

1949

Howard F. Coray v. Southern Pacific Company : Brief of Appellant

Utah Supreme Court

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Case No. 7382

IN THE SUPREME COURT
of the
STATE OF UTAH

HOWARD F. CORAY, Ancillary Ad-
ministrator of the Estate of William
Frank Lucus, Deceased,

Plaintiff and Appellant,

VS.

SOUTHERN PACIFIC COMPANY, a
corporation,

Defendant and Respondent.

BRIEF OF APPELLANT

FILED RAWLINGS, WALLACE, BLACK
& ROBERTS,

OCT 7 1949
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IN THE SUPREME COURT
of the
STATE OF UTAH

HOWARD F. CORAY, Ancillary Administrator of the Estate of William Frank Lucus, Deceased,

Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Defendant and Respondent.

Case No. 7382

BRIEF OF APPELLANT

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

Parties will be designated as in the trial court.

All italics are added.

STATEMENT OF FACTS

William Frank Lucus, an employee of defendant, 39 years of age at the time of his death, was fatally injured

while engaged in the performance of his duty as a signal maintainer on the main line track of respondent at a point approximately 3600 feet east of the east switch at Lemay, in Box Elder County, Utah, on the afternoon of the 24th day of May, 1944. Howard F. Coray, ancillary administrator, filed suit in the District Court of Weber County, Utah. This case has been twice tried. The first trial resulted in a directed verdict of no cause of action in favor of defendant. Thereafter, the case was appealed to this Court which affirmed the judgment of the lower court at, Utah, 185 P. (2d) 963. The Supreme Court of the United States granted certiorari and reversed the decision of this Court and remanded the case for a new trial, 69 S. Ct. 275 (Jan. 3, 1949). The case came on again for the second trial on the 25th day of May, 1949. The jury returned a verdict of no cause of action and judgment was entered accordingly (Tr. 145).

Defendant was charged with operating its eastbound freight train, First 582, consisting of 82 freight cars, a caboose and an engine, in violation of the Federal Safety Appliance Act, Sections 1, 8, 9, 51 and 53 of Title 45 U. S. C. A., in that it hauled and permitted to be hauled and used in interstate commerce PFE Car No. 29435 at a time when the threads on the triple valve were so badly worn that the triple union nut became disconnected from the triple valve, allowing the air in the brake line to escape to the atmosphere, thus causing the automatic air brakes on each car in the train to be set at once in emergency, bringing the moving train to an unexpected, undesired, abrupt and sudden stop; that seconds after

the stop the track car, upon which deceased was riding, violently collided with the rear end of the train, causing his death.

There was no particular conflict in the testimony. The evidence conclusively demonstrated that the defendant was guilty of the charged violation of the Safety Appliance Act, and it was stipulated that the train stopped because the triple union nut became disconnected from the triple valve on PFE Car 29435 due to the threads on the triple valve being worn (Tr. 41).

The Conductor, Darrel E. Jorgensen, was under orders to take the train onto the siding east of Newfoundland, and at the time of the accident he was making a run for that siding (Tr. 35-37).

There was no doubt about the stop being an undesired, quick action stop, and that it was unexpected by the train crew and all concerned in the operation of the train (Tr. 37, 38).

When Mr. Jorgensen first saw the track car upon which deceased was riding he thought it was about 500 feet from the rear end of his train (Tr. 38-40).

Alvin O. Lynch was riding on the track car with deceased at the time of the collision. He was being taken over the signal maintainer's territory by Lucas for the purpose of acquainting him with the signal maintainer's job at Lemay. Lynch testified that the track in the vicinity of the accident ran east and west and that Lucas was sitting on the north side of the track car, facing

north, and that he, Lynch, was sitting on the south side of the track car, facing south (Tr. 20). That immediately prior to the accident he, Lynch, was looking to the west watching a signal located at the east end of Lemay (Tr. 21).

Mr. Jorgensen testified that both Lucas and Lynch were looking to the west as the track car, on which they were riding, approached the rear of the stalled train (Tr. 45).

Lynch testified that the track car was not going at any excessive rate of speed and in his opinion was proceeding at between 10 and 25 miles per hour (Tr. 22).

All of the witnesses were of the opinion that the collision occurred within a very few seconds of the time the train came to a stop.

The only person qualifying as a dependent heir of deceased was Edith B. Lucas, wife of Frank Lucas. Deceased and Mrs. Lucas were married December 26, 1936 (Tr. 77). During all but the last year or two immediately preceding the death of Lucas they resided at Los Angeles, California. Both deceased and Mrs. Lucas were constantly employed during their married life. Deceased's earnings while in California ranged from \$40.00 to \$50.00 per week (Tr. 79). From his earnings deceased contributed between \$50.00 and \$75.00 per month to the support of Mrs. Lucas until 1941 when his contribution became less (Tr. 82). In 1941 his contribution fell to \$25.00 to \$30.00 per month.

In August, 1942, Lucus began an action for divorce (Tr. 84). Mrs. Lucus filed a counter action for separate maintenance (Tr. 85-86). In January, 1943, the matter was heard and Lucus was ordered to pay \$10.00 per week for the support of his wife (Tr. 87), starting with February 1, 1943 (Tr. 88). No further court proceedings were had, and Mrs. Lucus never saw nor heard from Lucus again during his lifetime (Tr. 88). Mrs. Lucus made a search of available sources of information concerning Lucus' whereabouts, but was unable to locate him. She remained at home and awaited his return, being sure that he would come back (Tr. 88-91).

The court, over plaintiff's objection, allowed a certified copy of Mrs. Lucus' cross-complaint for separate maintenance to be introduced in evidence as Exhibit "2". Said exhibit contained allegations that Lucus had not supported Mrs. Lucus for over a year; that Lucus squandered his money on liquor, and drank to excess, and had refused to return to live with Mrs. Lucus even though she begged him to return and give up his bad habits and disreputable friends.

ASSIGNMENT OF ERRORS

1. The Court erred in giving Instruction No. 16.
2. The Court erred in allowing the introduction of Exhibit "3", and giving Instruction No. 10.
3. The Court erred in refusing plaintiff's requested Instruction No. 4.

4. The Court erred in giving Instruction No. 9.
5. The Court erred in refusing to give plaintiff's requested Instruction No. 11.
6. The Court erred in overruling plaintiff's motion for new trial.

SUMMARY OF ARGUMENT

POINT I.

THE COURT PREJUDICIALLY INSTRUCTED THE JURY THAT IF DECEASED WAS GUILTY OF CONTRIBUTORY NEGLIGENCE HIS NEGLIGENCE WAS A COMPLETE BAR TO RECOVERY. (Assignment of Errors 1, 2, and 3).

POINT II.

THE COURT'S REFUSAL AND FAILURE TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 11 AND INSTRUCTING THE JURY AS IT DID IN INSTRUCTION NO. 9 CONSTITUTED PREJUDICIAL ERROR (Assignment of Errors 4 and 5).

ARGUMENT

POINT I.

THE COURT PREJUDICIALLY INSTRUCTED THE JURY THAT IF DECEASED WAS GUILTY OF CONTRIBUTORY NEGLIGENCE HIS NEGLIGENCE WAS A COMPLETE BAR TO RECOVERY. (Assignment of Errors 1, 2, and 3).

Section 53, Title 45, U.S.C.A., provides in part as follows:

“* * * That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.”

Sections 1, 8, and 9 of Title 45 U.S.C.A., are all statutes enacted for the safety of employees and they are the sections of the Code which defendant is charged with violating and which the court instructed the jury the defendant had violated (Instruction No. 5, J.R. 210). Yet, contrary to the provisions of Section 53 and the fact that defendant had violated Sections 1, 8, and 9 of Title 45 as matter of law, His Honor instructed the jury in Instruction No. 16 as follows (J.R. 210):

“You are instructed that where an employee has two ways of performing an act in the course of his employment, the one safe and the other dangerous, he owes a positive duty to the employer to pursue the safe method, and any departure from the path of safety will prevent his recovery, if he is injured.”

