

1951

# Marcella Jensen Tuttle and Richard Dale Tuttle v. Pacific Intermountain Express and Heath H. Cornette : Brief of Respondents

Utah Supreme Court

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**In the Supreme Court of the  
State of Utah**

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**MARCELLA JENSEN TUTTLE; and  
RICHARD DALE TUTTLE, a minor,  
by his Guardian ad litem, Marcella  
Jensen Tuttle,**

**Plaintiffs and Respondents,**

**vs.**

**PACIFIC INTERMOUNTAIN EX-  
PRESS COMPANY, a corporation,  
and HEATH H. CORNETTE,  
Defendants and Appellants.**

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**FILED**

**MAY 5 1951**

**Clerk, Supreme Court, Utah**

**NO. 7619**

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**RESPONDENTS' BRIEF**

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NEW CENTURY PRINTING CO., TROY, UTAH

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MARCELLA JENSEN TUTTLE; and  
RICHARD DALE TUTTLE, a minor,  
by his Guardian ad litem, Marcella  
Jensen Tuttle,

Plaintiffs and Respondents,

vs.

PACIFIC INTERMOUNTAIN EX-  
PRESS COMPANY, a corporation,  
and HEATH H. CORNETTE,

Defendants and Appellants.

NO. 7619

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## RESPONDENTS' BRIEF

The "Statement of Facts" set out in appellants' brief, and particularly that portion purporting to describe how the collision in question happened, is so distorted that we feel impelled to make a new statement, showing in detail what the evidence established. Counsel for defendants and appellants, far from fairly summarizing the evidence, or recognizing the evidence supporting the verdict of the jury, have simply mentioned carefully selected extracts of that part of the testimony which they believe supports their the-

ory, a theory rejected by the jury. Beyond that, they have stated as a fact their naked conclusions that the collision occurred as their theory suggested.

They seem not to recognize that they are not supporting the verdict of a jury in their favor, in which case there might be some justification in merely reciting the facts and conclusions favorable to them. They are endeavoring to upset the verdict of a jury squarely against them. They should not attempt to do this by closing their eyes to the record in support of the jury's verdict.

## I. STATEMENT OF FACTS

The record establishes that Dale Tuttle was a young man of splendid habits. At the time of his death he was twenty-one years of age (Tr. 173). After being discharged from the Navy, he married the plaintiff, Marcella Jensen Tuttle, whom he had known in junior high school before the war (Tr. 84). He had a good job and steady income which he devoted to family purposes (Tr. 186). At the time of his death, his wife was about four months pregnant (Tr. 187). The baby was born before the time of the trial—a boy, in the custody of, and supported by, Marcella (Tr. 187).

On the evening of January 15th, 1949, Dale Tuttle, who had had supper with his wife and her folks in Springville, left home at 8:30 p.m. for the purpose of going to Provo to take part in a bowling match. The time he left is fixed positively by various witnesses, and there was no evidence adduced to the contrary (Tr. 145, 154, 177, 183, 189). From the deceased's home to the point of the collision is 3.7 miles (Tr. 159). The night was cold, and the roads were exceedingly slick (Tr. 111, 164, 242, 395). It

was during the worst part of the most severe winter experienced in this section for many years—the winter of 1948-1949.

The collision happened just 5 or 6 minutes after Dale Tuttle left his home in Springville, bound for Provo to the north, being at 8:35 or 8:36 p.m. (Tr. 325-326). The speed recorder in the P. I. E. truck positively fixed the time of the collision, as did various witnesses (Tr. 325-326). The ambulance operator, who kept a time log, was called at 8:40 p.m., some 5 minutes after the crash (Tr. 193).

Immediately preceding 8:35 p.m., as shown by the automatic recorder in the P. I. E. truck (Plaintiffs' Ex. 16, Tr. 314) and by numerous witnesses, the defendant driver was operating his heavy equipment southward along Springville Road at a speed in excess of 50 miles per hour (Tr. 26, 35, 46, 80, 111, 279, 280, 326, 408), with his horn held down almost constantly (Tr. 31, 35, 44, 51, 79, 395), flashing his lights on low and high beam (Tr. 261) and he passed the Roberts car, the Payne car, the Stevenson car and finally the Holt-Beardall car shortly before the collision in question, causing strong wind and throwing up swirls of snow which interfered with the vision of the other drivers (Tr. 26, 35, 44, 382, 422). The evidence also shows that as he made a slight curve in the road shortly before the scene of the collision, he passed from the center line of the highway onto his left, or wrong, side and about that time, apparently lost control of his truck which went into a skid (Tr. 58, 136, 137).

The witnesses, Beardall and Holt, the latter an employee of the State Tax Commission (Tr. 134) were driving south and were passed by the defendants' truck almost immediately before the collision (Tr. 113, 137). There were

no cars proceeding south ahead of the Holt-Beardall car (Tr. 113, 135), but there was a car coming north toward them shortly before the truck passed them, which could have been only the Tuttle car (Tr. 136). Just after the truck passed the Holt-Beardall car, leaving a swirl of snow in its wake and interfering with their vision, there was a flash up ahead, the electric light wires over the road fell down and Beardall, the driver, had difficulty in stopping just short of the wires which were going down across the road (Tr. 113, 137). Beardall backed his car across the road to the east (Tr. 114, 137).

Beardall and Holt first saw the truck over on the east side of the road and a passenger car, later identified as the Tuttle car, north and farther east from it. There were no other cars in that vicinity and the Beardall-Holt car was the first at the scene of the accident. Beardall, on the east side of the highway, threw his headlights on the wrecked car, and Holt and Beardall got out to try to help (Tr. 114, 137). Their car was seen on the east side by a number of witnesses, and they were identified by others as being there when they came up (Tr. 36, 37, 97, 423, 424). Shortly after Holt and Beardall pulled their car over to the east side of the highway, Mrs. Ellis and Mr. Stevenson drove up to the wires in a car driven by the latter (Tr. 97, 116). Because they were conscious of another car being ahead of them proceeding south (the Holt-Beardall car), and because there was no other car on the right-hand, or west, side of the road when they drove up, they concluded that the car involved in the accident was the car which had been in front of them, not noticing at the time the Holt-Beardall car over on the east side of the highway (Tr. 92, 107, 409). They so mentioned their impression to the officer in the

immediate presence of the truck driver, and on this mistaken impression the defense of the defendants is based—that the passenger car involved in the crash was going south (Tr. 240, 241).

