair parts for the broken down bus (R. 343-348 and testimony of bus passengers). In fact, both Miss Anderson and Miss Spencer stated that on this trip they saw the broken down bus at Redmond (R. 231, 232, 245). These misstatements in the brief, in view of the record, are nothing more nor less than presumption and effrontery.

Again on page 8 of her brief appellant uses the word "admit" in describing testimony of the defendants. There is no question here of admissions, as though we had been forced into a corner to confess something that had to be wrung out of us. Appellant states that we admit that the bus was eight feet wide and that we admit that the bus was the only bus that runs between Redmond and Gunnison between six and seven o'clock in the evening. In the first place, anyone could testify to the width of the bus by measuring it or to the schedule of the Santa Fe Transportation Company and the mere fact that the occupants of the Sorensen car used this knowledge to fasten an impossible situation upon us cannot be construed as an admission on our part when we state facts that everyone knows. In the second place, the Rio Grande Trailways run over this same route and sometimes run in the evening off schedule (R. 381). As a matter of fact, no bus, Rio Grande or Santa Fe, could have caused the damage to the Sorensen left front fender.



Again on page 9 appellant says with reference to Exhibits 3 and 4 that the witness "admitted" that the pictures do not reflect the true condition of the Sorensen car on November 15. Exactly the opposite is the fact. The witness G. W. Sorensen, a mechanic, testified that the only thing he did was to raise the fender probably an inch and a half to get it off the wheel so he could move the car, that the pictures (Exhibits 3 and 4) were taken in the rear of his garage at Centerfield, Utah, and that the exhibits correctly portray the body and fender of the Chevrolet when he picked it up the night of November 15 after the accident (R. 393).

Another misstatement is also found on page 9 of the brief. In commenting on the testimony of Highway Patrolman Embly, appellant says that Embly went to the Beck residence and "had some discussion with Cleone Jensen, which discussion his counsel did not permit him to relate." We assume that by the statement "his counsel" appellant means us, since we offered and were examining the witness. As a matter of fact, the record shows that Mr. McCullough, appellant's counsel, objected to the witness answering the question as to what Cleone Jensen said:

"EMBLEY: So I talked to Cleone Jensen at that time. She seemed to be the one that was least injured, and she was the one that told me what had happened.

MR. MCCULLOUGH: Just a minute. We object to this on the ground it is incompetent, irrelevant, immaterial, hearsay.

THE COURT: I haven't heard any hearsay yet.

Q. (By Mr. Strong): Were you going into what Cleone told you — don't say what she told you. Say what you observed from then on."

On page 10 appellant's counsel say:

"Note that there is no evidence from witness Embley that he ever examined bus No. 392, which was the bus driven by Leonard Rushing on the night of the accident."

It is difficult to understand why counsel make such misleading statements. Mr. Rushing testified that on November 18 on his trip north he was driving 392, and that by pre-arrangement he met Patrolman Embly on the Levan cut-off and that Patrolman Embly examined the bus thoroughly (R. 357, 358, 359), and Patrolman Embley testified that he examined every Santa Fe bus that came through, not only 392, but every one of them, and that on November 18 on the Levan cut-off he examined the bus driven by Mr. Rushing (R. 405-409). He found no evidence of any collision marks on any of the buses.

Counsel state on page 10 of their brief that Highway Patrolman Embley "admitted" that there were tire marks on the west shoulder of the road north of the point of collision between the Anderson and Sorensen cars as corroboration of the testimony of the occupants of the Sorensen car that they had driven off the highway to avoid being struck by the bus. As a matter of fact, Officer Embley testified that there were no marks



on the highway indicating how the accident happened. "I did not find any marks on the road that night from the shoulder or any other place" (R. 410-411). With reference to the west shoulder itself, he stated that 50 to 100 feet north of the point of collision between the two cars he found tire marks on the west shoulder and that they were made from cars that were stopping there all the time, that if there had been any skid marks, they would still have been present but there were none (R. 430-431). The tire marks on the west shoulder were all along there from the cars that had stopped there on account of the collision between the Anderson and Sorensen cars (R. 410, 454).