The plain meaning of this instruction could only be that any negligence on the part of deceased would completely bar any recovery in this action. The court then went on to instruct the jury as follows:

“* * * Therefore, if you find that William Frank Lucas could have manipulated said motor car with equal ease from a position where he could have observed the freight train proceeding ahead of him, rather than a position with

his back towards the freight train, but that he did not do so but manipulated said motor car with his back to the freight train, and if you find that manipulating said motor car with his back to the freight train was not as safe as manipulating said motor car facing the freight train and that William Frank Lucus thus chose an unsafe position, when a safe position was equally available to him, then William Frank Lucus, the deceased, was guilty of negligence, and if such negligence, if you so find, was the sole proximate cause of deceased's injuries and death, then your verdict must be for the defendant 'no cause of action.' "

This instruction was not requested by defendant or plaintiff, but was given by the court on his own initiative.

Plaintiff is unable to discover any case or statutory law which would justify an instruction that an employee must at all times choose the safest method of performing his work or be charge with negligence as a matter of law.

In addition to the quoted instruction the court instructed the jury in Instruction No. 10 (J.R. 210) that the railroad company "has the legal right to make such rules and regulations for the conduct of its employees * * * and all employees while engaged in such service with a knowledge of such rules are expected to follow and obey them." This instruction was given for the purpose of aiding the jury in its use of defendant's Exhibit "3." Defendant's Exhibit "3" was allowed in the evidence over plaintiff's strenuous objection (Tr. 135).

The exhibit consisted of three rules taken from the railroad company's Rule Book. Rule 1112 dealt with track cars following moving trains, and stated (Tr. 136):

“When following moving trains, track cars must remain not less than 400 feet to the rear of same, * * *”

Rule 1119 is a cautionary rule concerning the speeds at which track cars may be operated, and states (Tr. 137):

“Track cars must not under any circumstances be operated at a speed in excess of 15 miles per hour, nor over road crossings at speed in excess of 4 miles per hour; and after dark or through stormy or foggy weather when visibility is poor, speed shall be reduced to the absolute minimum consistent with safety. A constant and vigilant look-out must be maintained and speed controlled approaching interlocked derails and switches or those operated by remote control, so that stop can be made to avoid accident in the event the route is unexpectedly changed. Before rounding sharp curves or through tunnels and snowsheds where view is obscured, flagmen must be sent ahead for protection, if it cannot otherwise be positively determined that way is clear.”

Rule 1120 was the third railroad rule which defendant was allowed to introduce into the evidence, and as far as material the rule provides as follows (Tr. 137):

“* * * and further that lineups obtained from train dispatcher cannot always be depended

upon by reason of conditions unexpectedly changing in the meantime.”

The introduction of the rules and Instruction No. 10 when taken together with Instruction No. 16, could have but one purpose, that being to lead the jury to believe that a disobedience of the railroad company's rules and regulations by Frank Lucus would be a “departure from the path of safety” and would be a bar to any recovery in this action.

Instruction No. 16, Instruction No. 10 and the introduction of Exhibit “3” will be discussed together for they are all errors which go to the basic proposition that the Court instructed the jury that negligence on the part of Frank Lucus was a bar to his administrator's action.

The authorities concerning these points will be discussed in the following order: the Supreme Court of the United States cases, other federal authorities, state decisions.

The United States Supreme Court in *Grand Trunk Western Railway Co. v. Lindsay*, 233 U.S. 42, 34 S. Ct. 581, 582, 58 L. Ed. 838, specifically disapproved a trial court's instruction containing somewhat similar language. In the *Lindsay* case the plaintiff went between two cars where a defective coupler had failed to perform its function. The trial court in instructing the jury gave the following instructions:

“ ‘You are further instructed that if you believe from the preponderance of the evidence

that the plaintiff gave a 'come-ahead' signal to the switchman or engineer, —one or both—and after that went between the cars and was injured, then you have a right to consider whether the giving of the 'come-ahead' signal by the plaintiff was the proximate cause of the injury as distinguished from the condition of the coupler, and if you find that, under the circumstances, the 'come-ahead' signal was the proximate cause of the injury, then your verdict must be for the defendant.

“ ‘You are also instructed that where there is a safe and a dangerous way of doing an act, and the servant uses a dangerous way and is injured thereby, he is charged with negligence on his part and may not recover.’ ”

At a later point in its instructions the court stated:

“ ‘If, under the employers' liability act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act ’ ”

The evidence indicated that the jury might find that the plaintiff had given a come-ahead signal and after the come-ahead signal, walked between the cars where the defective coupler was located. There was other evidence to the effect that the come-ahead signal was from some lantern other than plaintiff's. The Supreme Court in passing on the court's instructions, stated:

“* * * But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the safety appliance act and by the contributing negligence of the switchman in going between the cars. Under this condition of things, it is manifest that the charge of the court was greatly more favorable to the defendant company than was authorized by the statute for the following reasons: Although by the 3d section of the employers' liability act a recovery is not prevented in a case of contributory negligence, since the statute substitutes for it a system of comparative negligence, whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier,—in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee (Norfolk & W. R. Co. v. Earnest, 229 U.S. 114, 122, 57 L. ed. 1096,

1101, 33 Sup. Ct. Rep. 654),—nevertheless, under the terms of a proviso to the section, contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress enacted to promote the safety of employees. In that contingency the statute abolishes the defense of contributory negligence, not only as a bar to recovery, but for all purposes.”

The *Lindsay* case, of course, was authority for the later decision of the Supreme Court of the United States in *Spokane & Inland Empire Railroad Co. v. Campbell*, 241 U.S. 497, 36 S. Ct. 683, 60 L. Ed. 1125. The *Campbell* case concerned a railroad engineer who took his train out onto a single track line at a time when a regular train was approaching on the same track. After proceeding some little distance he observed the regular train coming toward him. He applied the brakes, they failed to work and a collision resulted. At the trial a jury specifically found that Campbell had disobeyed a direct order to him. They also rendered a general verdict on his behalf finding that the defective brakes were the proximate cause of the collision and injury to Campbell.

The railroad in the *Campbell* case argued that the disobedience of orders on the part of Campbell took him outside the class of employees for whose protection the Safety Appliance Act was passed and that because of his disobedience he departed from the course of his employment. The court, in affirming the general verdict for Campbell, set forth in the following language

the basic principles governing his conduct in relation to the railroad company's violation of the Safety Appliance Act:

“Upon the whole case, we have no difficulty in sustaining his right of action under the employers' liability act. That act (Sec. 1, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, Sec. 8657) imposes a liability for injury to an employee 'resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, . . . or other equipment.' As was held in *San Antonio & A. Pass. R. Co. v. Wagner*, decided June 5, 1916, 241 U.S. 476, 60 L. ed. . . . , 36 Sup. Ct. Rep. 626, a violation of the safety appliance act is 'negligence' within the meaning of the liability act. And by the proviso to Sec. 3 of the latter act, no employee injured or killed shall be held to have been guilty of contributory negligence in any case where a violation of the safety appliance act 'contributed to the injury or death of such employee.' It is too plain for argument that under this legislation the violation of the safety appliance act need not be the sole efficient cause, in order that an action may lie. The circuit court of appeals (133 C.C.A. 370, 217 Fed. 524) held that the element of proximate cause is eliminated where concurring acts of the employer and employee contribute to the injury or death of the employee. We agree with this, except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause. But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the

safety appliance act are concurring proximate causes, it is plain that the employers' liability act requires the former to be disregarded."

Justice McReynolds, following the same line of thought and authority in *Chicago Great Western R. Co. v. Schendel*, 267 U. S. 287, 45 S. Ct. 303, 304, 69 L. Ed. 614, reached a similar result dealing with the following facts quoted from his decision:

"While the freight train upon which Ring served as brakeman was upon the main line at Budd, Iowa, a drawbar pulled out of a car. Thereupon the crew chained this car to the one immediately ahead. The engine pulled the whole train onto the adjacent siding, which lies on a gentle grade, and stopped. The intention was to detach the damaged car and leave it there. The plan was to cut off the engine, bring it around back of the train, remove the rear portion, couple this to the forward portion and move on. Acting under the conductor's direction, Ring asked the head brakeman to tell the engineer to proceed, and then, without the knowledge of either of the others, he and the conductor went between the crippled car and the next one in order to disengage the connecting chain. While they were working there the engineer cut off the engine, the car ran slowly down the grade, and Ring, caught by the chain, suffered fatal injuries.

"A rule of the company provided that employees should advise the engineer when they were going between or under cars and must know that he understood their purpose before they put themselves in any dangerous position. Ring gave

no such warning, although familiar with the rule and with the grade upon which the train stood.