The investigating officer based his preliminary investigation on such mistaken impression, but when he had an opportunity of learning all the facts, he changed his report to show that the Tuttle car was proceeding north (Tr. 241). The investigator for the defendant company joined the driver at the home of the impressionable McPhies (Tr. 306) who also subscribed to this erroneous impression, and the truck driver, the McPhies and the investigator must have spent some time together. The investigator took statements from various witnesses in his own handwriting in which he omitted many things which were told him that appeared favorable to the deceased (Tr. 81, 105, 429, 432).

In the meantime, Tuttle's folks, who knew the direction in which he was proceeding, and Holt and Beardall, who knew he was not driving south, were at the hospital. Holt and Beardall, as soon as Tuttle was identified, left the scene to notify his wife of the tragedy. It was only after the investigating officer at the hospital was able to talk to Holt and Beardall that he obtained the truth as to the direction the Tuttle car was going, and he then changed his report to show that it was going north (Tr. 240, 241, 254).

Afterwards, Stevenson also indicated to Mrs. Ellis that they were mistaken in their impression that the Tuttle car was the one in front of them going south (Tr. 107), and Mrs. Ellis positively testified that the car in front of them was about a block ahead, and that her original impression was erroneous, the Holt-Beardall car being on the east side of the road (Tr. 97, 108). The testimony of Cornette, the

driver of the defendant vehicle, and that of the McPhies, who persisted in the fiction based upon Stevenson's erroneous impression, was so contradictory, unbelievable and contrary to established physical facts, that the jury could not have given any credence to it.

Since the peculiar facts in the case will dispose of most of the law arguments of defendants, we take the liberty of giving further details with specific reference to the record.

The P. I. E. driver had left his home in South Salt Lake City or Murray, Utah, and driven to the scene of the accident, a distance of 41 miles, in 1 hour and 10 minutes (Tr. 316). The gross weight of the P. I. E. outfit was between sixty and sixty-four thousand pounds (Tr. 260). The location of the accident was 3.7 miles north of Dale Tuttle's home on the main highway between Springville and Provo (Tr. 159) and was 1.6 miles south of the semaphore light at Seventh East and Third South Streets in Provo, Utah (Tr. 159) which is about 10 blocks from downtown Provo.

The evening of the collision, the P. I. E. truck passed Charles M. Roberts, one of the witnesses for the plaintiff, going south, about  $\frac{3}{4}$  of a mile north of the collision (Tr. 25). The P. I. E. truck was going at a high rate of speed (Tr. 26), was blowing its horn, and Roberts pulled off the main part of the road into a snow bank; the snow from the P. I. E. truck covered the windshield and headlights and Roberts had to get off the highway and wipe off the windshield before he could go on (Tr. 26).

Just prior to the accident, the P. I. E. truck passed Douglas Payne, another witness for the plaintiffs, who was delivering papers for The Deseret News. The truck passed Payne about a block and a half north of "Lou's Place." Payne heard a loud blast of the horn two or three times

and the truck came by, going pretty fast and blew snow and wind inside of the car (Tr. 35). The truck went up the road with a swirl of snow following the back of the truck (Tr. 36). Payne thought the truck was going about 50 miles an hour (Tr. 35). When Payne got to the scene of the accident, he saw a car parked on the east side of the road, facing south, and he parked behind it (Tr. 36, 37). This car was the Holt-Beardall car.

Dellis Elliott and his brother, Gordon, just before the collision, were standing on the road about a block north of "Lou's Place," when after sounding its horn, the P. I. E. truck passed a car just opposite Dellis, just as the car was passing (Tr. 45). There were one or two other cars fifty yards behind the car passed near Dellis Elliott (Tr. 47). At the time the truck passed Dellis Elliott, there were no other cars ahead of the truck (Tr. 51). The truck didn't honk any more after it passed Dellis Elliott (Tr. 51).

Jean Elliott, the mother of Dellis and Gordon, stated that her boys were hitchhiking a ride to Springville to go to the basketball game, and that when she heard a loud honking, she was afraid about the boys being out on the road too far. She went out on the porch of her home and saw the truck passing a car near a street light in front of their place (Tr. 54, 55, 56).

Gordon Elliott, brother of Dellis, testified that when the truck passed them, it was passing another car (Tr. 56). He testified that the truck was traveling in the middle of the road (Tr. 56), and that the truck was more to the east of the road when it passed him (Tr. 74); that it was most east of center (Tr. 74); and when it passed them, it cut across the bend in the road to the east side (Tr. 75).

Carol Ellis testified that she was riding in a car with

C. E. Stevenson the night of the collision and that they were following another car (Tr. 79). That she heard a horn blowing somewhere behind them and the truck passed them in the middle of the road going about 50 or 55 miles an hour (Tr. 80). After the truck passed them, so testified Mrs. Ellis, it started swaying (Tr. 87). She and Stevenson drove up to the wire which had fallen across the road and when they arrived at the scene of the accident, there was another car backed on the opposite (east) side of the road facing the wreck (Tr. 82). Mrs. Ellis testified that she first thought that the car they had been following was the car involved in the accident (Tr. 90), but changed her mind later when she talked to Mr. Stevenson (Tr. 107). She definitely recalled seeing a car there that night when they first arrived, but did not know whether it was the one they had been following, but she did see a car with its headlights on (Tr. 97).

Clifford Beardall, another witness for the plaintiffs, testified that the night of the accident, he was accompanied by Ernest L. Holt and was driving in the vicinity of Lou's Place when the truck passed him (Tr. 110-111) and that when it passed him, the wind caused a movement of his car (Tr. 111). He further testified that the truck was over the center of the highway (Tr. 112). Beardall testified that there was no car in front of him going south at the time the truck passed him (Tr. 113). He stopped his car about eight inches from the wires as they fell down; he immediately backed his car to the east and pulled up until his lights hit the scene of the accident (Tr. 114). At the time of his arrival, there was no one at the scene of the accident and after observing the person in the wrecked car, he went to direct traffic which was then coming both ways (Tr. 116).

Beardall further testified that he at first didn't recognize the deceased (Tr. 115) but later learned that it was Dale Tuttle (Tr. 118), and as soon as Tuttle was put into the ambulance, he went to Springville to notify his family (Tr. 120).

Ernest L. Holt, the passenger in the Beardall car, testified that the only other vehicle in front of them was one going over the Infirmary Hill towards Springville, where he could just see its tail lights (Tr. 135). Holt has been District Auditor of the Provo office of the State Tax Commission for 13 years (Tr. 134). He testified that the truck passed them near Lou's Place and when it passed them it was straddling the center line, and as it went on, it went over further to the east side of the highway (Tr. 136). He testified that just before the truck passed, there was a car coming from the south about half-way down the Infirmary Hill; after the truck passed the Beardall automobile it went over into the inside lane of the north-bound traffic and after that, there was a flash of light and he saw a wire fall across the highway and Holt called Beardall's attention to stop the car (Tr. 137). Holt testified that when they arrived at the scene of the accident and backed on the east of the highway, no one else had arrived at the scene of the accident (Tr. 136).