On page 11 appellant's counsel say that Exhibit B (Embley's notes) indicated that Cleone Jensen stated that on the night of the accident the Sorensen car and the bus had collided, the impression being that on the night of the accident Cleone Jensen had stated that the bus collided with the Sorensen car. As a matter of fact, Embley stated that he didn't get any of the statements the night of the accident but got them on the next day (R. 436), including Cleone Jensen's statement.

On page 12 appellant implies that the bus ride for the passengers was one of turmoil and confusion by saying:

"They all stated that it was a stormy night and that the bus was crowded."

As a matter of fact, all of the passengers said it was a peaceful, uneventful, restful trip, and when counsel attempted to inject a blinding storm into it, one of the witnesses said that one of the appealing things about the trip was her observation in the snowstorm of the pheasants along the roadway. The bus ride was a warm, comfortable, pleasant trip with nothing whatever occurring to disturb the equanimity of any of these lady passengers.

On page 12 appellant tries to give the impression that we had spirited a witness, Mr. Whitlock, away from the trial. Mr. Whitlock's testimony was at variance with a statement he had previously given to us, in which statement he stated that the truck was following the bus. Then later he stated that the bus was following the truck. In his statement and also in his evidence he stated that the truck had no clearance lights on it, while in his testimony in the Anderson case he stated that the truck had clearance lights on it. About the only thing he remained firm about was that the truck almost hit his car. We, nevertheless, subpoenaed him and intended to use him and counsel knows, as the record clearly discloses, why he was excused. Mr. Whitlock stated at the trial:

“BY MR. JONES (R. 548):

Q. Mr. Whitlock, Mr. McCullough asked you if you had been subpoenaed by the defendant and not used; that is right, isn't it?

A. That is right.

- Q. Tuesday night you were excused, is that it?  
A. I was.  
Q. You told me you had to get back the next day, didn't you?  
A. I did. Yes.  
Q. And you couldn't wait over?  
A. That is right.  
Q. Without great financial loss to you, and so I said, 'Well, you go ahead.'  
A. That is correct.  
Q. The plaintiff brought you back, and not me?  
A. They did."

The only mystery about the matter is appellant's counsel's mention of the episode in their brief. It is akin to the other mysteries in the story told by their witnesses. It is significant, however, that Mr. Whitlock testified to the presence of a truck without lights that nearly ran into him. These details appellant fails to call to our attention.

## ARGUMENT

While appellant has specified 16 errors, she has discussed but 2 propositions:

**"PROPOSITION I. THE TESTIMONY INTRODUCED BY DEFENDANTS OF ROSE SORENSEN'S FAILURE TO HAVE A DRIVER'S LICENSE, AND COUNSEL FOR THE DEFENDANT'S DISCUSSION OF SUCH EVIDENCE BEFORE THE JURY CONSTITUTED REVERSIBLE ERROR WHICH DENIED TO THE DEFENDANT A FAIR AND IMPARTIAL TRIAL.**

PROPOSITION II. THE COURT ERRED IN LIMITING THE JURY TO THE QUESTION OF WHETHER OR NOT DEFENDANT'S BUS STRUCK THE AUTOMOBILE DRIVEN BY ROSE SORENSEN, AND ERRED IN REFUSING TO INSTRUCT THE JURY THAT IF SAID BUS CROWDED ROSE SORENSEN'S CAR OFF THE ROAD AND THEREBY PROXIMATELY CONTRIBUTED TO PLAINTIFF'S INJURIES THEN SAID BUS COMPANY WOULD BE LIABLE."

We shall, therefore, discuss only the specifications of error covered by the two propositions. Several of the specifications of error, such as 8, 9, 10, 12, and 14 on pages 14 and 15 of the brief, undoubtedly were abandoned by appellant in view of the fact that the instructions requested are merely repetitious and were fully covered by equally, if not more, exhaustive instructions given by the court.

