

1951

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

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, a corporation, and  
HEATH H. CORNETTE,

*Defendants and Appellants.*

Case No.  
7619

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APPELLANTS' REPLY BRIEF

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FILED

AUG 7 - 1951

STEWART, CANNON & HANSON,  
E. F. BALDWIN, JR.

Clerk, Supreme Court, Utah

*Attorneys for Defendants  
and Appellants.*

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## APPELLANT'S REPLY BRIEF

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### I

#### RESPONDENTS' STATEMENT OF FACTS

When there are eye-witnesses to an accident, including disinterested witnesses who actually saw how the accident occurred, there is no reason to guess or assume that one of the vehicles (in this instance the Tuttle car) was going in the opposite direction to which it was actually travelling at the very time of the accident. There is no question in this case but what the McPhies,

being close to the scene of the accident and walking in the same direction as the Tuttle car was travelling, saw how it occurred. Their testimony is corroborated by the physical facts and other witnesses, namely, Stevenson, Cornette, and we might add Carol Ellis as evidenced on her cross examination.

Much of what we could say here is set forth in our original brief, including specific excerpts from the evidence. Counsel for respondents has, however, indulged in numerous statements and conclusions which appear more calculated to confuse and distort the actual facts than enlighten the court. Much is directed to sympathy and collateral matters.

It is without dispute, and counsel for respondents agrees, that ALL WITNESSES WHO ACTUALLY SAW AND WITNESSED THE COLLISION (and they were in the immediate vicinity) testified that the Tuttle car, travelling near the west edge of the highway, suddenly turned as though making a U turn immediately in front of defendants' truck. That was the actual cause of the collision.

NOTIONS AND SUPPOSITIONS OF COUNSEL DO NOT DISPEL THESE VISIBLE FACTS. Such would be to accept speculation as against the clear and undisputed testimony of ALL WITNESSES who actually saw the accident occur. THERE IS NO REASON TO SPECULATE WHEN DISINTERESTED WITNESSES OBSERVED WHAT HAPPENED. ACTUAL PROBATIVE FACTS SHOULD BE DISTINGUISHED FROM SPECULATION AND BARE HYPOTHESES.

Without unnecessarily duplicating the matter stated in our original brief, but to illustrate the far-fetched notions and suppositions of counsel, we would like to call attention to the location of the various witnesses with relation to the place of the actual collision, and the various distances involved. It is frequently helpful in visualizing general locations to refer to the maps and drawings.

In our original brief, we inserted a photostatic copy of the large map, plaintiffs' Exhibition "GG". Perhaps here we should make the observation that in order to get the exhibit in the brief, it is of necessity smaller than the original, about one-fourth in size. It also appears the photographer was unable to get in the extreme ends of the map. So, in measuring and calculating actual distances, such measurement should be taken from the original, unless the substantially reduced size is taken into account.

The full details of Exhibit "FF", the smaller map, although substantially duplicated on the top of Exhibit "GG", prepared by plaintiff, was drawn to a very small scale; one inch equals 100 feet. Being 41 inches in length, it represents the total distance along the actual highway of 4100 feet, practically a mile (5,280 feet). The scale is so small that the actual four paved traffic lanes are not shown, the two outside lines being an inch in width, representing the entire right of way to the fence lines, or 100 feet in actual width on the ground. (T. 13)

It should further be observed as to Exhibit "FF"

that there is a small oblong area in the approximate center of the map indicated by heavy dotted lines and which measures on the exhibit 4x2 inches. It is within this small area that the collision occurred. Such area is shown in greater detail on the larger map shown on the bottom of Exhibit "GG", the paved lanes of traffic being there shown. The larger map is drawn to the scale of one inch equals six feet, nearly 17 times larger than the small map; the large one represents an over-all distance of 400 or 410 feet on the actual highway or ground. This larger scaled map is simply an enlargement of the small 4x2 inches area indicated on the small map (Exhibit "FF"), and the McPhie residence is located within such area. (See plaintiffs' original Exhibit "FF") The brass monument shown on Exhibit "FF" is not the brass monument where the collision occurred. There was another brass monument near the collision, shown only on the enlarged map (bottom of Exhibit "GG").

#### NO NORTHBOUND CAR WAS INVOLVED IN THE ACCIDENT

When one considers the extreme ends to which counsel went in his efforts to prove that the Tuttle car was travelling north, the use of such a small scaled map, Exhibit "FF", is self-evident. Respondents' claims are based solely upon the notion advanced that the Tuttle car was going north. YET NO ONE SAW A NORTHBOUND CAR AT OR NEAR THE IMMEDIATE VICINITY OF THE COLLISION NOR ANY SUCH CAR ACTUALLY INVOLVED IN THE COL-



LISION. Respondents' suppositions are based upon the isolated statement of one witness, namely Ernest L. Holt, that he saw HEADLIGHTS of a northbound vehicle ABOUT THE CENTER OF THE COUNTY INFIRMARY HILL. Holt was riding in a car with Clifford Beardall, a close friend of deceased and deceased's family. As to his actual observations, we quote his testimony:

"Q. I see. Now were there any cars, or did you notice any cars southward, or northward bound toward Provo?

"A. There was one car coming towards Provo.

"Q. Where was that? A. It was — oh, I'd say about halfway down the Infirmary Hill.

"Q. And do you know, when you made that observation whether it was before or after the truck passed? A. Before the truck passed." (T-136)

With respect to when the truck passed, he testified on cross-examination:

"Q. I think you told us that this truck passed you just a little south of Lou's Place? A. I said in the vicinity of Lou's Place.

"Q. Well, I think you did. Were you north or south of Lou's Place. A. I WOULDN'T BE SURE." (T-140)

And, indeed, he wasn't and couldn't be sure.