“Petitioner insists: (1) The facts do not bring the case within the Safety Appliance Act since the car had come to rest on the side track and had ceased to be ‘used,’ within the meaning of the statute. (2) The defective drawbar did not proximately contribute to the injury. (3) The violation of the rule by Ring constituted negligence subsequent to and independent of the question of a defective safety appliance and was a proximate cause of the injury.”

In discussing the effect of the violation of a Safety Rule by Ring the Justice uses the following language:

“The things shown to have been done by the deceased certainly amount to no more than contributory negligence or assumption of the risk, and both of these are removed from consideration by the Liability Act. When injured he was ‘within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height. * * * His injury was within the evil against which the provisions for such appliances are directed.’ *St. Louis & San Francisco R. R. Co. v. Conarty, supra.* He went into the dangerous place because the equipment of the car which it was necessary to detach did not meet the statutory requirements especially intended to protect men in his position.

“We find no material error in the judgment below, and it is

“Affirmed.”

The decisions of the Supreme Court cited and quoted from herein have been construed and used by the various circuit courts in a variety of railroad accident cases.

Scrimo v. Central R. R. of New Jersey et al., 138 F. (2d) 761, 762, concerned a safety rule promulgated by the railroad company which prohibited employees from going between cars where the coupling device was defective. The evidence indicated that the deceased, Murray, had entered in between two moving cars while attempting to use a defective cutting lever which was a part of a coupling mechanism. The jury returned a verdict for the plaintiff and the railroad company cited as error an instruction of the court to disregard the safety rule. The circuit court in dealing with this action on the part of the trial court stated:

“The defendants put in evidence their Safety Rule 203 of which Murray had a copy. This reads as follows: ‘Rule 203. In coupling or uncoupling cars the cutting levers must be used. If cutting lever or coupling device is inoperative, cars, locomotives or motors must be stopped, and slack permitted to run in or out before any attempt is made to adjust coupling device.’

“The court charged that violation of the safety rules was not an issue in the case and they were not to be considered by the jury. Counsel for the defendants took an exception and asked the court ‘in furtherance of that situation to charge the jury that if the jury were to find that the violation of those rules which are in evidence was the proximate cause of the decedent’s death,

then their verdict would be for the defendants.' This request was properly denied since contributory negligence or assumption of risk are no defense if a violation of the Safety Appliance Act contributes to the injury or death. 45 U.S.C.A. Secs. 53, 54; *Chicago, G. W. R. Co. v. Schendel*, 267 U.S. 287, 292, 45 S. Ct. 303, 69 L. Ed. 614."

Palum v. Lehigh Valley R. Co., 165 F. (2d) 3, 6, a decision written by Augustus N. Hand, deals with the failure on the part of a railroad employee to keep a lookout in the direction in which his train was moving, and also a failure on the part of the employee to obey an unwritten safety rule which required a fireman to notify the engineer before leaving the cab while the train was in motion. The argument by the railroad company was that plaintiff's disobedience of the rule and his failure to observe the low bridge in time to prevent being hit by it was the sole cause of his injury. Justice Hand in his opinion stated as follows:

"* * * What the plaintiff seems to have done was to have failed to be watchful enough for obstacles as well as to have forgotten to notify the engineer that he was going to leave the cab. We think the inadvertent neglect to observe the rule, while probably an act of contributory negligence to be considered by the jury in reduction of his damages, was not a bar to his claim."

Philadelphia & R. Ry. Co. v. Auchenbach, 16 F. (2d) 550, 551, concerned an accident wherein a brakeman was crushed between two cars after attempting to effect a coupling when the automatic coupler did not work

on impact. The railroad company offered to prove that one of its rules had been disobeyed by the plaintiff in that he had failed to leave his lantern outside on the ground where it would be in view of the members of his crew while he went between the cars, and that this failure on his part was the proximate and sole cause of plaintiff's injury. The trial court then instructed the jury that if they found there was a violation of the Safety Appliance Act liability would attach to the defendant without regard to the negligence on the part of plaintiff. The Circuit Court of the Third Circuit, in affirming the trial court's ruling, stated:

“The plaintiff in the instant case went between the cars to prepare for another attempt to couple only because the couplers did not at first couple automatically by impact, that is, ‘Because the equipment of the car which it was necessary to (couple) did not meet the statutory requirements especially intended to protect him in his position.’ Chicago G. W. R. R. Co. v. Schendel, *supra*; Tennessee A. & G. R. R. Co. v. Drake (C. C. A.) 276 F. 393. If his act amounted to negligence it was no more than contributory negligence which was removed from consideration by the Act. Chicago G. W. R. R. Co. v. Schendel, *supra*; Auchenbach v. P. & R. R. Co., *supra*. Moreover, it is the law that a violation of the Act need not be the sole efficient cause in order that an action may lie. So also the element of proximate cause is eliminated where concurrent acts of the employer and employee contribute to the injury. Spokane & Island E. R. Co. v. Campbell, 241 U.S. 497, 510, 36 S. Ct. 683, 60 L. Ed. 1125; Pless v. New York Central R. R. Co., 189 App. Div. 261,

179 N.Y.S. 578, Affirmed, 232 N.Y. 523, 134 N.E. 555. In this situation, where there was nothing to show that the plaintiff's contributory negligence, if any, was other than negligence concurrent with that of the defendant, it follows that an issue of the plaintiff's contributory negligence with its underlying issue of proximate cause was eliminated from the case and, in consequence, evidence to prove it was properly rejected. *Southern R. R. Co. v. Crockett*, 234 U.S. 725, 34 S. Ct. 897, 58 L. Ed. 1564; *Great Northern R. R. Co. v. Otos*, 239 U.S. 349, 36 S. Ct. 124, 60 L. Ed. 322; *T. & P. R. R. Co. v. Rigsby*, 241 U.S. 33, 36 S. Ct. 482, 60 L. Ed. 874; *Atlantic City R. R. Co. v. Parker*, 242 U.S. 56, 37 S. Ct. 69, 61 L. Ed. 150; *Union Pacific R. R. Co. v. Huxoll*, 245 U.S. 535, 38 S. Ct. 187, 62 L. Ed. 455."

The most recent circuit court decision in point here is *McCarthy v. Pennsylvania R. Co.*, 156 F. (2d) 877, 881, (cert. den. 329 U.S. 812, 67 S. Ct. 635, 91 L. Ed. 693), wherein Judge Minton, President Truman's nominee to the Supreme Court of the United States, authored the court's opinion. McCarthy, the engineer, operated his engine from Indiana Harbor, Indiana, into Chicago, Ill., after knowing that the locomotive had developed a hot box. At Whiting, Indiana the conductor gave McCarthy a signal to go to the next station at Colehour, about one mile away, and get another engine. McCarthy ignored this signal. Several other employees between Whiting and Chicago gave McCarthy a hot box signal. At Englewood the conductor again talked to McCarthy and suggested that he get another engine at defendant's shop at 59th Street in Chicago, but McCarthy refused

and continued toward the Union Station in Chicago. At 22nd Street another hot box signal was given McCarthy, which he ignored, and after traveling a short distance the pony truck on the locomotive broke, the engine turned over and McCarthy was killed. In discussing the case Judge Minton stated:

“The defendant’s answer tendered the issue that the sole proximate cause of the accident was the fact that the decedent continued to use the locomotive after he knew of its defective condition and failed to report it as was his duty under the rules. These acts constituted no defense. The decedent’s acts were all concurring acts with the act of the defendant in violation of the statute, and were either acts of contributory negligence or assumption of the risk of known danger, from both of which, as we have pointed out, the decedent had been relieved by the statute. ‘* * * But where, as in this case, plaintiff’s contributory negligence and defendant’s violation of a provision of the safety appliance act are concurring proximate causes, it is plain that the employers’ liability act requires the former to be disregarded.’ *Spokane & Inland Empire R. Co. v. Campbell*, 241 U.S. 497, 510, 36 S. Ct. 683, 689, 60 L. Ed. 1125. See also *Louisville & Nashville Co. v. Wene*, 7 Cir., 202 F. 887, 892.