Holt further testified that shortly after they got over to the east side of the highway, the cars started coming but they had sufficient time to back the Beardall car over and get the lights on the wreck before any other cars approached (Tr. 136).

Elmer Roberts, a witness for the plaintiffs, who was called on plaintiffs' rebuttal, testified that he had been one of the pedestrians accompanying Mr. and Mrs. McPhie, witnesses for the defendants, and that when he ran up to

the scene of the accident, Mr. Beardall was standing out in the middle of the road, although he didn't recall seeing Mr. Beardall's automobile backed on the east, but did know that there was light on the scene of the accident and it could have been from headlights of a car (Tr. 423 and 424).

Although none of the witnesses for the plaintiffs claimed to have seen the actual impact, except for the flash of lights, their testimony was clear and convincing that there was no impact on the west side of the highway and no passenger car driving south where the impact occurred. Holt saw the car coming from the south toward the north immediately prior to the impact and that was the only car in that vicinity and could have been none other than the Tuttle car as there were no other cars there when Holt and Beardall arrived. It is true that some of the witnesses for the defendants believed that Stevenson, who was traveling south, had been following the car in which the deceased was riding, and that some of the witnesses for the defendants claimed to have seen the impact, but in examining the testimony of the witnesses who claimed to have seen the impact, it was clearly demonstrated that the collision could not have happened in the way they testified; that the witnesses were subject to false impressions and the only reasonable conclusion that could be reached by the jury was that the Tuttle automobile at the time of the impact was proceeding north.

From an examination of plaintiffs' Ex. GG, it will be seen that the point at which the Elliott boys were standing when the truck passed them was approximately 1,500 feet from the point of impact and that Lou's Place was approximately 1,000 to 1,100 feet from the point of the impact. The testimony of the Elliott boys, and particularly Dellis

Elliott, was that there was no other car in front of the car that the truck passed near the Elliott boys; thus Holt's and Beardall's testimony was fully corroborated.

## II. STATEMENT OF POINTS

We will follow the general order of treatment specified in appellants' brief, but will present our argument under the three major headings, since it is impractical in many respects to segregate the material under the sub-headings set out by appellants. We shall also consider the points concerning the denial of a directed verdict and the denial of a new trial under the same heading.

Respondents claim that:

1. Defendants' motion for a directed verdict was properly denied by the court, as was defendant's motion for a new trial.

- (a) The collision was caused by the defendants' own negligence and was not contributed to by the deceased.

- (b) The jury found from ample evidence that the deceased was traveling north, according to the theory of the plaintiffs.

- (c) Proximate cause and all other necessary elements of plaintiffs' case are fully and amply supported by the evidence.

2. The court's instructions when considered as a whole, were correct, and fully and correctly set forth the theories of both plaintiffs and defendants and the law applicable thereto, and no prejudicial error was involved in any instruction.

3. Defendants' counsel on cross-examination, himself, brought out the matter of insurance in response to his own question, and the mention of insurance was not prejudicial in any respect.

**1. Defendants' motion for a directed verdict and a new trial were properly denied.**

Counsel for defendants cites numerous cases in support of the proposition that a motorist proceeding in the same direction as a car following, who makes a left turn directly in front of the oncoming motorist, is either solely negligent or at least contributorily negligent. With this proposition, we have no quarrel. Both sides of the controversy in this case in the argument, agreed that the material question and the ultimate fact to be determined by the jury was whether the decedent, just, prior to the collision was driving south or was driving north. This question was submitted to the jury and the jury determined that the decedent was traveling north just prior to the impact; consequently, the cases cited by counsel for the defendants could have no bearing upon the ultimate decision in this case, and we submit counsel are merely trying to cloud the issue here. Not one case has been cited by the defendants to indicate that if the deceased were traveling north, recovery should not be had.

We admit now, and we conceded at the trial, that if the jury found that immediately prior to the collision, the Tuttle car was proceeding south and turned directly in front of the oncoming P. I. E. truck, as claimed by the defendants, the defendants would not be liable. The evidence, however, abundantly established the opposite.

Defendants' motion for a directed verdict, and motion

for a new trial should not have been granted and were properly denied because, even if the evidence did not show beyond all reasonable doubt that the deceased was traveling north, it did show by a quantum of proof that is convincing to reasonable men that he was going north. The evidence further tends to show that the sole defense of the defendants was based upon a mere mistake or fiction.

There is, in fact, no contributory negligence, either claimed, alleged or proved on the theory that the deceased was driving northward. Every claim of contributory negligence made by defendants is predicated on the fiction that the deceased was driving south. There being abundant evidence to support the fact that he was going north, and the jury so having found, there is not even a claim or pleading of any kind to support appellants' arguments of contributory negligence.

Plaintiffs abundantly established that the deceased was traveling north at the time of the collision by the destination of the deceased as Provo immediately before the collision, by the time element as to when he left Springville, by positive testimony that there was no vehicle going south in front of the Beardall-Holt car, and by the positive testimony of Holt that there was a car approaching the scene from the south going north immediately prior to the collision, which could have been only the Tuttle car. The physical facts themselves effectually negated any idea that the Tuttle car, being, when it stopped, considerably north and east of the tractor and trailer, could have been going south. No one, moreover, can question that the deceased met his death as a result of the collision with the P. I. E. truck.

Defendants say that the verdict should not be based upon speculative evidence. To that we may agree. But every necessary fact is established by affirmative evidence. Certainly, circumstantial evidence is often more convincing than direct.

Where is the assumed or supposed fact in this case which is not confirmed by proof? There is no question but that the deceased met his death as a result of a collision with the P. I. E. truck. It is positively established that there were no cars in front of the Beardall-Holt car on the west side of the street, but that there was a car approaching from the south toward the north just before the collision which could have been none other than the Tuttle car. The fact is abundantly established that defendant driver was speeding, crossed to the wrong side of the highway, and lost control of his vehicle, which skidded sideways.

There is no question but that the decedent was where he had a right to be, and that his death was proximately caused by the negligence of the defendants.