Coming now to Proposition I. Appellant complains that we introduced testimony that Rose Sorensen didn't have a driver's license and of our comments to the jury referring to her absence of a driver's license as one of her reasons for desiring to direct attention from herself to the defendant company and take the onus of an investigation from her own shoulders and place it on ours. Appellant then cites several authorities to the effect that failure to have a driver's license will not deprive a person of his right to recover for injuries inflicted on him through negligence of another unless the absence of the license has a causal connection with the accident. We find it somewhat difficult to understand why appellant has cited these authorities, since we never contended that Rose Sorensen's lack of a driver's license would

deprive the plaintiff of her cause of action, if any, against us. That the court was of the same opinion is abundantly apparent in instruction No. 8 to the jury wherein we thought the court went a good deal farther than was proper in eliminating anything pertaining to Rose Sorensen from the consideration of the jury (this instruction will be referred to more extensively later). We did not introduce testimony that Rose Sorensen had no driver's license. We knew she didn't have one. We asked her why she didn't have one, and appellant herself produced this evidence later in page 2 of her Exhibit B and her examination of the witness Embley with reference thereto (R. 439). This witness was the one from whom we also received our information that Rose Sorensen had no driver's license. We in our cross examination were trying to find some basis for the weird story told by Miss Sorensen. We knew that our bus had not been involved in any accident and had not sideswiped or collided with any car. At that point in the trial we did not know that Miss Spencer and Miss Anderson were going to state that the bus was anywhere in the vicinity of the accident at the time it occurred, since they had led Officer Embley to believe that they had not seen the bus that day and that if it had been in front of them, they would certainly have seen it. Miss Sorensen had testified that she and all the other occupants of her car were very nervous every time the bus passed them and we were wondering if her nervousness was of such a nature as to prevent her from getting a driver's license. Certainly she had no right to be driving the car on that occasion

without a driver's license and if her nervousness had prevented her from getting a license, we were certainly entitled to know that, especially in view of the fact that we know of no reason why she collided head-on with the Anderson car. Our bus showed no evidence of any contact with her car, and certainly no collision with our bus could have accounted for the damage to the left front fender of her car or her fantastic statement that the bus had glided gently into her but with sufficient force to knock her dazed and that the terrific impact with the Anderson car brought her to. If her nervousness and her inability to secure a driver's license caused her to go off the west side of the road and then careen over to the east side, she and not ourselves were responsible for the accident, and the fact that she had no driver's license certainly required an inquiry and explanation of why she didn't have one. We had contended all along that we had nothing to do with the accident. Rose Sorensen was the one who ran into the Anderson car and certainly any evidence affecting her credibility or explaining her reasons for trying to divert attention from herself to somebody else was not only competent and material, but highly relevant, particularly in view of the fact that neither she nor any of the occupants of her car had sued us. We never contended that if the bus had actually hit the Sorensen car the fact that Miss Sorensen had no driver's license would deprive the plaintiff of her right of action against us and the court plainly and emphatically told the jury that plaintiff could not be held responsible for anything Rose Sorensen did if our bus had hit



her car. If Rose Sorensen's nervousness was the cause of her erratic driving so that she could not secure a driver's license, that would explain how she happened to go off the road on the west side and then cross over to the east side and hit the Anderson car. Certainly it taxes credulity to believe that our heavy bus could have hit her and the blow of the bus deflect her course to the east in the same direction from which the alleged force came, instead of to the west and down into the barrow pit immediately adjacent to the west shoulder as laws of physics would seem to require. We were then and are now entirely in the dark as to why Rose Sorensen collided with the Anderson car and were entitled to discover if we could any reason for her actions that night.

It will be noted that both our question on cross-examination and our reference to the driver's license in argument to the jury are directed solely to the credibility of the witness in her efforts to divert attention from herself to us, the innocent bystander, as the cause of the accident.

In stating their Proposition I, appellant's counsel say, "The testimony introduced by defendants of Rose Sorensen's failure to have a driver's license," etc. We did not introduce any evidence that she didn't have a driver's license. That was done by appellant's own counsel by means of their Exhibit B. All we did was ask Miss Sorensen why she didn't have one. Appellant was under no compulsion or necessity to offer Exhibit B in evidence. Her counsel knew it was incompetent

and hearsay, but notwithstanding that, he made a play of it before the jury, waving it around in front of the jury and the witness, and probably no one was more surprised than appellant's counsel himself at our consent to the reception in evidence of his Exhibit B. Appellant's counsel asked the witness Embley if he had made any memorandum. Upon receiving an affirmative answer, he asked for the memorandum and then asked the indulgence of the court while he proceeded to read it to himself in the presence of the court and jury. He then asked to have it marked and said (R. 432, 433):

“Now, turning to the second page of what has been marked for identification as Exhibit ‘B’, is there any memoranda there with reference to what Maxine Anderson said to you?”