“The court further instructed the jury: ‘On the other hand, (if you find) that the railroad company, knew at all times the things required of it by law, and that it did not violate the law requiring the use of engines in safe condition, even if you find the Defendant was negligent and did not comply with the law requiring the use of

engines in good condition, but that such failure to comply with the law was not the cause of the injury to and death of the decedent, but that such injury and death were caused solely by his own acts, independently of any negligence on the part of the Defendant, it would be your duty to find for the Defendant. But, as I have stated, such acts of negligence on the part of the Plaintiff, if you find such acts of negligence, merely contributed to and were not the sole cause of his death, you should find for the Plaintiff.'

"This instruction is improper, first because it told the jury in effect that the defendant's liability for violation of the statute depended upon the said violation being the cause of the decedent's death, whereas the statute provides that the defendant shall be liable if the violation caused 'in whole or in part' the death of the decedent. 45 U.S.C.A. Sec. 51; *Spokane & Inland Empire R. Co. v. Campbell*, supra. Secondly, the instruction is improper because it told the jury that the plaintiff could not recover if his decedent was guilty of acts of negligence that solely caused his death. As an abstract proposition of law, that is correct, but there was no evidence of any independent acts of negligence by the decedent that were the sole cause of the accident and his death. The court had instructed on a proposition of law about which there was no evidence.

"This was bound to confuse and mislead the jury into believing that the concurring acts of the decedent in continuing to use the defective locomotive after he knew it was defective, and not reporting it, might be considered as acts of negligence, for which the decedent might be charged with sole liability for the accident. The

giving of such instruction under such circumstances was error. *Insurance Co. v. Baring*, 20 Wall. 159, 87 U.S. 159, 162, 22 L. Ed. 225; *United States v. Breitling*, 20 How. 252, 61 U.S. 252, 254, 15 L. Ed. 900; *Adams v. Vanderbeck*, 148 Ind. 92, 97, 45 N.E. 645, 47 N.E. 24, 62 Am. St. Rep. 497; *Fletcher Bros. Co. v. Hyde*, 36 Ind. App. 96, 75 N.E. 9; 64 *Corpus Juris*, Sec. 657; 53 *American Jurisprudence*, Section 579-580, and numerous cases cited.

“The judgment is reversed, and the District Court is directed to grant a new trial.”

The language which Judge Minton uses in the *McCarthy* case and his line of reasoning is especially applicable in the present situation.

The court instructed the jury in Instruction No. 16, as follows (J.R. 210):

“* * * then William Frank Lucas, the deceased, was guilty of negligence, and if such negligence, if you so find, was the sole proximate cause of deceased’s injuries and death, then your verdict must be for the defendant ‘no cause of action.’ ”

There is, of course, no evidence of any independent act of negligence by the decedent, William Frank Lucas, and if the instruction in the *McCarthy* case concerning sole cause was an abstract proposition of law about which there was no evidence, then, of course, the court’s instruction in the present case is also an abstract proposition of law about which there is no evidence. Neither the Utah State Supreme Court nor the United States

Supreme Court in the two decisions which have been written conceived or discussed the actions of Lucus as being independent intervening acts.

It seems obvious that Instruction No. 16 was bound to confuse and mislead the jury into believing that the acts of negligence on the part of decedent could be the sole cause of his death.

The United States Supreme Court in its decision in the case at bar pointed out that this court discussed the causes of the death of Lucus by resort to dilectical subtleties distinguishing between what was a philosophical cause and a legal cause. The decision then stated:

“The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees’ deaths ‘resulting in whole or in part’ from defective appliances such as were here maintained. 45 U.S.C. 51. And to make its purpose crystal clear, Congress has also provided that ‘no such employee . . . shall be held to have been guilty of contributory negligence in any case’ where a violation of the Safety Appliance Act, such as the one here, ‘contributed to the . . . death of such employee.’ 45 U.S.C. 53. Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee’s death, the railroad must pay damages. These air-brakes were defective; for this reason alone the train suddenly and un-

expectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

Using the Supreme Court of the United States decision as a foundation, plaintiff in his requested Instruction No. 4 requested that the court instruct the jury as follows (J.R. 208):

"You are instructed that under the provisions of the Federal Safety Appliance Act if a violation of such act by a common carrier by rail in interstate commerce contributes to the death of one its employees then such employee cannot be held to have been guilty of contributory negligence.

"In this connection if you find from a preponderance of the evidence that the violation of the Federal Safety Appliance Act mentioned in Instruction No. (here insert number which corresponds to plaintiff's Requested Instruction No. 3) contributed to the death of William Frank Lucus then you are instructed that the said William Frank Lucus cannot be found or considered guilty of contributory negligence, and you must, in arriving at your verdict, entirely disregard the manner in which he drove and operated the motorcar regardless of whether or not the manner in which he drove or operated constituted a failure on his part to exercise ordinary care, and your verdict should be for plaintiff even though his conduct contributed to cause his own death."

The first paragraph only of this request was given.

This Court will, of course, notice that the Supreme Court of the United States does not use the words "proximate cause" but states, as did Instruction No. 4, that "where a violation of the Safety Appliance Act, such as the one here, 'contributed to the death of such employee.' " Could there be any possible doubt that the unexpected, sudden stop of the freight train contributed to cause Lucas' death?

Can the immovable object be casually eliminated from the explosion resulting from a meeting with the irresistible force?

The unanimous opinion of the Supreme Court became the law of this case. The trial court's refusal to give plaintiff's requested Instruction No. 4 was a direct disregard of that opinion depriving plaintiff of the rights which the Supreme Court declared were due him and prejudicially depriving him of his rights under the Safety Appliance and Federal Employers' Liability Acts.

The state authorities construing and following the Supreme Court of the United States and other federal cases are numerous. The factual situations, of course, are varied in many ways. We cite and discuss only a few of the more pertinent cases.

In *Leet v. Union Pacific R. Co.*, 60 Cal. App. (2d) 814, 142 P. (2d) 37, 40, the plaintiff brought an action for wrongful death basing her suit upon a violation by the

defendant of the Federal Safety Appliance Act, requiring all cars used in interstate commerce to be equipped with efficient hand brakes. The defendant sought to introduce a rule which was excluded by the trial court. After referring to *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 143 A.L.R. 967, the court stated:

“Since the negligence of the defendant in sending out a car with its brake rigging in a defective condition was concededly established, it follows that defendant may not be relieved from the consequences of its neglect by the claim that plaintiff assumed the risk of such negligence.

“Rule 26, which was excluded from the evidence reads as follows: ‘When emergency repair work is to be done under or about the cars in a train and a blue signal is not available, the engineman and fireman must be notified and protection must be given those engaged in making the repairs.’

“In view of the amendment to section 54 and of the Tiller decision rule 26 was immaterial to the issues and was properly rejected. *Chicago, etc., Co. v. Schendel*, supra. If there was no assumed risk or contributory negligence to be attributed to the brakeman, no amount of rules adopted by defendant could alter the law if the company was itself negligent.”

In *Aly v. Terminal R. Ass'n of St. Louis*, 342 Mo. 1116, 119 S.W. (2d) 363 (1938), action was brought for personal injuries sustained by plaintiff. Plaintiff's suit

was based on a violation of the Federal Boiler Inspection Act, 45 U.S.C.A., Section 22, one of the acts enacted by Congress to promote the safety of railroad employees. Plaintiff had sought to mount a moving engine and in stepping on a footboard, it gave way causing him to fall and lose both legs. The engine was coming toward him at the time he attempted to mount it. The defendant sought to introduce a rule of the company forbidding switchmen to board engines coming toward them. The trial court's refusal to admit the rule was upheld by the Appellate Court, and in discussing the matter, the court stated:

“Appellant offered to introduce in evidence a rule of the company which forbade switchmen to board engines coming toward them. The trial court refused to permit this rule to be introduced in evidence. Appellant has cited the case of *Frese v. Chicago, B. & O. R. Co.*, 263 U. S. 1, 44 S. Ct. 1, 58 L. Ed. 131. In that case a statute of Illinois made it the duty of a locomotive engineer to stop his train at a crossing of another railroad and to positively ascertain that the way was clear before passing over the crossing. This the engineer failed to do and lost his life in a collision which followed. The court held that a violation of the statutory duty on the part of the engineer was the sole cause of the injury. Without deciding whether a violation of a rule of the company is a parity with a violation of a state statute, there is on this distinction: In the *Frese Case* the plaintiff relied upon the negligence of the fireman in failing to perform a duty which the

statute imposed upon the engineer. In the case before us plaintiff was relying upon a defective appliance. So even if plaintiff violated a rule, that would be only a contributing cause and not the sole cause. In *Spokane & I. E. R. Co. v. Campbell*, 241 U.S. 497, 36 S. Ct. 683, 60 L. Ed. 1125, the plaintiff had violated an order, and was injured through a defective air hose which caused a collision. In 241 U.S. 497, loc. cit. 508, 36 S. Ct. 689, 60 L. Ed. 1125, the Court said in speaking of the violation of the order: 'In its legal effect this was nothing more than negligence on his part.' The court further said in the concluding part of the opinion: 'But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the safety appliance act are concurring proximate causes, it is plain that the employers' liability act requires the former to be disregarded.' In the case under consideration the jury was explicitly instructed that plaintiff could not recover unless the foot-board slipped toward the drawbar and caused the plaintiff to fall. A violation of the rule, therefore, could at most have been only contributory negligence and not a defense. We must rule the point against appellant."

