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J. Harold Mitchell v. Arrowhead Freight Lines, Ltd.
And Marvin C. Van Patten :Reply Brief of
Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

J. HAROLD MITCHELL,

Respondent,

vs.

ARROWHEAD FREIGHT LINES, LTD.,
a corporation, and MARVIN C. VAN
PATTEN,

Appellants.

Case No.
7242

REPLY BRIEF OF APPELLANTS
STEWART, CANNON & HANSON
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REPLY BRIEF OF APPELLANTS

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MAR 2 1949

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ANNUITY TABLES

Counsel acknowledges that there was no direct evidence in this case that there was any *permanent material impairment of a substantial nature* in plaintiff's *earning capacity* as required under the Pauley case before the annuity tables could be introduced in evidence. His only argument is that plaintiff's injuries were of such nature that he might be unable to carry on his avocation as a school teacher. The sole handicap argued was that he might be hampered in his ability

to talk; however, there is nothing in the evidence to that effect. The fact that plaintiff admittedly was teaching Sunday school and singing in a choral group and taking part in the ordinary activities of life (Tr. 353) proved to the contrary. This uncontradicted evidence and plaintiff's ability to testify without difficulty at the trial shows there is no merit to counsel's contention, which is wholly unsupported by the evidence.

Of the seven doctors called to testify, five of whom were called as plaintiff's witnesses, none testified that plaintiff either was, or would be unable to resume his occupation as a school teacher.

The only statement of any lay witness on the matter was that of plaintiff, who testified: "I didn't want to try to continue my school work *at the present time*. I just simply feel like I couldn't handle it *this year*." (Tr. 332). Plaintiff was still planning on resuming his school work at the time of the trial. This he never denied.

Plaintiff outlines at great length evidence relating to his injuries, most of which had healed or were completely repaired even at the time of trial. The only injuries which could *permanently* affect plaintiff's earning capacity would necessarily have to be *permanent injuries* of such a nature and character as to be prohibitive of his resuming his occupation.

As a matter of fact, plaintiff began to resume his ordinary activities as early as thirteen days after the accident following that period of hospitalization. He was attended for a short while thereafter by Dr. Butler at Safford, Arizona from April 22nd to May 16, 1947

(Tr. 281). He had then recovered sufficiently that he did not need the assistance of Dr. Butler to the time he left Safford June 1947, and finished all his routine work before he left Arizona (Tr. 283). Other than the fixing of his teeth, he thereafter required no further medical attention than the examinations made by Dr. Richards and Dr. Clegg.

In his enthusiasm, Counsel suggests such things as arthritis. There was no evidence that plaintiff had even a sign or trace of this disease, which normally comes from age rather than trauma. The only mention or reference to arthritis was in the taking of Dr. Butler's deposition at Safford, Arizona, which was read at the trial. In that deposition, Dr. Butler had made a voluntary statement that arthritis sometimes follows injury or fractures involving a joint of a vertebrae. Our objection and motion to strike such voluntary statement should, in our opinion, have been granted by the lower court (See Tr. 272). We would have insisted further that such reference to arthritis be stricken, but the trial court assured us the record was cleared up by the cross-examination developed in the deposition. We quote:

“Q. But you did not see anything that indicated that (referring to arthritis) in any of his joints?

A. No, sir.

MR. CANNON: Now, at that point, your Honor, we would like to move to strike the doctor's statement on Page 17, wherein he referred to arthritis, since he now testifies he found no arthritis.

MR. WHITE: Of course, your Honor, we resist the motion, as it is a condition which may develop in the future according to the doctor.

MR. CANNON: That is pure speculation.

THE COURT: Well, it's—that is just part of your cross examination; *it shows now that he hasn't any*. The motion is denied.” (Tr. 282-3).

Of all the doctors who examined plaintiff from the beginning through the trial, none was able to discover even a trace of arthritis. Of the numerous x-rays taken and the physical examinations made, including those of Dr. Clegg and Dr. Broadbent, all were entirely negative as to arthritis. Plaintiff himself made no such claim. The matter was undisputed.

Plaintiff's claims of fractures in the vertebrae are equally unfounded. While it is true that Dr. Butler suggested a fracture in the joint of the first cervical vertebrae, and this apparently was the basis of his conclusion as to any permanent injury to the neck, we pointed out in our original brief, and again here mention, that even if a fracture could have existed, (and the several other doctors all testified there was none) it was necessarily healed and repaired itself, and it is entirely clear from the record that there was no permanent injury to the neck on account of the fractures. The limitation of motion, if any, was necessarily based on injury to the soft tissue.