(It will be noted that on the second page also appears under the heading Rose Sorensen, the following: “No operator's license”). Of course we objected to this method of procedure and insisted that we should have a right to look at the exhibit and that if he was going to examine with reference to these notes, they should be offered in evidence before such an examination took place. Counsel persisted in his efforts and we insisted on seeing the notes. Counsel protested that he didn't want “to disclose my hand to the attorneys on the other side.” Mr. Embley stated that the information contained in the notes was received from the persons questioned the day after the accident and that he did not get the information from them the night of the accident. This



colloquy covers five or six pages of the record (R. 432-437). The following appears on page 437:

“MR. McCULLOUGH: As part of the cross examination of this witness, we would like to offer in evidence the Exhibit B, including all of the statements which he has here with reference not only to Maxine Anderson, but each and every one of the witnesses, as to what they told him, as far as the accident is concerned.

MR. JONES: Mr. McCullough knows it is absolutely incompetent. \* \* \* but I haven't any objection to its going in.

THE COURT: I thought you were going to object to it.

MR. JONES: It is objectionable, and he knows it is, but I am going to let the jury see it. He has made this play before them; let them see it.

MR. McCULLOUGH: No play at all.

THE COURT: Let's go ahead. No objection?

MR. JONES: It is all right.

THE COURT: It may be received.”

Thus appellant's counsel himself offered the evidence that Rose Sorensen had no operator's license. All we did was question her as to why she didn't have one.

Not satisfied with having put the exhibit in evidence, counsel then proceeded to go over the memorandum item by item (R. 439):

“Q. And the next page, you got 'Rose Sorensen'?

A. The driver.

Q. 'Redmond, Utah'. That is her address?

A. Yes.

Q. 'Age 49'. Is that correct?

A. Yes.

Q. 'One year driving.' Correct?

A. Yes sir, one year driving experience, that is.

Q. And then it shows 'No operator's license'.

A. That is right."

It is thus somewhat ludicrous for counsel to object to our asking Rose Sorensen why she didn't have a license when he is the one who later insisted on presenting to the jury the positive evidence that she didn't have the license.

Even if we were to assume that the cross examination is erroneous in the first instance, which it was not, any complaint appellant may have had was certainly waived by the voluntary conduct of her own counsel in offering the only positive evidence there is of the non-existence of her driver's license. In this state, as in most jurisdictions, we have definite statutory enactments that would preclude appellant taking advantage of any such situation even had our cross examination been improper, which it was not. Section 104-14-7, Utah Code Annotated, 1943, provides:

"The court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

Also, Section 104-39-3, as follows:

“No exception shall be regarded, unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting.”

Certainly in the face of counsel's own conduct, nothing that we did was prejudicial or effected the substantial rights of the plaintiff. The jury would have known of Rose Sorensen's lack of a driver's license if we had never said a word. Counsel was, to use an expressive colloquialism, “hell bent” on getting Exhibit B in evidence or else making the jury believe it contained something we were afraid of, even though he knew it was incompetent. Counsel is thus hoist with his own petard.

As this court said in *B. T. Moran, Inc., v. First Security Corporation*, 82 Utah 316, 24 P. (2d) 384, at page 327 of the Utah Reports:

“With the copy of the telegram eliminated there was sufficient evidence to support a finding that notice of withdrawal of the offer was communicated to the agent before acceptance of the contract by the principal at Chicago.”

In that case evidence claimed to be incompetent was received over objection, but later the same information was put in without objection and thus no prejudice occurred. Paraphrasing the language of this court in that case, we could say:

“With the cross examination of Rose Sorensen eliminated there was sufficient evidence to support a finding that she had no driver's license.”