In *Jordan v. East St. Louis Connecting Ry. Co.*, 308 Mo. 31, 271 S.W. 997, the plaintiff brought suit under the Federal Employers' Liability Act and based the action upon a violation of the Federal Safety Appliance Act relating to automatic couplers. Plaintiff kicked the drawbar in order to align it for coupling, and his foot was crushed by the impact of the couplers. Defendant attempted to introduce a rule of

the defendant company prohibiting employees from kicking drawbars. The court stated:

“The next error assigned is the refusal of the court to permit defendant to show that a rule had been promulgated forbidding employees to kick drawbars, and to show that the plaintiff had knowledge of the existence of that rule. Upon that *Schendel v. C. M. & St. P. R. R. Co. (Minn.)*, 197 N. W. 744, and *Kern v. Payne, Dir. Gen.*, 65 Mont. 325, 211 P. 767, are cited. But it was held otherwise in *Moore v. St. Joseph & G. I. Ry.*, 268 Mo. 31, 186 S. W. 1035. In that case, one under the Safety Appliance Act, the question came up upon a rule forbidding employees ‘to go between cars in motion to uncouple them.’ Following references to the circumstances under which the question arose, the court said, *loc. cit.* 35 (186 S.W. 1037):

“ ‘Further, respondent’s violation, if any of appellant’s rule was at most but evidence of contributory negligence; and in this case, the action being founded upon violations of the applicable Safety Appliance Act, contributory negligence constitutes neither defense nor mitigation. (Second Employers’ Liability Cases, 223, U.S. 1. c. 49, 50). There was no error in this ruling.’

“ ‘In the first case cited by defendant, *Schendel v. Chicago, M. & St. P. Ry. Co.*, the question at issue was one of ‘exact obedience from an employee to a foreman’s direct command requiring instant execution.’ It was held that if the employee directly contrary to such command meddled with a defective appliance, his willful disobedience must be regarded as the sole cause of his injury. But the court distinguished between a

command of that sort and the issuance of general standing orders or rules; the rule on the latter being that of the Supreme Court of the United States in *Great Northern Ry. v. Otos*, 239 U.S. 349, 36 S. Ct. 124, 60 L. Ed. 322. This assignment must be ruled against defendant."

In *Ross v. New York C. & St. L. R. Co.*, 73 F. (2d) 187, 188, (1934, 6th Circuit), plaintiff claimed the right to recover under the Federal Employers' Liability Act and the Boiler Inspection Act. The court charged the jury that there was no liability under the Federal Employers' Liability Act, but submitted the case upon the Boiler Inspection Act. There was a verdict for defendant and plaintiff appealed. The chief error relied upon was the admission over plaintiff's objection of a company safety rule in evidence. The court stated:

"The petition charged violation of the Federal Employers' Liability Act, and under that enactment, section 53, title 45, U.S.C. (45 U.S. C.A., Section 53), testimony bearing upon the contributory negligence of the defendant is admissible in diminution of damages except where the common carrier has violated any statute enacted for the safety of employees, thus contributing in whole or in part to the injury or death of such employee. *Kansas City Southern R. Co. v. Jones*, Adm'x, 241 U.S. 181, 36 S. Ct. 513, 60 L. Ed. 943.

"The testimony as to the existence, promulgation and violation of the rule was admissible at the time it was received, for no violation of a safety act had been shown and the case was still being heard under the Federal Employers' Lia-

bility Act. When the court charged the jury that no liability was imposed upon the defendant because of the Federal Employers' Liability Act, counsel for plaintiff should then have requested that all testimony as to the existence, promulgation, and violation of the rule be excluded from the record and that the jury be instructed to disregard it. No such request was made."

In *Alabama Great Southern R. Co. v. Cornett*, (Ala.) 106 So. 242, the plaintiff attempted to uncouple two cars, but because of the defective condition of the couplers, he failed and fell underneath the wheels. The defendant contended that there was no direct evidence as to the cause of the injuries to the deceased beyond the undisputed fact that he was run over by one of the cars. Defendant contended that plaintiff had failed to discharge the burden of the proof that the violation, if any, of the Safety Appliance Act, proximately caused the injuries. The court stated:

"Under the federal statutes entering into the decision of this case, any misconduct of said intestate, being no more than contributory negligence, is excluded as a defense in bar to a recovery by the terms of the Employers' Liability Act (35 Stat. 66 (U.S. Comp. St. Sections 8657-8665) vol. 2, Roberts Fed. Liab. of Carriers, P. 1406, Section 863-868), and by those of the Safety Appliance provisions, 27 Stat. 532 (U.S. Comp. St. Section 8612); Barnes' Fed. Code (1919), pp. 1929, 1937, Section 8030, 8071; Roberts Fed. Liab. of Carriers, p. 773, et seq.; Ala. & V. R. Co. v. Dennis, 128 Miss. 298, 91 So. 4. Pertinent observations of Mr. Justice Pitney are contained in San

Antonio, etc., Co. v. Wagner, 241 U.S. 476, 36 S. Ct. 626, 60 L. Ed. 1110, 1117.

“The common-law duty of due care is changed to that of an absolute duty in respects indicated by Congress. A failure of a coupler to work at any time when required or necessary held to sustain a charge of negligence or failure of statutory duty in the premises (Chicago, etc., Co. v. Brown, 229 U.S. 317, 33 S. Ct. 840, 57 L. Ed. 1204; C., B. & Q. R. Co. v. United States, 220 U.S. 559, 31 S. Ct. 612, 55 L. Ed. 582; St. L., etc., Co. v. Taylor, 210 U.S. 281, 28 S. Ct. 616, 52 L. Ed. 1061); that is to say, this prescribed and required safety appliance must not only be provided, but duly maintained in condition for operation (L. & N. R. Co. v. Layton, 243 U.S. 617, 37 S. Ct. 456, 61 L. Ed. 931). When the statute is so understood, the conduct of plaintiff’s intestate was immaterial, though in contravention to positive rules or instructions by defendant. Noel v. Q. O. & K. C. R. Co. (Mo. App.) 182 S. W. 787. There was no error in the court’s rulings and refusal of charges as to the rules of defendant as affecting intestate’s conduct in disregard of said rules and defendant’s liability for injury inflicted while so disregarding the rules. Texas & P. R. Co. v. Rigsby, 241 U.S. 33, 39, 36 S. Ct. 482, 60 L. Ed. 874, 877.”

In the case of *Seaboard Air Line Ry. Co. v. D’Avignon* (Ga.), 153 S. E. 96, the court held that in a suit by an employee for personal injury based upon an alleged violation of the Safety Appliance Act, the only defense that an interstate carrier can make is that proper appliances were provided and maintained in good condi-

tion, or that the defective appliance was not a contributory cause of the injury of the employee.