Respondent emphasizes such things as impairment of breathing. Plaintiff admitted testifying in his de-

position that his breathing was “pretty much all right now,” and added: “It is quite definitely cleared up.” (Tr. 344).

The careful and thorough examinations conducted by Dr. Clegg at plaintiff’s request, other than the moderate limitation of motion of the neck and jaws, showed a *healed* fracture of the left mandible, *healed* scar of the left ear, area of anesthesia about the left ear and left side of the chin, *healed* rib fracture, *healed* fracture of the nasal bone, and anklyosis, partial fibrous *slight* of *left thumb*. (Tr. 290-1, 305). All ex-rays showed the bony structures to be in good alignment and good apposition. The possibility of a chip fracture, the evidence clearly shows, could not have affected or limited the motion of plaintiff’s neck.

We wish to correct the transcript page on page 15 of our brief, wherein reference is made to the testimony of Dr. Broadbent where he says there was no evidence of a skull fracture. The transcript page should be 225 rather than 223.

So far as any permanent disability was concerned, that was limited to the two possibilities, that of moderate limitation of motion in the neck and jaws, so the question is really reduced to whether moderate limitation of motion in the neck and jaws would prevent plaintiff from resuming his occupation in the teaching profession.

The demand for teachers at the present time is great. We submit there is no evidence in this case that plaintiff could not resume his occupation. The evidence is that he was intending to do so.

Similarly, no proof was offered by plaintiff as to any permanent impairment of earning capacity as to the ranch, and no claim of such proof was made at the time of oral argument before this court. There was no evidence that plaintiff had any earning capacity in connection therewith. Furthermore, if plaintiff intended to resume his occupation as a teacher, he would not then have more time than to supervise or manage the ranch. At least, there is no evidence but what that would consume all his time, especially if he continued in such community activities as teaching Sunday School and singing with his choral group.

The original claim by plaintiff's amended complaint was \$3,000 necessitated by the employment of others on the ranch (Tr. 23). The only evidence was that \$900 was paid a brother June to December the year of the accident. How much of this would have been paid had the accident not occurred was not shown. The disturbing feature, however, is how counsel just after the court at the conclusion of the trial overruled our final motion to strike the annuity tables and just as the instructions were to be read to the jury, seized upon the opportunity to quietly withdraw his claim for \$900 wages paid. To this procedure, we normally would have no objection; however, we were led to believe that this item of special damage was withdrawn because of lack of proof. In withdrawing the \$900 item, which counsel does not deny, he could only have had two possible reasons for so doing: Either he was thereby admitting there was no proof but that the \$900 would have been paid notwithstanding

the accident, or, secondly, it was a deliberate act adroitly enacted to cause the jury to confuse the matter of payment of wages with "permanent impairment of earning capacity of the plaintiff." We are now convinced it was the latter. We are not unaware that it cannot be presumed without proof that the jury arrived at its verdict in a certain manner; however, neither can it be assumed that the jurors did not use the annuity tables to the prejudice of defendants. It does appear that the jury used the figure, \$16,591.72, being \$100 a month for life at four per cent interest. Under the circumstances, particularly when no foundation was laid for admissibility of the tables, we are satisfied the jurors were misled and awarded plaintiff \$100 a month upon a wrong theory, namely, that plaintiff paid his brother an average of about \$100 per month for work on the farm for the term April to December, 1946, a period of nine months, or a total of \$900.

It is not only reasonable to believe that that is how the jury arrived at the verdict, but it is the most probable manner in which it would so arrive at its verdict. This is particularly so when the matter of earning capacity was confused by the court's instruction No. 17 (Tr. 74-75) wherein the court instructed the jury that plaintiff was entitled to "compensation for his actual loss of *past earnings*, if any, and for impairment of earning capacity, if any, which will diminish his capacity to earn money in the *future*." Exception was taken to this instruction as a whole, and also specific exception was taken to the words "past earnings" in line four of the fourth para-

graph; also to the words “and for any impairment of earning capacity, if any, which will diminish his capacity to earn money in the *future*.” (Tr. 545). The trial court recognized this error, that is, the portion referring to *past earnings* and the confusion it might cause, particularly when the evidence relating to the \$900 paid plaintiff’s brother was not eliminated so far as the jurors were concerned. The jury was not instructed to disregard that evidence in any written instruction or oral instruction by the court. Counsel for plaintiff not only himself injected this error into the record through his requested instruction No. 5 (Tr. 112-3), but refused the offer of the trial court to have the jury called back and the instruction modified to cure the error. He elected to take his chances, knowing that this mistake was in the record. He did not want the jury further instructed about the matter because it would destroy the effectiveness of the annuity tables.