The proximate cause of the decedent's death is not left to conjecture. In cases cited by defendants in their brief, the death was caused in one of two ways, there being no proof as to which manner was involved. If it were caused one way, the defendants would have been responsible; if it were caused another way, the defendants would not have been responsible. In the cases cited by defendants, it could not be determined in which manner death occurred. The court held that the jury had to determine from a preponderance of the evidence in order to hold the defendant liable, that the death occurred in the manner for which the defendant would be liable. Of course, if the probabilities

are equally balanced and there is no evidence tending to show the fact, then the defendant would prevail. The cases cited by the defendants are very different from the instant case. There are no inferences based upon inferences here.

It has been held that in an action for negligently causing the death of a brakeman, plaintiff may rely on physical facts to show that the train moved while deceased was between the cars, though the conductor testified negatively that he did not observe it move. *Perrin v. Union Pac. R. Co.*, 59 Utah 1, 201 Pac. 405; certiorari denied, 42 S. Ct. 270, 257 U. S. 661.

If there is evidence from which jury, as reasonable men, can find the existence of a disputed fact, it is not "speculation" simply because there is equally strong evidence from which they could have arrived at an opposite conclusion. *Coray v. Ogden Union Ry. & Depot Co.*, 111 Utah 541, 180 P.2d 532.

The fact finder is not always required to believe the uncontradicted testimony of a witness. *Gagos v. Industrial Commission*, 87 Utah 101, 48 P.2d 449; rev. 87 Utah 92, 39 P.2d 697.

Although the trier of facts in determining where truth lies must not arbitrarily, capriciously nor without adequate reason reject testimony, he should not accept testimony founded in ignorance, confusion, mistake, bias, prejudice or falsehood merely because no other witness testified conversely. *Jensen v. Logan City*, 96 Utah 522, 88 P.2d 549; affirming 96 Utah 53, 83 P.2d 311.

For purpose of supporting judgment, it is immaterial from which side the evidence comes. *Haycraft v. Adams*, 82 Utah 347, 24 P.2d 1110.

Where plaintiff's witness and defendants' witness give conflicting testimony, a jury is entitled to believe the testimony of plaintiff's witness. *Schlatter v. McCarthy*, \_\_\_\_\_ Utah\_\_\_\_\_, 196 P.2d 968; rehearing denied, 198 P.2d 473. *Balle v. Smith*, 81 Utah 179, 17 P.2d 224.

It has further been said that testimony contrary to uncontroverted physical facts is not substantial evidence. *Hearstrich v. Oregon Short Line R. R. Co.*, 70 Utah 552, 262 Pac. 100 .

While a jury cannot arbitrarily reject testimony, it need not accept it when it is rendered improbable or doubtful by circumstances. *Leavitt v. Thurston*, 38 Utah 351, 113 Pac. 77.

The whole defense of the defendants that the deceased was going south was originally predicated on a misunderstanding. It was not explained and never could be explained by defendants or their counsel why in the limited time between the time Dale Tuttle left his home and the scene of of the crash he would, or could, drive to, or toward Provo, then make a 180-degree turn back toward Springville, and then with this huge tractor and trailer, lights flashing and horn blowing, bearing down upon him, suddenly make another 180-degree turn directly into the path of the truck. It was never explained how the light touring car of Tuttle, if it were traveling south and turned in front of a truck going 50 miles an hour or better, could end up almost immediately east of the claimed point of impact, on the extreme east side of the road, while the truck ended up considerably to the south. Had the accident happened as defendants claimed, it is apparent that the lighter car would have been knocked farther south and to the west of the road, while it is natural that Tuttle, traveling north, and

trying to turn to the right to avoid the careening truck on the east side of the road, slid into such truck sideways, being pushed off farther north from where the truck stopped.

One has but to examine the conflicting testimony of the driver Cornette to see why the jury could not believe him or the other witnesses for the defendants. At the hearing, Cornette testified that he noticed that the first car which he passed was a light one and the second one was dark, and positively had a recollection of that before the impact (Tr. 287), but he admitted on cross-examination that he had testified at the time of the taking of his deposition sometime previous to the trial that he did not notice the color of the cars at all but just noticed there were cars, and admitted that he had testified that his observation of the Tuttle car was based on what he had seen after the accident (Tr. 301).

At the trial, Cornette testified that he didn't try to turn "in no direction" at the time of the accident but admitted that he had given a statement to the company that he applied his brake as fast as possible and that he attempted to turn to the right to avoid the other car (Tr. 304).

In reading the record, and particularly the testimony of Cornette, one cannot but feel that he was not telling the truth and in view of his testimony and the testimony of Mr. and Mrs. McPhie, setting forth occurrences that were impossible because of the physical facts, the jury concluded, and rightly, that prior to the impact, the Tuttle car was going north, and returned a verdict in favor of the plaintiffs for damages, the amount of which is not complained of by plaintiffs.

We ask the Court to carefully read the record and examine the exhibits: the pictures taken by the police officer

that night, giving some indication of the bitter, cold and slippery conditions prevailing, and the huge equipment which the defendant driver was so recklessly operating; the speed recorder of the truck showing that at the time of the impact the truck was exceeding 50 miles per hour, which may have been all right for a dry, sunny day, but by virtue of the very nature of the conditions existing that night was highly reckless under the circumstances; the pictures showing the pole near which the Tuttle vehicle stopped and the type of roadway involved; the map showing the distance farther north where the defendants' vehicle came to rest; the officer's report showing how he first fixed the direction of travel of the Tuttle car on the mistaken impression of Stevenson, but showing later how he changed the direction "south" to "north" after he had had an opportunity of talking to Beardall and Holt at the hospital and completing his investigation; the statements of witnesses taken by the defendants' investigator in his own handwriting in which he left out anything that would be favorable to plaintiffs, as shown by Holt, Beardall, Ellis and Roberts.

We ask the Court to consider that these statements were taken, beginning first at the McPhie residence where the truck driver stayed with the investigator until the early hours of the morning. We ask the Court to consider how, if the truck going more than 50 miles an hour, hit the Tuttle car as it was proceeding in the same direction and suddenly turned in front, it could, under any stretch of the imagination, shoot as almost a right angle over to the extreme east side of the highway, while the truck ended up a considerable distance to the south and not as far east.

We ask the Court to consider the admitted fact that the defendants' driver could not identify even the color of

the Tuttle car, basing his knowledge only on what he saw after the car came to rest. If the physical facts themselves, as shown by the exhibits, are considered, we believe that the defendants' version must be considered impossible. An analysis of all the evidence shows that it was impossible.

Counsel for the defendants, both in opening statement to the jury and in argument, admitted that the controlling issue, and the one which would ultimately determine the case, was the direction in which the deceased was going just prior to the impact. We reiterated counsel's statement. The jury determined that the deceased was going north. Now, counsel should not be heard to complain that the jury decided on the evidence against his contention. . The question should be, and is, the ultimate and final determination.