In the case of *Potter v. Los Angeles & S. L. R. Co.*, 42 Nev. 370, 177 Pac. 933, 934, the court granted plaintiff's motion to strike the defendant's defense of contributory negligence, the plaintiff having based his claim upon an alleged violation by defendant of the Safety Appliance Act. The court stated:

“* * * It is clear from the complaint that plaintiff, as a basis of recovery, relies upon the negligence of the appellant in having a defective automatic coupler upon the car which was being switched. The allegation as to the speed of the car was, we take it, for the purpose of showing the necessity for plaintiff's jumping from a car after it had become uncoupled, and was not pleaded as a cause of action. Conceding, for the purpose of the case, that the plaintiff was guilty of contributory negligence in jumping from the car, it was only one of the concurring causes of plaintiff's injury for the proximate cause was the defective coupler, but for the defective coupler, the cars would have been under perfect control, they would not have run at an excessive rate of speed, and there would have been no injury. We think the language of the court in *Otos v. Great Northern Ry. Co.*, 128 Minn. 283, 150 N.W. 922, is squarely in point. The court said:

“ ‘Defendant contends that the proximate cause of plaintiff's injury was, not the defective condition of the coupling, but his violation of a rule of the employer forbidding employees going between moving cars. It appears that there was

such a rule. There is evidence that in this yard it had, with the knowledge of the yardmaster, been more honored in its breach than in its observance. But, whatever may be said of the propriety of plaintiff's act in going between the cars, it was only one of the concurring causes of plaintiff's injury. The violation of the statute was one cause of his injury. *Turritin v. Chicago, St. P., M. & O. Ry. Co.*, 95 Minn. 408, 104 N.W. 225; *Sprague v. Wisconsin Cent. Ry. Co.*, 104 Minn. 58, 116 N.W. 104. This is all that is necessary to create liability. The statute which abolishes contributory negligence " 'would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. * * * It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act.' " *Grand Trunk Western Ry. Co. v. Lindsay*, 233 U.S. 42, 47, 34 Sup. Ct. 581, 582, 58 L. Ed. 838, Ann. Cas. 1914C, 168, quoting 201 Fed. 844, 120 C.C.A. 166.' "

Instruction No. 16 also contains what plaintiff conceives to be a misconception of the evidence in that the instruction states that Frank Lucas was in a position on the motorcar with his back toward the freight train, posing a hypothetical question for the jury to consider as to whether or not Frank Lucas could have manipulated the track car as well without his back being toward the freight train. There is absolutely no evidence in the record that Mr. Lucas was in a position on the motor car where his back was toward the freight train. Mr. Lynch testified that the track car was pro-

ceeding in an easterly direction; that he was seated on the south side, facing south, and that Mr. Lucas was seated on the north side, facing north (Tr. 19, 29). The evidence was clear that both Lucas and Lynch were looking to the west, but they were both seated on the car in the normal and usual manner, i.e., they were seated with their feet off the edge of the platform and on a railing constructed around the outer edge of the track car for the purpose of supporting the workmen's feet. There is no evidence in the record any place that the position of Frank Lucas on the motor car was an unsafe or dangerous position.

It is obvious, of course, that the failure of Frank Lucas to observe the stalled freight train some time prior to the time the track car came into collision with its rear was a contributing cause to his death, but it is inconceivable that anyone could believe that the stalled freight train was not also a contributing cause to the death of Frank Lucas. The court refused plaintiff's requested Instruction No. 4 which set forth in clear and concise language this principle. Instead he instructed in legal language which was well calculated to mislead the jury into believing that under these circumstances there was a sole proximate cause of the death of William Frank Lucas.

We again call the Court's attention to the *McCarthy v. Pennsylvania R. Co.*, case, *supra*, and the decision of the United States Supreme Court in this case with full assurance that this Court applying the standards set down in those two cases can arrive at but one conclusion:

perred -

That the trial court, in refusing plaintiff's requested Instruction No. 4, in allowing the introduction of Exhibit "3" and in giving Instruction No. 16, all and each of which errors deprived plaintiff of his rights under the Federal Safety Appliance Act and the Federal Employers' Liability Act.

We submit that the language and thought set forth and contained in the opinion of Justice Black, written for a unanimous court, is as crystal clear as he declares the statute to be. That court has stated for the guidance and direction of this court and the trial court in this case that the issues presented by the pleading and proof, concern two matters, and two matters only: (1) was the defendant guilty as it is admitted it was of a violation of the Federal Safety Appliance Act, and (2) did that violation contribute in whole or in part to the death of deceased.

The trial court by its rulings in this case has either intentionally disregarded the mandate of the Supreme Court or has been incapable and unable to interpret and apply the express direction. In either event the trial court was guilty of gross and prejudicial error.

Edith B. Lucas, the widow of this deceased, is entitled to a fair trial of her cause under the law, and the guiding interpretive decision of the Supreme Court of the United States should make that law so clear and so easy of understanding that any trial court in the State of Utah could understand and be guided by it. It is true that a jury might well find that Mrs. Lucas has not

been as greatly damaged in the loss of her husband as other widows whose matters have been brought to the attention of this court, but that is of no moment here in this case. Her rights are just as great and just as sacred as though her husband had been constant and faithful in his devotion to his family and she had been the mother of numerous dependent children.

The Judge who tried this case has been clearly informed and advised by the Supreme Court of the United States, if such advice is necessary in view of the "crystal clear" language of the act that contributory negligence was not an issue in this case, but for the benefit of the litigants here the trial judge has written some new law and has not only made contributory negligence a partial, but a complete defense to this action. Such apparent disregard of the law deserves the rebuke of this court and should not be tolerated.

The records in this case will show that plaintiff exhausted his remedy to escape from the necessity of trying this case before the Honorable John A. Hendricks, and we pause at this time to call the court's attention to the contention we made at that time that it would be impossible for Mrs. Lucas to obtain a fair and impartial trial before Judge Hendricks, and we assert here now that the record in this case shows that plaintiff was entirely correct in that contention and that she not only failed to receive a fair and impartial trial but the law of the case, as declared by the Supreme Court of the United States, was entirely disregarded and the matter tried and submitted to the jury without any attention

paid to the Supreme Court of the United States, and on issues which were not only eliminated by the Federal Congress but were declared to be non-existent as matter of defense by the Supreme Court of the United States.

The only determination that counsel for the plaintiff has ever had in this matter is to obtain for Edith B. Lucus a fair and impartial trial according to the law and the testimony in this case, and although that determination has been tried and vigorously tested, it still exists and will continue to exist until that end and aim is fully realized.

We believe that a trial court's first duty is to apply the law as it exists, not as the trial court feels it should be, and we believe that when the Supreme Court of the United States has outlined the law in language that cannot be misunderstood by any intelligent consideration of it, that a trial court commits error when it completely and intentionally disregards the mandate of the Superior Court, and we submit to this court that the record in this case establishes and supports these charges which we have made, and which we will continue to make until the doors of all courts in this country are closed against us.

The contention of defendant that an issue of sole proximate cause is made is pure and simple subterfuge and made for the purpose of breathing life into a defense which has been expressly eliminated not only by

the Federal Congress but the Supreme Court of the United States in this very case.

POINT II.

THE COURT'S REFUSAL AND FAILURE TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 11 AND INSTRUCTING THE JURY AS IT DID IN INSTRUCTION NO. 9 CONSTITUTED PREJUDICIAL ERROR. (Assignment of Errors 4 and 5.)

The evidence presented on the dependency and reasonable expectation of Mrs. Lucas for support from Frank Lucas demonstrated beyond any possible doubt that Frank Lucas did not at the time of his death intend to voluntarily support Mrs. Lucas. Reference to defendant's Exhibit "2" will demonstrate that Mrs. Lucas did not believe that she could voluntarily get support from Frank Lucas. However, Mrs. Lucas had an adjudication of her right to support from Frank Lucas and that adjudication by the California Court continued in force to the date of Frank Lucas' death. In light of this evidence plaintiff requested Instruction No. 11 as follows (J.R. 208):

"You are instructed that the marriage relation creates a right on the part of the wife to be supported by her husband and this right may be legally enforced by her so long as the marriage relation exists, and if the said Edith B. Lucas is entitled to recover damages under these instructions she cannot be deprived of that right

by a plea on the part of defendant that her husband had not fulfilled the duties he owed to her.

“In this connection you are instructed that if you find that plaintiff is entitled to recover damages in this case then in determining the loss of pecuniary benefits mentioned in Instruction No. (here insert the number of the Court’s instruction which corresponds with plaintiff’s requested Instruction No. 10). You may take into consideration not only such voluntary contributions as William Frank Lucas may reasonably have been expected to make to Edith B. Lucas during her lifetime but also such contributions as she may reasonably have been expected to secure through the enforcement of her legal right to support from her husband.”