At page 37 of our original brief, we mentioned that four of the last five figures of the verdict were identical with the figure \$16,591.72 (adopted from the table). We should have said that three of the last five figures of the verdict, that is, \$21,594.22 compared with the figure taken from the annuity table; however, when the special damages are totalled, that is, \$1638.50 added to \$1264.00 and the figure from the annuity table, \$16,591.72, included, the total is exactly \$2100.00 less than the total verdict, or \$19,494.22. Note that three of the last four figures are identical with the figure taken from the

annuity table, and that the last four figures are identical with the total amount of the verdict.

The affidavits of the jurors offered to prove a quotient verdict show that as to the figure of \$2100, \$1200 was for pain and suffering and \$900 wages paid by plaintiff to his brother, although the latter figure was never submitted to the jury. The only special damage submitted to the jury were \$1264 damage to plaintiff's truck, and \$1638.50 for hospital, medical and traveling expenses (Tr. 116, 76).

Perhaps this court feels that the affidavits cannot be used for any purpose other than showing a quotient verdict. However, it is our contention that the affidavits filed by us in clear, concise and unmistakable terms showed a quotient verdict, and that if the jurors did thereafter dispute their first affidavits or attempt to explain them, the reason is undoubtedly accounted for in that they were then put on notice of the invalidity of the verdict through opposing counsel, and attempted to make counter-affidavits in their own defense. The original affidavits were in clear, concise and unmistakable language and were and are, we submit, sufficient to show a quotient verdict. As they were offered and received for one purpose, they are properly before the court on this appeal.

Even if the affidavits are not considered, this much is a reasonable certainty, that not more than \$2100 was allowed for pain and suffering, and that part of the verdict, namely, the figure \$16,591.72, was not a proper element of damage in this case.

Nor do we believe it should be necessary for appellants in this case to prove that the tables actually operated to their prejudice when the verdict was exorbitant and excessive and when prejudice is presumed to result from improper evidence, the natural and probable tendency of which is to enhance the verdict.

Counsel for plaintiff freely acknowledges that the tables were offered and intended to be used to enhance the verdict and makes no contention that they were not harmful to defendants, if not improperly admitted.

Counsel does call attention to *Section 104-39-3, Utah Code Annotated 1943*, which provides:

“No exception shall be regarded, unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting.” Substantially the same provision is found in Section 104-14-7. In construing the latter section, this court in *Jensen v. Utah Ry. Co.*, 72 Utah 366, 270 Pac. 349, points out at page 400 of the Utah Reports that where errors are shown by appellant which are merely abstract or on their face immaterial, or otherwise are not in and of themselves calculated to do harm, then appellant in order to show reversible error must show by the record that it resulted to his prejudice in some substantial right. However said the court:

“Where the committed error is of such nature or character as calculated to do harm, or on its face as having the natural tendency to do so, prejudice will be presumed, until by the record it is affirmatively shown that the error was not or could not have been of harmful effect. Thus, if the appellant shows committed error of such

nature or character, he, in the first instance, has made a prima facie showing of prejudice. The burden, or rather the duty of going forward, is then cast on the respondent to show by the record that the committed error was not, or could not have been, of harmful effect.”

To the same effect see *Clark v. Los Angeles & S. L. R. Co.*, 73 Utah 486, 275 Pac. 582, at page 502 of the Utah Report.