The case of *Larkey v. Church* (Okla) 192 Pac. 569, cited by defendants, is interesting, and the headnote sets forth pretty well the holding:

"The act of driving an automobile on the wrong side of the street, in violation of a city ordinance, at the time when an accident by collision occurs, is of itself prima facie evidence of negligence. However, that presumption of negligence may be overcome by proof; but the burden is upon the party so wrongfully using the streets to show by a preponderance of the evidence that the fact that he was driving on the wrong side of the street was not the proximate cause of the collision."

In the instant case, the record is replete with evidence that the defendant Heath Cornette was on the wrong side of the road at the time of, and just before, the impact. The jury believed that the deceased was at the time traveling north. There was no evidence to show contributory negligence on the part of the deceased—no evidence to show

that the negligence of the defendant, Heath Cornette, was not the proximate cause of the plaintiffs' damage if the jury should adopt plaintiffs' theory, which it did. All evidence and reasonable inferences therefrom are resolved most favorably to plaintiff as against a motion for a directed verdict. *Roach v. Kyremes*, \_\_\_\_\_Utah\_\_\_\_\_, 211 P.2d 181.

The trial court which heard the case denied defendants' motion for a new trial, obviously feeling that justice had been done, as indeed it has been. The court's action should not be disturbed on appeal. *Valiotis v. Utah-Apex Mining Co.*, 55 Utah 151, 184 Pac. 802. *Moser v. Zion's Co-op Mercantile Institution*, \_\_\_\_\_Utah\_\_\_\_\_, 197 P.2d 136.

## **2. The court did not err in instructing the jury.**

We first present our position in summary.

The theories of the parties were fairly and fully presented to the jury and the question resolved itself into the jury's determination of whether the Tuttle car was going north or south. There was no possibility of confusion or prejudice. Any technical objections which defendants have raised could not have been prejudicial in any respect.

The court did not err in giving instruction No. 13, and the jury could have been in no way misled by such instruction.

Instructions numbered 14 and 15 must be read in the light of other instructions and in that connection were correct. In no way could they have been prejudicial.

Defendants' requested instructions Nos. 16 and 17 were properly refused, since they were merely repetitious and the court in its instruction No. 4 gave instructions even

more favorable to the defendants, instructing the jury in effect that if the deceased were going south and turned in front of the defendants' truck, there could be no recovery in any event, no matter what the speed or manner of operation of the truck were. Also in instruction No. 11, the same matter was covered in a form more favorable to the defendants. In fact, the defendants secured instructions from the court amounting in effect to the instruction that if the deceased was driving southward, there could be no recovery in any event.

The court did not err in its instructions Nos. 6 and 9, such instructions being correct statements both standing alone and in view of other instructions; in fact, instruction No. 6 was unduly favorable to the defendants as it told the jury that if they found that the deceased was guilty of any acts of negligence pled by defendants proximately contributing to the accident, they should return "No cause of action". Defendants' requests Nos. 7 and 9 were properly rejected. Insofar as they were proper, they were covered by other instructions.

The court did not err in giving instruction No. 1. This instruction merely recited the various allegations of the parties and clearly stated that such allegations were denied by the opposing parties. There were no allegations recited concerning the conduct of the defendants of which there was not adequate evidence. On the other hand, some allegations were recited in that instruction as against plaintiffs upon which there was no evidence, such as the deceased's claimed "failing to slow down or turn out to avoid the collision." However, in view of the instructions of the court clearly defining the controlling issue and presenting the theory of each party, there was, and could be, no prejudice.

Any abstract instructions given by the court were proper statements of the law and were in no way misleading, confusing or prejudicial. They were as favorable to the defendants as to the plaintiff, and probably more so, and in view of other instructions could not have prejudiced the defendants in any way. The defendants' requests which appellants argue should have been given were merely repetitious and, in most cases, were biased and argumentative reiterations of the single theory of the defendants, that the deceased was going south. They prefixed the instruction of the court to the effect that in any event if the decedent was going south and turned in front of the truck, there could be no recovery with a lot of arguments as to why the turning in front of the truck would bar recovery, and the requests were unnecessary and improper.

Counsel for defendants object to the language in instruction No. 13 of the court and particularly "included in this duty to use due care and diligence is the duty to constantly keep a lookout not only ahead but to the sides of his vehicle." They refer to the case of *Morrison v. Perry*, 104 Utah 151, 140 P.2d 772. Even in that case, the court felt that under some circumstances, there would be required a constant lookout. The court, in view of the dangerous conditions of the road, as brought out by the evidence, could well instruct as a matter of law that there was required a constant lookout. In any event, in considering the instruction as a whole, there could be no prejudice to the defendants, for if the jury found the deceased was going south, it was instructed to find in effect for defendants, and if north, the instruction was wholly immaterial as the truck would be on the wrong side of the road.

The court did not instruct that the defendant driver

should keep a constant lookout in "every direction" as stated by counsel for the defendants, but ". . . not only ahead, but to the sides of his vehicle." That language must be given a reasonable construction.

In the instant case, the court qualified his instruction and provided that the defendants would not be liable if the other person were negligent and his negligence proximately contributed to the injury.

Instruction No. 14, to which objection is made by the defendants, only required that the defendant driver must maintain **reasonable** control over his automobile and take such measures as are **reasonable** to stop or turn to avoid a collision with other vehicles. This is no more than the law requires. The Affleck case cited by the defendants went much further and could be interpreted by a jury to state that there was an absolute duty as in insurer, to avoid injuring anyone or colliding with any person on the highway.

Taking instruction No. 15 as a whole, it cannot be seen how it could be in any way prejudicial, particularly in view of the fact that the jury obviously adopted plaintiffs' theory that the decedent was going north at the time of the impact and that the defendant Cornette was driving on the east and wrong side of the road. Defendants object to No. 15 on the claim that there was no evidence that defendant's speed was a proximate cause of the collision. Certainly the jury was instructed to find on the question of proximate cause in instruction No. 7 and the record was full of evidence of the tremendous speed of the defendant Cornette under the circumstances. If ever there was a clear case of speed as one of the proximate causes, this is it. The speed was not disputed. There was evidence that the truck of the defend-

ants started to skid prior to the impact and there was nothing to explain such skidding except speed.

The court's instruction No. 6, taken as a whole, together with the other instructions, covered the situation correctly, we believe, under the facts. If the jury believed that the deceased was going north, as they did, there would be no eye-witnesses as to any contributory negligence on the part of the deceased and he would be presumed free from negligence.