The request was refused and the court gave no instruction concerning the right of Edith Lucas to force Frank Lucas to support her. Instead he gave the following Instruction No. 9 (J.R. 210) :

“You are instructed that the mere fact that Edith Lucas was the legal wife of Frank Lucas at the time of his death is not sufficient evidence to prove that the plaintiff is entitled to recover any damages for his death in this action. If you believe from all the evidence in the case that the deceased would not have made any further money contributions to Edith Lucas or would not have supported her in the future if he had not died, then your verdict should be for the defendant.”

This Court had a similar problem before it in *Llewellyn v. Industrial Commission et al.*, 202 P. (2d) 160. Chief Justice Pratt, in his opinion, clearly explains the

rights of a wife under a Utah separate maintenance decree. It is long established law in Utah that where there is no evidence on foreign law, that law will be presumed to be the same as the law of Utah. *Smith v. Smith*, 77 Utah 60, 291 P. 298, at 300:

“First. Was the decree entered in the divorce suit *res adjudicata* of the matter sought to be litigated in the suit at bar? The evidence adduced at the trial clearly showed that, by reason of the divorce action, the North Dakota court had before it the question of the division of the property of the parties. Comp. Laws Utah 1917, Sec. 3000, provides that, in actions for divorce, ‘the court may make such order in relation to the children, property, parties, and the maintenance of the parties and children as shall be equitable.’ In the absence of a showing to the contrary, it is presumed that the law of North Dakota is to the same effect. *Am. Oak Leather Co. v. Union Bank*, 9 Utah 87, 33 P. 246; *Dickson v. Mullings*, 66 Utah 282, 241 P. 840, 43 A.L.R. 136.”

To the same effect see *Shurtliff v. Oregon Short Line R. Co.*, 66 Utah 161, 241 P. 1058; *Grow v. O. S. L. R. Co.*, 44 Utah 160, 138 P. 398.

In the *Llewelyn* case, *supra*, Chief Justice Pratt made the following statement concerning the right to involuntary support:

“In the case of *Utah Apex Mining Co. v. Industrial Commission* (66 Utah 529, 244 P. 658) cited above, this court discusses, *inter alia*, the probability of the wife, in the future, obtaining support from the husband either ‘voluntarily or

involuntarily.' Obviously, in the present case the support would not, in the future, have been voluntarily given; but certainly the chances of acquiring involuntary support from the deceased would have met with little difficulty where the status of dependency has been adjudicated and the husband is capable of supporting his wife. There is a distinct and reasonable probability that the obligation of support under such a decree would be satisfied by direction of the court. The separate maintenance decree is evidentiary of the fact that the wife is rightly living separate and apart from the husband through no fault of her own, but is entitled to support."

The Supreme Court of the United States in a landmark case, *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 33 S. Ct. 192, 196, 57 L. Ed. 417, set forth the rule under Federal Employers' Liability Act cases as follows:

"The distinguishing features of that act are identical with the act of Congress of 1908 before its amendment: First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries."

New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 536, 62 L. Ed. 1167, concerned a suit under the Act by deceased's mother. The widow who had lived with the deceased for only six months where-

abouts was unknown. There was no indication that a divorce proceeding had been commenced. The Supreme Court refused to allow the mother to participate as a dependent under the act, and stated as follows:

“The act makes the widow sole beneficiary when there is no child and only in the absence of both may parents be considered. The deceased left a widow and although they had lived apart no claim is made that rights and liabilities consequent upon marriage had disappeared under local law. Of course, we do not go beyond the particular facts here disclosed. In the circumstances, proof of the mother’s pecuniary loss could not support a recovery.”

See also *Louisville & N. R. Co. v. Holloway*, 246 U. S. 525, 38 S. Ct. 379, 62 L. Ed. 867.

Southern Ry. Co. v. Miller, 267 F. 376, 381, (Cert. den. 254 U. S. 646, 41 S. Ct. 15, 65 L. Ed. 455), concerned facts similar to those in the present case. The court made the following statement:

“The court was asked to rule that only nominal damages could be recovered, because Miller and his wife had separated soon after their marriage, and he had not thereafter contributed to her support. But there had been no divorce, and nothing appears to show that she might not at any time have enforced her conjugal rights under the laws of Virginia. This being so, she was entitled to substantial damages, if the jury found in her favor, as seems to be plainly held by the Supreme Court in *New Orleans & N. E. R. Co.*

v. Harris, 247 U.S. 367, 372, 38 Sup. Ct. 535, 62 L. Ed. 1167.”

See also *Dunbar v. Charleston & W. C. Ry. Co.*, 186 F. 175.

The state decisions holding that under the Federal Employers' Liability Act a widow is entitled to have the jury consider the involuntary as well as the voluntary contributions which she might reasonably expect, are numerous and without conflict.

In *Fogarty v. Northern Pac. Ry. Co.*, 85 Wash. 90, 147 P. 652, 653, there was evidence tending to show that the deceased railroad employee had abandoned his wife and child about five years before he was killed and since his abandonment had contributed practically nothing to their support. The evidence also indicated that the widow had been searching for her husband since his abandonment. On these two facts the *Fogarty* case is directly in point. The deceased in the *Fogarty* case also stated to persons that he had permanently abandoned his wife and he repudiated his paternity of the child which she had borne. Neither spouse had ever secured a divorce. The jury returned a verdict in favor of the plaintiffs and apportioned it between the widow and child. In discussing the case the court stated:

“The appellant’s argument is directed to two contentions: (1) That the undisputed evidence shows that neither the widow nor the minor child had any reasonable expectation of ever receiving any assistance or support from the de-

ceased; (2) that in any event the widow had forfeited all right to any assistance or support.

"1. It is now thoroughly settled that the federal Employers' Liability Act in its essentials follows the first English law on the subject, that of 9 and 10 Victoria, known as Lord Campbell's act, and must be construed as that act has been construed, not as a mere continuance of the right of the injured employe in favor of his estate, but as granting a new and independent cause of action for the benefit of the dependent relatives named in the statute, and that the damages recoverable are limited to the financial loss sustained by their being deprived of a reasonable expectation of pecuniary benefit by the wrongful death. Mich. Cent. R. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; American R. R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456; Gulf, Colo. & S. F. Ry. Co. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785.

"In its final analysis, the appellant's argument is reduced to the claim that in case of abandonment the jury should not be permitted to speculate upon the possibility of a reconciliation. It ignores the legally enforceable liability of a husband and father to support his wife and child to the extent of his reasonable ability."

* * * *

"If, therefore, in addition to the legal liability, there was shown an earning power and capacity of the deceased, such that, had he lived, the legal right to pecuniary assistance or support might have been enforced as a thing real and measurable, pecuniarily valuable, then it cannot be said, as a matter of law, that there was no

reasonable expectation of such assistance or support, even though it had not theretofore been voluntarily given. Such legal liability accompanied by proof of ability of the deceased to have met the legal duty also meets the other requisite read into the act by the United States Supreme Court in the Vreeland decision in defining 'the pecuniary loss and damage' as 'one which can be measured by some standard.' The legally enforceable liability and the actual ability of the deceased to have met it furnishes a standard of measurement pecuniary in its nature, just as would be furnished by the antecedent voluntary performance of the legal duty. To hold otherwise would be to hold the right to enforce assistance or support by the wife and child a thing of no pecuniary value. This, so far as we are advised, no court has ever held."

The same legal principle is set forth in *Gilliam v. Southern Ry. Co.*, 108 S. C. 195, 93 S. E. 865, 866:

"* * * Some 16 or 18 years before, McBride married the woman, and had by her the child for whose benefit the action was brought. After living with his wife about a year, he abandoned her and his child. There was no evidence that he afterwards contributed anything to the support of either of them; nor was there any evidence that he did not, except as that was inferable from the fact that he had not lived with them or communicated with them. There was evidence that, after he abandoned her, his wife lived in the house with another man, and that she had another child."

“* * * Defendant moved for a directed verdict on two grounds, which are renewed here. The first is that there was no evidence that the beneficial plaintiffs sustained any actual pecuniary loss by the death of McBride; and the second is that, as his death was instantaneous, there was no survival of the right of action for his pain and suffering.