In *Littledike v. Wood*, 69 Utah 323, 255 Pac. 172, the suit was for personal injuries and also damages in the nature of loss of time or of earnings or impairment of earning capacity. In holding there was insufficient proof of impairment of earning capacity or loss of income and in granting a new trial, the court said:

“But the other point, that there is no evidence upon which compensation for loss of time may be ascertained or measured with reasonable or any degree of certainty, is more serious. All the evidence there is on the subject is that the respondent was confined in the hospital for several weeks by reason of his injuries; that his ribs gave him ‘trouble yet,’ and hurt him when he did hard work; and that he could not do a day’s work as he did before. But no evidence was given as to the occupation or earning capacity or earnings of the respondent, nor as to the value of the time lost or as to what earnings, or the amount or value thereof, were lost by him, nor any evidence to measure the damage or the loss sustained by him in such respect. Under such circumstance, the authorities teach that it was error to direct the jury, as was done, that they had the right to and should take into consideration the time lost by the respondent in as-

sessing the amount of damages. * * * There being here no evidence as to the value of the time lost by respondent, nor any evidence by which such value could be ascertained or determined, any allowance made by the jury for loss of time of necessity would rest on mere speculation and conjecture. We are also of the opinion that the ruling was prejudicial, for it cannot be told how much, if anything, the jury allowed for loss of time. It is but speculation that the jury did not allow anything, and if they made an allowance it again is but speculation as to how much they allowed. *Candland v. Mellen, 46 Utah 519, 151 P. 341. The erroneous charge was error which was calculated to do harm, and in such case prejudice will be presumed until by the record it is shown that the error was not or could not have been harmful.*

Similarly in the instant case, the annuity tables were calculated to enhance the verdict and they were not admissible under the rule of the Pauley case.

We made repeated objections before the trial court to the use of the annuity tables, based upon the grounds that they were incompetent, irrelevant and immaterial, that there was insufficient foundation laid, and that the tables offered were not in proper form, and that they assumed facts which were not in evidence. (Tr. 405, 418, 410, 411, 412, 541). We asked leave of court at several stages during the trial for permission to argue the question of admissibility of the annuity tables because no semblance of a foundation was either laid or attempted. The court for the purpose of the record did allow our objections to go to the entire line of that evidence.

Any conclusion that plaintiff's *earning capacity* was *permanently impaired* to any extent, much less a substantial extent as required under the rule of the Pauley case, would have to be based entirely upon assumptions and inferences not founded on any evidence. We again call attention to the total lack of any evidence of permanent impairment of earning capacity as outlined in our original brief at pages 26-30. Inference cannot be predicated upon inference.

In our original brief, we pointed out other objections to the annuity tables offered in this case. While we do not want to unduly repeat, we feel such matters should not be overlooked. Even if the tables were admissible in the first instance, it would be improper to permit the jury to use plaintiff's full life expectancy because he was intending while getting his ranch going, to lay off school for a year or two, or at least for a substantial period. During this time, he could not be out anything so far as his teaching profession was concerned. Then on the other end of his life expectancy, there was the retirement age for school teachers at ages fifty-five and sixty (See Section 75-29-44, Utah Code Annotated 1943), so the jury should not in any event have been permitted to use plaintiff's full life expectancy, which was incorporated into the table without any qualification. (See table, page 32 App. Br. and cases cited, pages 33-34).

The court's unwillingness to give our objections any consideration in a matter of such importance as the annuity tables, which are always damaging to the defense,

and counsel's deliberate and persistent efforts in insisting on the use of such evidence, without any proper supporting evidence or foundation laid *hurt*, and defendants were thereby deprived of a fair trial on the issue of damages.

ERRONEOUS INSTRUCTIONS

Respondent contends the errors committed in the giving of the court's instructions No. 6 and No. 7, were not prejudicial, and that defendants did not take proper exceptions as to the latter instruction.

The Court's Instruction No. 7

Five separate exceptions were taken to this instruction, one to the *whole* thereof, and four other specific portions. To assist the court in observing the specific objections (Tr. 544-5), we have placed parentheses around the words to which specific exception was taken as follows:

“You are instructed that the laws of this state provide that no vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle traveling in the same direction, (*unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction of any vehicle overtaken.*) (*In every event, the overtaking vehicle must return to the right hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction.*)

“If you shall find and believe from a preponderance of the evidence that the defendants operated the Arrowhead truck and trailer upon U. S. Highway 91, and attempted to overtake another vehicle proceeding in the same direction at a time when the left side of said highway was not clearly visible and was not free from oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of the vehicle approaching from the opposite direction, which was being driven by the plaintiff, (*then you are instructed that such conduct on the part of the defendants was negligent and in violation of the traffic laws of this state*), (*and if you shall further find from a preponderance of the evidence that such negligence was the proximate cause of the collision between plaintiff’s pickup truck and said Arrowhead truck and trailer, then you should find the issues in favor of the plaintiff and against the defendants.*)” (Tr. 64).