Also in the case of *Schofield v. Zion's Co-op. Mercantile Institution*, 85 Utah 281, 39 P. (2d) 342, where complaint was made of the introduction of certain letters but the information contained in the letters was subsequently otherwise received in evidence, this court at page 294 of the Utah Report says:

“Furthermore no dispute is made in the record as to the facts recited in the letters, so they could in no wise be prejudicial.”

In the case of *Van Leeuwen v. Huffaker*, 78 Utah 521, 5 P. (2d) 714, secondary evidence as to the contents of a written instrument was received without the proper foundation being laid for its reception. Objection was made, which was overruled. This court held that it was error to overrule the objection but that the error was rendered harmless by what transpired afterwards during the trial. The same evidence as was contained in the secondary evidence was offered and received orally and this court on page 534 of the Utah Reports says:

“It thus appears that defendant himself in his own testimony admitted substantially all that plaintiff sought to prove by the contract \* \* \*. Such being the state of the record, we do not see how the error of the trial court could have resulted in any prejudice to the substantial rights of the defendant.” (Citing Com. Laws Utah 1917, Sec. 6622, which is the same as our present 104-14-7).

See also 3 Am. Jur., p. 583.

Still bearing in mind then that the failure of Rose Sorensen to have a driver's license was never advanced

as an argument to deprive plaintiff of her cause of action if our bus had actually run into Rose Sorensen's car, let us advert briefly to appellant's objection to the refusal of the court to instruct the jury that failure to have a driver's license was immaterial. Counsel requested the court to single out this one bit of evidence and emphasize it by giving instructions directed to that point alone. That it is bad practice to single out one particular piece of evidence and emphasize it in instructions has been held so often as to require no citation of authority. In addition to that, no one ever claimed that the manner in which Rose Sorensen operated her automobile could defeat plaintiff's right of recovery if our bus had run into Rose Sorensen's car. Rose Sorensen's negligence or contributory negligence was not an issue in the case, even though appellant's counsel against her interest tried to make it an issue. Counsel attempted to make it an issue by his request for instructions 9 and 11. The court, however, in instruction No. 8 not only in effect instructed the jury that Rose Sorensen's conduct in this respect was immaterial, but stated specifically that if the bus struck the Sorensen car causing it to become uncontrollable and unmanageable, plaintiff was entitled to recover regardless of anything Rose Sorensen did. The instruction is in full as follows:

"Instruction No. 8

You are instructed that even though you believe that Rose Sorensen may not have been operating her automobile in a careful and prudent manner at the time it was allegedly struck by

the defendant company's bus, nevertheless if you do believe, by a preponderance of the evidence that the defendant company's bus was, at the time and place in question, being operated in a negligent manner, as set forth in these instructions, and as a direct result of such negligence, if any, struck the Rose Sorensen car, causing the same to become uncontrollable and unmanageable, and for that reason causing a collision with the Anderson car, as a result of which plaintiff was injured, then you will find for the plaintiff, regardless of whether or not Rose Sorensen was driving her automobile in a proper or an improper manner."

Appellant's counsel have failed to comment upon or call this instruction to this court's attention. This is hardly consistent with frankness or with dealing fairly with the trial court. If the jury believed our bus hit the Sorensen car, this instruction eliminated from consideration by the jury our cross examination with reference to the driver's license, our mention of it to the jury in our argument, and appellant's own evidence that Miss Sorensen didn't have a license. It also corrected any prior error, (we claim there was none) that may have occurred, by withdrawing the whole matter of Rose Sorensen's conduct from the consideration of the jury. It thus more emphatically appears that no prejudice resulted to the plaintiff, nor were her substantial rights affected. As this court has said on many occasions, "If any errors were committed in this respect, the same were cured by the court's instruction to the jury, and therefore no useful purpose can be served by a discussion of these assignments in this opinion." *Campbell v. Los*

*Angeles & S. L. R. Co.*, 71 Utah 173, 263 P. 495, page 180 of the Utah Reports; *Ludlow v. Los Angeles & S. L. R. Co.*, 73 Utah 513, 275 P. 592, page 519 of the Utah Reports. In *Trimble v. Union Pacific Stages*, 142 P. (2d) 674, at page 677, this court as late as October 27, 1943, said:

“The instructions given are not models and could have been improved upon. However, they substantially cover the material requested, and therefore it was not prejudicial error to refuse plaintiffs’ request, *since the substance thereof was given in other instructions.*”

It also will be noted that counsel for appellant made no objection to our argument to the jury, no request to the court to instruct the jury with reference to it, and thus is in no position in this court to complain of the matter even if he could have done so at the time of trial. This proposition is well settled.