“As to the first ground, the motion was properly refused. The law imposes upon every man the duty of supporting his wife and minor unmarried children; and, in this state, any able-bodied man who, without just cause or excuse, abandons or fails to supply the actual necessities of life to his wife or to his minor unmarried child or children dependent upon him, is guilty of a misdemeanor. Crim. Code, Sec. 697; State v. English, 101 S. C. 304, 85 S. E. 721, L.R.A. 1915F, 977. Therefore, prima facie and presumptively, the widow and minor unmarried child of deceased had a legal pecuniary interest in the continuance of his life. The fact that he had abandoned them and had failed to perform the duty imposed upon him by the law did not absolve him from the obligation, nor deprive them of the right to have it enforced. The evidence did not warrant the court in holding, as matter of law, that the wife had forfeited her right of support by her conduct. As to that, the evidence made an issue for the jury, under proper instructions. Besides, there was no evidence that the right of the child, if she then was, or should thereafter during minority become, dependent was not still existent; and the action was brought for her benefit as well as the wife's.

“When the relation between deceased and the beneficial plaintiff is that of husband and

wife or parent and minor child, in the absence of evidence to the contrary, actual pecuniary loss will be presumed from the death. *Minneapolis & St. Paul Railroad Co. v. Gotschall*, 244 U.S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995; *Ingersoll v. Detroit, etc., Railroad Co.*, 163 Mich. 268, 128 N.W. 227, 32 L.R.A. (N.S.) 362; *Fogarty v. Northern Pacific Railroad Co.*, 74 Wash. 397, 133 Pac. 609, L.R.A. 1916C, 800; note in L.R.A. 1916E, 127, 144, 148."

Davis' Adm'r et al. v. Cincinnati, N. O. & T. P. Ry. Co., 172 Ky. 55, 188 S. W. 1061, 1063, is a case which indicates that it was error for the trial judge to leave to the jury the question of whether or not a dependent child had any right to expect pecuniary benefit from her deceased father. The Kentucky court pointed out that the right of a child for support from her father was a right which could be adjusted to accommodate the needs of the child and the ability of the father to pay. That principle is, of course, applicable in the present case for Mrs. Lucas could certainly, if the need arose, insist on an adjustment upward of the decree of the California court providing Frank Lucas could afford to pay an increase in the support money. The Kentucky court in the *Davis* case, discussing this principle, stated as follows:

"* * * By the judgment of divorce the wife was given the custody of the child, and the deceased, who was the defendant in that suit, was

adjudged and ordered to pay his wife the sum of \$300 in support of their infant child. This sum he was ordered to pay in installments of \$25 every three months. There is nothing said in the judgment indicating that this is the only sum which he will ever be called upon to pay in support of his child, and that it is a well-known rule of law in this state that such judgments may be opened up at any time, by appropriate proceedings, and additional allowances made, if the proof on such proceedings justifies it. Moreover, the child was not a party to that proceeding, and the judgment ordering the allowance is by no means binding on it. Notwithstanding these facts, the defendant was permitted to introduce the judgment and read it to the jury upon the trial, over the objections of the plaintiff. We think this serious error. As we shall hereafter see, the child, as a dependent upon its father, was entitled to recover the pecuniary benefits, which, as manifested by the proof, it had a right to expect from its father, who was under a legal obligation to support and supply it with necessities during its infancy, and these benefits cannot in the least be augmented or diminished by a judgment in a collateral proceeding to which the person entitled to them was in no sense a party. Whatever effect the judgment might have as between the husband and wife in regard to any sums which he might be adjudged to pay her cannot affect the rights of the child which it may have in the continued life of its father. We, therefore, think that the objections of plaintiff, in this particular, are well taken."

The principle of the right to involuntary contributions from a person having a legal duty to support has

been recognized and applied for a great number of years. In *Ingersoll v. Detroit & M. Ry. Co.*, 163 Mich. 268, 128 N. W. 227, 229, the court had before it a case wherein the trial court judge had directed a verdict against plaintiff after counsel's opening statement. In discussing the facts, the court set them down as follows:

“* * * It appears that the marriage was lawful that the child was born as a result of such marriage, that at the time the deceased was injured and died the wife did not know where he was, and that he had never contributed anything to her support nor that of the child. The plaintiff contends that contributions of a husband and father may be voluntary, or they may be forced; that the law would compel decedent to contribute to the widow during her life, and to the child during its minority; that by death she and the child lost this resource which the law gives, whether it was a voluntary, or an involuntary, contribution; that the common and statute law of Minnesota, where the marriage took place, of Wisconsin, where the widow and child resided at the time of the death, and of this state, where the death took place, would compel the decedent to support his wife and child; and that this furnishes a basis on which damages may be assessed by the jury, just as the court could assess damages, or fix liability, against decedent, had he been arraigned before it for a failure to contribute to their support. The defendant urges that no basis for damages was furnished in the opening statement of counsel; that the wife and child had no reason to expect the husband and father to contribute to their support; that damages must be proved by the circumstances, by capacity to earn,

and by disposition to contribute pecuniarily to the aid.”

It then proceeded to discuss in a scholarly fashion the law concerning the involuntary contributions as the basis for assessing damages. On this subject it states:

“It is urged by defendant that there was no basis for assessing damages. Had decedent been proceeded against to compel him to support his wife and child, the same difficulty would have been encountered; and yet we think the court would have had no difficulty after learning all of the facts to fix a reasonable basis from which to determine the amount. Had this man been killed by a negligent act, an hour after his marriage, and before he had ever contributed a cent to the support of his wife, would it be contended that she had not suffered pecuniary loss thereby? It would seem not. What would be the basis of assessing damages in such a case? We think that they would be determined by showing the circumstances, and by evidence of the probabilities, under proper rules, as in suits brought by parents to recover damages in case of the negligent death of a young child, who had never earned a dollar. *Rajnowski v. Railroad Co.*, 74 Mich. 20, 41 N. W. 847. In this case it appears that the husband had abandoned his wife through no fault of hers.

“Similar questions have been before the courts of other states. In 6 Thompson’s Commentaries on the Law of Negligence, at section 7054, the rule is stated as follows: ‘The widow is not prevented from maintaining an action for the death of her husband by negligence, by the

fact that she is living in separation from him, unless she has forfeited the right to support from him by leading an abandoned life. Nor will a child be prevented from recovering for the death of his father by the fact that the father had lived away from him for many years, and had not contributed anything to the support of his wife or child'."

* * * *

"Under the circumstances of this case should not the question of what, if any sum, might the widow and child, be reasonably expected to receive from the deceased, have been submitted to the jury? Can it be said as matter of law that the wife would never learn the whereabouts of her husband and proceed against him for support?"

The court cites several cases in support of its opinion. Two of particular interest are: *Dallas R. Co. v. Spicker*, 61 Tex. 427, 48 Am. Rep. 297, and *B. & O. R. Co. v. State, for Use of Chambers*, 81 Md. 371, 32 Atl. 201. It then concluded that the circuit court should have permitted the jury to determine the liability of defendant and assess plaintiff's damages for contributions voluntary or forced that would probably have been made by deceased in favor of the widow during her probable life, if not exceeding the probable life of decedent and for the child during its minority.

Plaintiff's requested Instruction No. 11 was in all respects a proper and accurate application of the law

of the United States and the State of Utah to the evidence before the jury. It was an instruction to which Plaintiff as matter of law was entitled. The court not only refused plaintiff's instruction but failed and neglected to instruct the jury in any way that Edith Lucas was entitled to involuntary contributions from Frank Lucas. This right to involuntary contributions is beyond possible doubt. In our research we have failed to find any case which holds that involuntary contributions should not be considered in assessing the damages to a widow, and we feel confident that there will be no authority cited by defendant which will so indicate.

Mrs. Lucas was confident that her husband would return to her. She in no way abandoned her claim for support from him, searching diligently for him, and making numerous inquiries in an attempt to discover his whereabouts. The failure of the court to instruct the jury that Mrs. Lucas was entitled to involuntary contributions left the jury without any information concerning that valuable right. We submit that the failure and refusal by the court to instruct on the right to involuntary contributions when considered together with Instruction No. 9 (J.R. 210) "that the mere fact that Edith Lucas was the legal wife of Frank Lucas at the time of his death is not sufficient evidence to prove that the plaintiff is entitled to recover any damages for his death in this action," is gross and prejudicial error depriving Edith Lucas of her most valuable right.

CONCLUSION

Plaintiff submits that the trial court committed grievous prejudicial errors, both of omission and commission in his instructions and in the erroneous admission of prejudicial evidence, and plaintiff should be granted a new trial.

Respectfully submitted,

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