The sum and substance of the matter as to the direction in which the deceased was traveling immediately prior to the impact was presented to the jury, and was determined, and such issue was so clear and determinative that any technical error should not be deemed prejudicial. In any event, the court did not instruct the jury that the presumption in favor of due care by the deceased was evidence, and correctly instructed the jury that the burden was on the defendants to show contributory negligence on the part of the deceased and that only in the absence of evidence, did such presumption prevail. There could have been, and was, no prejudicial error in this respect.

The instructions of the court left no room for misunderstanding. The theories of the respective parties were clearly and expressly stated. In its last analysis, the primary complaint of the appellants is that the jury did not believe their theory. We say that their theory cannot be believed in view of the contrary physical facts in evidence, the time element, the testimony of Holt and Beardall, which remained unimpeached, and all the other surrounding facts which, when analyzed, were consistent only with plaintiffs' theory.

In final analysis, even though the deceased may have

had time, which he did not, to drive past the scene of the accident bound for Provo, then turn around without stopping in Provo, and then just as this big tractor and trailer, with horn blowing and lights alternately on high and low beam, bore down upon him, turn around again without any discernable reason right into its path, the theory is fantastic in and of itself. But be that as it may, at the very least there was a conflict of testimony as to the direction the Tuttle car was going, which was the whole crux of the case, and the court very clearly and properly submitted that controlling question to the jury from the standpoints of the respective parties as follows:

“No. 3. You are instructed that plaintiffs’ contention is that at the time of the accident, the deceased, Dale Tuttle, was driving an automobile north on the highway at the time and place of the accident, and that the defendant, Heath H. Cornette, was driving defendants’ truck south upon said highway in the opposite direction, and that plaintiffs further claim that the defendant Cornette carelessly and negligently turned and drove defendants’ truck across the center line, and thereby proximately causing the collision.

“If you find by a preponderance of the evidence that the defendants were negligent as claimed by the plaintiffs, the accident having occurred as claimed by the plaintiffs and that such negligence of the defendants, if any, was the proximate cause of the death of Dale Tuttle, and if you further find from the evidence that the said Dale Tuttle exercised reasonable care for his own safety and was not himself guilty of negligence contributing to his death, then you are instructed that it will be your duty to return a verdict in favor of the plaintiffs and against the defendants in this action for damages to be fixed and assessed by you in accordance with instructions as herein given.

by not considering any other instruction, that an argument can be made against it.

Defendants' requests on the question of presumption would have the jury believe that since McPhie claimed to be an eye-witness, they would in no event consider any presumption of due care, even though the jury believed that McPhie did not see the collision. The court in such event would be instructing the jury that they were bound to believe McPhie at all events, even as against the testimony of Roberts and the other evidence showing that he could not have seen what he claimed.

It was for the jury to say whether there was any credible evidence establishing the fact, and to adopt defendants' requests would have been to usurp the province of the jury and practically direct a verdict for defendants. What the court said was a correct statement of the law and the only proper way to leave the matter with the jury. Had the jury believed McPhie's evidence, the court had already instructed the jury that plaintiffs could not have recovered if the deceased were going south. In view of that, and the other instructions of the court, there was no possibility that the jury could have been misled.

There was evidence to show (a) that defendant at the time of the impact was going approximately 52 miles an hour; (b) that the driver lost control of the truck prior to the impact; (c) that when passing other cars, defendant flashed his lights from high beam to lowbeam and again on high beam, which in connection with his other actions was calculated to confuse other drivers; (d) that driving conditions were especially bad that night and that the defendant driver operated the truck recklessly under the condi-

tions; and (e) that he operated the truck on his left-hand side of the road.

The jury could well find that all of these acts contributed to the death of Dale Tuttle. There was ample evidence to support all of the allegations in the complaint. Counsel for defendants assert that “. . . certainly by no stretch of the imagination were lights a proximate cause of the collision.” With this statement we do not agree. Evidence was submitted that the defendant Cornette cut his truck across the curve; the lights of the truck would have been directly on the oncoming traffic. The flashing of the lights onto high beam, as was testified to, would have blinded the eyes of Dale Tuttle, and this cause, together with other causes about which evidence was introduced, proximately caused the death of Dale Tuttle. There is no question that there is, and was, ample evidence to support all of the allegations of negligence set forth in the complaint.

All reasonable men must agree that to pass other cars at a high speed, against oncoming traffic, with lights flashing on high and low beam, would be likely to cause an accident and would not be due care. It is a complete answer that if Dale Tuttle were going north, the defendants do not even claim they would not be liable. There could be no possible prejudice to the instructions complained of, since the direction in which the Tuttle car was proceeding fixed the liability under the peculiar circumstances of this case.

We call attention to Rule 61, Utah Rules of Civil Procedure, to the effect that no error is ground for granting a new trial or otherwise disturbing a judgment unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect which does not

affect the substantial rights of the parties. This sound principle was recognized under the statutes on procedure prior to the rule cited. 104-14-7 and 104-39-3, U. C. A. 1943.

In the case of *Fowler v. Medical Arts Building*, 112 Utah 367, 188 P.2d 711, the prevailing opinion, after admitting that at least one issue was submitted to the jury on which there was no evidence and conceding that the instructions which involved a mere repetition of ambiguous pleadings were erroneous, held that in view of the circumstances in the issues before the jury, the jury could not have been misled and the judgment was sustained.

In the case at bar, the court did not fall into the error mentioned in the *Fowler* case, except in a manner favorable to defendants. Even in instruction No. 1, the court mentioned no facts claimed by plaintiffs on which there was no evidence. The conflict between the respective theories was made clear and it was also clear that if the jury found that the deceased was going north it would return a verdict for the plaintiff, and if going south, for the defendants. No confusion or mistake could have resulted.

Abstract instructions ordinarily do not constitute reversible error. See Section 121, p. 347, "Abstract instructions in civil cases," Reid's Bransons Instructions to Juries, Vol. 1, 3rd Ed., "An abstract proposition having no application to the issues before the jury should not be given as an instruction, though correct in principle, for its tendency is to confuse and mislead but such an instruction will not ordinarily warrant a reversal unless the instruction has misled the jury to the prejudice of the complaining party." The claimed abstract instructions here did have application to the issues. There could have been no prejudice.

On the other hand, it is settled that a trial court's refusal to give requested instructions in a personal injury action is not error where the substance of those requests is embodied in the court's instructions. *Moser v. Zion's Co-op. Mercantile Institution*, \_\_\_\_\_ Utah \_\_\_\_\_, 197 P.2d 136. *Skeen v. Peterson*, \_\_\_\_\_ Utah \_\_\_\_\_, 196 P.2d 708.