To hold that defendants’ exceptions were not sufficient would be to override the clear provisions of Section 104-24-18, which specifically provides: “That no reasons need be given for such exceptions.” This is true especially when the erroneous instruction was drafted by counsel for plaintiff and insisted upon by him and given by the court in the exact form requested over defendants’ several specific exceptions.

We still insist the instruction is erroneous not only in its entirety, but also as to the particular parts to which exception was duly taken.

In his brief, respondent overlooked one of the most objectionable features to this instruction, namely, that

the court in giving the same thereby adopted and injected the provisions of *Section 57-7-124* of the Utah Motor Vehicle Code without any qualification or proper application of the same to the evidence. The instruction as given effectively told the jury that defendant was bound under any and all circumstances not only to succeed in passing the Pace Buick, but also to return to his right hand side of the highway before the Mitchell truck was within one hundred feet of him. The instruction went still further and told the jury that Van Patten was *negligent as a matter of law* in failing to conform to the statute, and that he was *liable* to the plaintiff. The statute was applied in such form as to make defendant an absolute guarantor of plaintiff's safety under any and all conditions, plaintiff's own negligence notwithstanding. The instruction as given is illustrative of the harmful effect of injecting the terms of a statute in the abstract without qualifying it where there is evidence of unusual or excusable circumstances.

This court has frequently held that it is error to give abstract proportions of law not applicable to the facts and circumstances of the case. In other words, the trial court should adopt its instructions to the evidence and so connect the proposition of law with the evidence as to lead the jury to make the proper application thereof; otherwise, the law, although correctly stated in the abstract, nevertheless may be faulty in that the law as stated may not be correctly applied to the evidence. *Everts v. Worrell*, 58 Utah 238, 197 Pac. 1043.

In *Jensen v. Utah Ry. Co.*, 72 Utah 366, 270 Pac. 349, the court at page 385 of the Utah Report criticizes instructions, which while correct as abstract propositions, are at fault "in stating propositions * * * unrelated and unrestricted to and *regardless of conditions or circumstances.*" Said the court:

"As a general rule a trial court should not leave the jury to apply mere general principles of law to a case, as here was done by the defendant's requests. The court should give the jury what the law is as applied to the facts either stated or assumed, and if so found by the jury. The rule is well settled that instructing a jury, a mere abstract or general statement as to the law should be avoided, and that all instructions should be applicable to evidence on either one or the other of the respective theories of the parties. Instructions which are not so applicable, though abstractly they may be correct, are not helpful to the jury, are apt to be misleading and to be improperly applied."

The court's instruction No. 7 should at least have been qualified so as to apply the statute to the evidence and eliminate defendants' negligence, if the jury found the conditions to be such that Mr. Van Patten was reasonably misled, or if they found from the evidence that plaintiff was guilty of negligence which proximately contributed to the accident.

In our original brief, we pointed out that the instruction was also erroneous in that it eliminated contributory negligence. We do not claim that it is always necessary to qualify every instruction given by the court by negating contributory negligence, except when plain-

tiff requests or the court gives a formula instruction which purports to state all of the conditions of recovery.

Plaintiff's requested instructions should not be so drawn as to not purport in and of themselves to state all the conditions essential to recovery; or if they do, then all conditions should be covered; otherwise the jury is likely to be misled. The fact that other instructions may correctly state the law only creates an irreconcilable conflict, making it impossible to determine which instruction the jury followed. In that sense, defendant is deprived of a substantial right, which presumably operates to his prejudice. *Sorenson v. Bell*, 51 Utah 262, 170 Pac. 72; *State v. Green*, 6 Pac. (2d) 177, 78 Utah 580; *Martin v. Sheffield*, (Utah) 189 Pac. (2d) 127.

Evidence of Plaintiff's Negligence

Respondent's criticism of Van Patten's testimony is unjust. This is particularly true as to the discrepancies as to exact distances and the speed of respective vehicles involved. Some people are better acquainted with exact measurements than others. In automobile accidents, where objects are on the move, no one is capable of stating exact distances, because no actual measurements were or could have been taken. If Van Patten told Deputy Smith that the Mitchell car was twenty-five feet from him, he undoubtedly had in mind as of the time instant when he saw the vehicles were going to collide in the borrow pit. The physical facts considered in the light of Mr. Pace's testimony and that of Van Patten necessarily show the distance was somewhere around one hundred fifty to two hundred feet, more or less, when

Van Patten first saw plaintiff's truck crossing the highway diagonally toward the northeast.