“It is assumed that proper objection was made; if it was not, the error is not reversible.” 3 Am. Jur., pp. 609-610, Sec. 1062.

Appellant’s second proposition is ridiculous.

On page 22 of their brief counsel query, “Can defendants complain if the evidence fails to show all that plaintiffs allege and shows merely an actionable part of it?” Plaintiff’s pleadings do not allege nor does her evidence show any actionable negligence on the part of the defendants if the bus did not strike the Sorensen car. Counsel say that the plaintiff should not be precluded



from recovery simply because the jury finds that the bus only crowded the Sorensen car off the road and did not actually strike it. There is not one word of evidence or one inference in the record that the bus simply crowded the Sorensen car off the road without striking it. If the jury were at liberty to make such a finding, they could only do so by some speculation of their own and by disbelieving the testimony of every occupant in the Sorensen car, in which case plaintiff would have no evidence whatever to go to the jury.

The fact of the matter is, however, that there is no question of "variance" involved in this case. There is no variance between plaintiff's pleading and her proof. Counsel themselves apparently overlook the fact that they concede the same thing. On pages 1 and 2 of their brief they say:

"The plaintiff's and the defendants' evidence differed as to how the accident occurred. The difference consisted in plaintiff's evidence which showed that the bus, while travelling north on the aforesaid highway at the time and place alleged, sideswiped an automobile driven by Rose Sorensen, which was traveling in the opposite direction, causing said automobile to careen out of control onto the side of the road on which the automobile, in which plaintiff was riding as a passenger, was traveling. As a result, the Sorensen car crashed into the car in which plaintiff was riding and plaintiff sustained the serious and permanent injuries complained of. The defendants' version of the accident differs principally in the fact that they deny that the bus struck the Sorensen car."



Plaintiff's whole complaint is founded upon the theory that our bus hit the Sorensen car and that the impact was the sole cause of the collision between the Sorensen and Anderson cars and the resulting injuries. Paragraph 4 of their complaint states, "striking the front left portion of an automobile driven by Rose Sorensen, traveling in a southerly direction on said highway, with the left rear portion of the defendant company's bus, knocking said automobile out of control so that the same ran into and against the front portion of the automobile in which plaintiff was riding."

The specific acts of negligence charged against us, aside from one that we were traveling in excess of 50 miles an hour which was not presented to the jury because of a total lack of evidence, are all based exclusively on the fact that we ran into the Sorensen car. As we have already pointed out in the resume of the testimony, every one of plaintiff's witnesses who attempted to account for the accident stated that it was the impact of the bus that started the trouble. In fact, Cleone Jensen stated that was the only thing she was sure of. According to them, the impact knocked them dazed, knocked the left front fender down onto the wheel, knocked the Chevrolet out of control. The whole issue was whether or not the bus hit the Chevrolet. Our entire testimony was directed to meeting this issue. At no time did we have any intimation that we were called upon to defend ourselves against a claim that our bus merely crowded the Sorensen car off the road. The fact of the matter is that the argument of variance is a pure afterthought,

concocted out of thin air and not even built upon shifting sands. It doesn't have any foundation upon which to rest, and to attempt to insert it into this case is absurd.

A consideration of the entire record in this case convinces one that it would have been difficult, if not impossible, for an unbiased jury to arrive at any other result than the one reached herein, and that plaintiff had a full and fair trial and that the correct verdict was rendered. The judgment should be affirmed.

Respectfully submitted,

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SHIRLEY P. JONES,

*Attorneys for Defendants  
and Respondents.*