The case of *Jensen v. Utah Ry. Co.*, 72 Utah 366, 270 Pac. 348, is referred to by defendants in support of their argument that prejudice will be presumed. In the *Jensen* case, which involved a number of basic errors which vitally affected the shady line between uncertain fact situations, there was no question but that the errors were such as to affect the outcome. In our case, we do not believe that there was any substantial error for the reasons stated in this brief. It furthermore appears clear that if there were any errors committed, they could not have affected the result of the case.

If the jury had found the deceased was traveling south there could have been, under the instructions, nothing but a "no cause of action" verdict; if north, not even the defendants contend that the verdict could have been in their favor. The entire brief of defendants is based on the assumption that the jury had to find that the deceased was traveling south. The facts show that he was not so traveling, and the defendants' real complaint is that the jury did not agree with defendants on this point. Had the jury found the deceased was traveling south, there could have been no other result under the instructions than a verdict for defendants, and the court in substance so instructed the jury.

Whichever view the jury took on direction, substantially determined the outcome. Any super-technical or mic-

roscopic examination of the instructions indulged in by defendants we believe comes well within the comment of the Utah Court in its decision on the re-hearing in the Jensen case, *supra*, (p. 362).

“We think the better rule is that not all committed errors in the trial of a case are presumptively or *prima facie* prejudicial for some committed errors are merely abstract, or on their face immaterial, or otherwise are not in and of themselves calculated to do harm.”

**3. Plaintiffs' counsel did not wrongfully or otherwise inject insurance indemnification into the case.**

The fact is that on cross-examination of an opposing witness, counsel for the defendants, himself, first brought out the question of insurance. Any mention was occasioned by defendants. Plaintiffs' counsel carefully avoided any reference to insurance or any questions designed to produce any mention. Interrogatories on insurance were even avoided by plaintiff on *voir dire*.

The fact that the corporate defendant was a great company with whom all were familiar would make it unlikely that the question of insurance could make any difference anyway. The jury was properly instructed to disregard any mention of insurance by the witness Ellis, so originated by defendants' own counsel on cross-examination.

In the instant case, after the question by counsel for defendants on cross-examination which first brought out the mention of insurance as quoted on page 61 of plaintiffs' brief, it is true that plaintiffs' counsel examined Mrs. Ellis and that she answered as quoted in plaintiff's brief. However, there was nothing in the context of the questions of plaintiffs' counsel which would enable him to anticipate

that there would be a further reference to insurance. We quote the questions leading up to the last reference:

"Q. About how long did Mr. Kunz talk to you, Mrs. Ellis?

A. Oh, it was quite some time.

Q. Talk to you more than once?

A. No, he didn't. Just the once.

Q. Where were you working at the time?

A. I was working at Provo Clinical Laboratory.

Q. What were you doing there?

A. Assisting Mr. Creer with book work, and clinical.

Q. Was this during office hours?

A. Yes, it was.

Q. What did he say to you?"

Plaintiffs' counsel never referred to Mr. Kunz as an insurance adjuster, as intimated by defendants' counsel, and any mention of insurance was a surprise to both counsel—certainly to plaintiffs'. Mrs. Ellis, previously to the time mentioned by counsel for the defendants, had testified that she had not talked to the police officer who had come down to the scene of the accident (Tr. 88) and then, as counsel stated, the questions were asked which gave rise to the alleged objectionable statement with respect to an insurance investigator (Tr. 90). In examining the record, we cannot even now, ascertain to whom counsel referred when he asked, "Who did you make that statement to?" There had been a lot of questions asked between the time that counsel had been talking about the police officer and the time that he asked his question. The answer was no fault of the plaintiffs nor of their counsel; it came as much of a surprise to plaintiffs as to defendants. There was no intent on the

part of plaintiffs or counsel that such a statement should be made, nor any knowledge thereof. The case of *Morrison v. Perry*, 104 Utah 151, 140 P.2d 772, cited by defendants herein was very much different. The court in this case stated on page 779, para. 17:

“It is apparent the only purpose for such persistent questioning was to tell the jury that defendant was insured. From the record it appears that plaintiff’s counsel knew that Mr. Williams was employed by the insurance company and consequently he could anticipate the witness’ answer. We need not cite authority for the proposition that the question of indemnity insurance in a case such as this is irrelevant. It is also a well known fact that juries are influenced in determining liability and the amount of recovery by the fact that an insurance company would pay the damages. By this we do not say that in some cases a reference to insurance is not proper.”

In the *Morrison* case, the fact was apparent that the questioning was for the apparent purpose of getting the matter of insurance before the jury. No such thing existed in this case. In fact, defendants’ contention is somewhat far-fetched when you come right down to it, because defendants’ own question brought the reference out. Moreover, the jury was properly instructed to disregard the reference. We also have the fact that the defendant, being a huge interstate transport company, could hardly have been prejudiced by the mention of insurance.

The whole essence of all the cases cited by the defendants in connection with this matter, including the Arizona case of *Consolidated Motors, Inc. v. Ketcham*, 66 P.2d 246, hinges on the matter of intention and design to bring out the matter of insurance. It would be a peculiar commen-

tary, if the defendants in this case, when the case has gone against them, after they, unintentionally or otherwise, brought out the matter of insurance, could successfully assert that their own mention of insurance by a witness was reversible error.

The case of *Poland v. Dunbar* (Maine) 157 Atl. 381, cited by defendants, emphasized this view as to the intent and design to bring out the matter of insurance. In reading the cases cited by defendants, it may be seen that in all of them there has been such design and intent to bring out the matter of the insurance. That is the thing that is condemned by the courts. In addition, in the *Tuttle* case at bar, the matter was ordered stricken from the record by the court. The cases examined, for the most part, treat situations where the plaintiff's counsel elicits the answers. Here, there could be no question of prejudice anyway, for the P. I. E. corporation, as the jury well knew, and as pointed out above, was financially responsible for any verdict.

In the case of *Hankins v. Hall* (Okla) 54 P.2d 609, cited by defendants, the determinative question seemed to be the matter of whether or not the plaintiff was responsible therefor.

In 56 ALR 1418, and following, there is an annotation covering the matter. On page 1451, the rule is stated as follows:

“Obviously, information volunteered by a witness to the effect that the defendant carries liability insurance is as harmful and prejudicial as responsive testimony to that effect, and should be promptly stricken out, yet, as a general rule, the admission of voluntary unresponsive statements of this kind are not regarded as reversible error, even when made by the plaintiff or

his witnesses, if the court takes prompt action to eradicate such statements, although if the plaintiff himself makes such statement after admonition by the court, there is reversible error, and some cases hold that the mere statements by the plaintiff that defendant carries liability insurance is reversible error."