The same can be said as to exact distances at which the impact occurred east of the highway, and as to the exact speed of the Mitchell truck. Van Patten's best estimate of Mitchell's speed was that he was moving about the same as defendant's truck. The pictures introduced by plaintiff show the impact was well east of the paved portion of the highway.

With reference to Van Patten's statement that the left front of the Mitchell truck came in contact with the right front of defendant's truck, and that both moved a short distance in the direction in which they were headed is not inconsistent with any law of physics, when it is considered these trucks came together at practically right angles (See defendants' Exhibit 6 and the pictures introduced by plaintiff).

Nor was Van Patten's conclusion that he thought neither he, nor Mitchell was to blame for the accident determinative of the issues of fact in this case. The questions asked by counsel for respondent in cross-examination in that connection improperly called for the opinion of the witness on issues clearly for the jury to determine. Van Patten undoubtedly felt the dust storm had been responsible to a certain extent in creating the situation, but the ultimate issue as to whether Mitchell was negligent was properly for the jury to decide.

Counsel also attempts to minimize the testimony of the witness Pace. Mr. Pace's best judgment as to the position of the Mitchell truck when he first saw it was

that "it was about in the center of the highway or probably straddled on the center or yellow line of the highway when I saw it." (Tr. 472). The fact that he, Pace, could not judge exactly how many feet it was on one side or the other of the center line did not restrict the jury in believing from his testimony that it was crossing the center line when he first saw it, *just as it was so headed when Van Patten first saw it.*

It must be remembered that Van Patten was coming out of the dust area. There is evidence that he could see two hundred yards or more. There is evidence that no traffic within view was approaching from the opposite direction on his, that is the east side of the highway at the time Van Patten pulled out to pass. He was not expecting cars to come from the west side of the highway, but he did not observe any on the paved portion on that side. At that instant, plaintiff's truck suddenly appeared, cutting diagonally across the highway approximately twenty-five to fifty yards ahead of the Pace automobile. Plaintiff could have been on the west shoulder for sometime trying to get his bearings. William M. Mitchell, plaintiff's father, admitted he was worried "for fear we would get one side or the other off the road." Under this state of the evidence, the jury could reasonably find that Mitchell had gotten lost west of the paved portion of the highway and cut out in front of the approaching traffic, and that Van Patten was reasonably misled thereby. Even if they found that Van Patten was not reasonably misled, the jury could

find from the evidence that plaintiff was guilty of contributory negligence.

The jury could also reasonably conclude from the evidence that the emergency was created through the negligence of Mitchell.

Upon this basis, we submit that the court's instructions No. 6 and No. 7 were prejudicial to defendants' substantial rights in that they effectively told the jury that defendants were *liable* notwithstanding defendants' theory of the evidence.

Whether plaintiff had sufficient opportunity to avoid a collision after discovery of the perilous situation was, we submit, also an issue for the jury, as was Mitchell's failure to slow down or stop in the dust storm, if he could not see ahead as he claimed. These issues were tendered by defendants' requested instructions No. 9 and No. 18, discussed at pages 50 to 52 of our original brief. They were not covered by the court's instructions, and defendants were entitled to have the jury instructed on those issues.

It is no answer that some instructions were given on other issues of contributory negligence. Defendants were entitled to have all of the issues submitted to the jury under their theory of the evidence.

OTHER ASSIGNMENTS OF ERROR

While in order to avoid undue repetition, we have not again discussed each individual assignment of error outlined in our original brief, it is not our intention to waive any of the errors so assigned.

CONCLUSION

We were surprised and shocked, during the trial of this case, that the trial court refused to give any consideration to our repeated petitions to be heard on our objections to the use of the annuity tables, particularly when this court had issued the warning announced in the Pauley case. That the tables were effectively used to the prejudice of defendants without any foundation laid and without any evidence whatsoever to justify their use is, we submit, clearly shown by the record.

Plaintiff had no purpose in using them over our repeated objections other than to get an excessive verdict and he ran reckless chances in so doing to the injury and prejudice of defendants.

We also submit that the instructions given by the court at plaintiff's request were erroneous and prejudicial to the substantial rights of the defendants in the trial of the factual issues involved in this case.

We respectfully request that the judgment in this case be reversed and that a new trial be granted with instructions that the annuity tables be excluded from the evidence and that proper instructions be submitted to the jury upon the issues of negligence and contributory negligence upon all of the issues.

Respectfully submitted,

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