In the Tuttle case, there was a mere voluntary statement of a witness, initially brought out by the defendants themselves on cross-examination, as to an insurance man.

On pages 1488-9 of the last mentioned annotation, there appears the follownig statement:

"Many courts take the position that if the fact that the defendant is insured, or facts leading to the inference that he is insured, come out naturally as an incident to a lawful inquiry without a wilful attempt to bring in this incompetent evidence, no reversible error occurs, even though they are not strictly relevant or competent. And this would seem a most reasonable and just view to take of the matter; but a few courts go to the extreme of holding that the mere mention of insurance in the course of a trial is so prejudicial as to require a reversal (which the note refers to as including Oklahoma from which jurisdiction counsel for defendants have referred to cases) even where offered to discredit a witness, the theory being that, while this evidence may be logically relevant, it is inadmissible because it will result in confusion of issues of undue prejudice. But, as said by the Texas Court of Appeals, if any court has held that the mere mention of an insurance company in a personal injury or death case is sufficient to reverse the judgment, whether or not such mention had any effect on the case, it is best not to follow it, and to return to the domain of common sense and reason."

To the same effect are the annotations in 74 ALR 849, 95 ALR 388 and 105 ALR 1088. In the annotation in 95 ALR 388, at page 393, reference is made to the case of *Allen v. Tatum*, 11 N. J. Mis. R. 666, 167 A. 668, in which it was held that a denial of a mistrial was proper after a witness for plaintiff had said, when asked upon cross-examination why he had made a certain statement, "Just to get rid of the insurance man, I guess", plaintiff having made no attempt to benefit by such mention of insurance and the trial court having charged the jury to disregard it.

Of particular note here is the case *Balle v. Smith*, 81 Utah 179, 17 P.2d 224, cited in the annotation 95 ALR 388; in that certain case the court said (P. 231) referring to a statement that the defendant was covered by insurance:

"Whether the making of such remark is such misconduct as required a reversal depends upon the facts and circumstances of the case, and particularly upon whether it was made for the purpose of injecting the subject of defendant's indemnity to prejudice the jury."

We call attention to the following cases as mentioned in the annotation in 105 ALR 1324:

"Plaintiff's voluntary reply to a question asked by defendant's counsel as to whether she had signed a statement, that she signed on for defendant's insurance man, having come naturally to a question that was not directed to any specific statement, was held not objectionable, and her later similar reply on redirect examination by her own counsel was held competent to show the circumstances under which a particular statement was made, the situation having been invited by defendant, in *Kaley v. Huntley* (1935). \_\_\_\_\_ App. \_\_\_\_\_, 88 S. W. 2d 200.

"A plaintiff's testimony, when cross-examined by defendant's attorney, that the latter had stated that he could not take plaintiff's case because the insurance company had offered to employ him in the case, was said to have been clearly invited, and any error from its introduction was held cured by the court's instruction to disregard it, in *Clark v. Patterson* (1935) 190 Ark. 148, 77 S. W. 2d 978 (master and servant case).

"And the fact that the suggestion of insurance was first brought out upon defendant's cross-examination of plaintiff, in explaining how he happened to sign a statement at the request of a man who said he represented an insurance company, was held to render innocuous a later question to plaintiff, by his own counsel, asking whether the man said that he was an insurance adjuster, and also unanticipated testimony of another witness as to defendant having said that he carried insurance, the jury having been instructed to disregard such question and testimony, in *Raymond v. Sternberger* (1935) 116 P. Super. Ct. 451, 176 A. 787."

There seems no possible merit in defendants' contention.

### CONCLUSION

Appellants' entire case is predicated on the fiction that Stevenson followed the Tuttle car, when in fact, he was following the Holt-Beardall car. Laboring under the erroneous assumption, Stevenson commented at the scene of the wreck that he had followed the car involved in the collision, which comment was seized up by the truck driver as an "out" from an entirely hopeless situation. The impressions of the witnesses McPhies were predicated upon such fiction. The investigators for the trucking company who spent considerable time with the driver and McPhies had

this fiction in mind, while the Tuttles and Holt and Beardall, who knew the direction Dale Tuttle was traveling, were locating Tuttle's people and at the hospital. The officer, who at first talked only to the truck driver and thus with this mistaken impression in mind, originally reported in accordance therewith, but when he heard both viewpoints, changed his report to show the fact that the deceased was traveling north. The theory of the appellants is a physical impossibility, for if the vehicles had been traveling in the same direction, the lighter vehicle, hit broadside, would have been knocked farther to the south and to the right, whereas in fact, it stopped considerably north of the truck. The markings on the highway show that the Tuttle car was going north, since the scuffing on the road was about at right angles to where the Tuttle car came to rest.

The time element and the proved intentions and destination of the deceased, confirm this. The testimony of Beardall and Holt, as corroborated by numerous other witnesses, including Mrs. Ellis, who rode with Mr. Stevenson, shows clearly that the Holt-Beardall car was in head of the Stevenson car and that when the collision occurred, the Holt-Beardall car immediately backed over to the east of the road and parked; whereas Stevenson, who came up later, stopped on the west side, saw no car in front of him on the west and assumed that the car he had been following was involved. The testimony is positive that there was no car on the west side of the road, but a car was approaching on the east side of the road coming north, which could have been only the Tuttle car. There is no question but that Tuttle met his death in the collision and that the defendant vehicle was on the wrong side of the road and out of control at the time and prior thereto.

The defendants cannot deny that defendants' driver

was grossly negligent. His negligence was calculated to, and did, cause death in view of the hazards existing at the time. The plaintiff's widow and her infant child were deprived of their husband and father by such negligence. They are entitled to recover.

The entire defense was based upon the fiction that the deceased was traveling south. The arguments on appeal in defendants' brief are premised on the assumption that the deceased was going south, and his numerous cases principally relate to negligence under such circumstances, the law of which we do not dispute and never have disputed. Not one case is cited, nor argument advanced by defendants in their brief indicating that if the deceased were traveling north, there should be no recovery. No argument can be so advanced. The case has already been tried twice at a great burden to all parties, but particularly to the widow.

No claim is made that the judgment is excessive.

Because of abundant evidence, fully establishing all necessary elements of plaintiffs' case, the defendants' motions for a directed verdict and for a new trial were properly denied.

The court did not commit prejudicial error in its instructions, and the issues were fairly presented to the jury.

No prejudicial or any error was committed in connection with insurance.

The judgment is a just and proper one. It should be affirmed with costs to respondents.

Respectfully submitted,

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