Referring back to the map, plaintiffs' Exhibit "FF" (or see the upper portion of plaintiffs' Exhibit "GG") and measuring the scale, we observe it is 1162

feet from Lou's Place to the approximate point of collision and another 18 or 19 inches on the map, or 1800 to 1900 feet, to the approximate middle of the Infirmary Hill. Totalling these distances, there was not less than 2900 to 3000 feet (over one-half mile) that even the headlights of any northbound car was claimed to have been seen or observed. With many cars on the well-travelled highway at night, it is only likely, (perhaps more likely than not), that someone within nearly a mile's distance would claim to have seen northbound lights of some vehicle at some remote point. Being at night, it couldn't really be known (if lights were seen and no other witness saw any) whether it was the Tuttle vehicle or even if it was a passenger car. Certainly, it seems the height of speculation to assume that such car was involved in the accident when there is no evidence that this or any northbound car was in the vicinity of the collision. MR. HOLT DID NOT SEE THE LIGHTS THEREAFTER, and it is just as likely that the lights observed belonged to the automobile that was seen by Mrs. McPhie after the accident which came from the south towards the north and stopped just south of defendants' truck. (T-332, 337) She said, "It was stopping at that time, about the time that we arrived there, the car from the south driving north". (T-337)

We might add another observation concerning actual distances. Holt did not know how far north of Lou's Place he was when he claimed to have seen the headlights on the Infirmary Hill. The truck would necessarily have had to have passed him, Holt, a sub-

stantial distance north of Lou's or, otherwise, such headlights would have had to have travelled substantially in excess of 50 m.p.h. to have met the truck at the McPhie's residence, the place of collision.

It is a well established law that a WITNESS' TESTIMONY ON DIRECT EXAMINATION IS NO STRONGER THAN AS MODIFIED OR LIMITED BY HIS FURTHER EXAMINATION OR BY HIS CROSS EXAMINATION.

*Porter v. Hunter*, 60 Utah 222, 207 P 153.

*Edwards v. Clark*, et al, 96 Utah 121, 83 P(2) 1021.

*Putnam v. Industrial Commission*, et al, 80 Utah 187, 14 P(2) 973.

While we may be necessarily repeating some of our summary of the evidence given in our original brief, we wish to further point out the remote and speculative nature of the conclusions of counsel for respondents viewed in the light of this well-established rule.

The negative character of the testimony of the witnesses Charles M. Roberts, Douglas A. Payne, Jean Elliott and Dellis and Gordon Elliott, her two boys, was brought out at page 34 of our original brief. In view of counsel's insistence, however, we would like to quote further from the actual record. Counsel for respondents, through these friendly witnesses and leading and suggestive questions, elicited general statements, estimates if the court please, to the effect that the truck as it passed was travelling approximately 50 m.p.h., and in passing, may have passed approximately near

the center of the highway. THEY ALL ADMITTED THEY DID NOT SEE THE COLLISION AND ALL OF THEM WERE SUBSTANTIALLY OVER ONE-FOURTH OF A MILE OR MORE FROM THE SCENE.

Perhaps it should be mentioned that the Charles M. Roberts here was not the Elmer M. Roberts walking with the McPhies near the accident. He was travelling in a car about 20 m.p.h. (T-26) three-fourths of a mile north of the accident. (T-25) He did not see the accident and later, as to when he arrived at the scene, he said, "When I got out there the condition was there: THAT'S ALL I KNOW ABOUT THAT". (T-26)

Douglas A Payne was delivering papers for the Deseret News about a block and a half north of Lou's Place (or approximately three Salt Lake City blocks from the scene of the collision). No claim was made that he saw the accident. We quote:

"Q. How long did you observe that truck? The P.I.E. outfit. A. I couldn't see it after it got up the road about a block and a half or two blocks. I DIDN'T SEE IT AFTER THAT." (T-35)

The Elliotts lived on the west side of the highway about 1700 or 1800 feet north of the accident. The two boys were on their way to Springville and had gotten out on the west edge of the highway. Their mother, Jean Elliott, was produced by plaintiff as a witness. She had been concerned about the boys and came out on her front porch and saw the truck pass. She did not

claim to have seen the accident. (T-53-55)

As to the two Elliott boys, Dellis explained that they were between their home and the Petrofesa's residence. This was over 1500 feet, or substantially over one-fourth of a mile, from the place of accident. (An X and the initials G.E. were placed on the upper part of Exhibit "GG" to illustrate their general location). Dellis testified they were going to Springville to attend a dance. He observed the truck passed, and testified further:

"Q. How many cars had gone past going south while you were there? A. Going south?

"Q. Yes. Going toward Springville. A. Well, I don't know.

"Q. Would you have any estimate? A. Why, I wasn't counting the cars. We was looking for a ride. But in ten minutes how many cars can go by on a main highway?

"Q. I'm just asking you. A. I don't know. (T-50)

"Q. Did you observe the truck after it passed you? A. UNTIL IT GOT TO ABOUT LOU'S. THAT'S ALL." (T-45)

While counsel for respondents through leading and suggestive questions attempted to elicit from Gordon Elliott, the other boy, that he observed no cars ahead of the one the truck was passing, it is evident that this immature boy did not know with any degree of certainty what cars were southbound ahead of the truck and had no actual knowledge as to the cause of the accident. He said, "Well, we were hitchhiking over to Springville,

we was going to a BASKETBALL GAME, and this truck passed me. I turned my back to it to keep the wind and snow out of my face, and it went up the road and I heard a crash, a big flash of lightning and crashing, and me and my brother went up there.” (T-57)

By the next question and in an effort to lead this immature witness, the following question and answer are significant:

“Q. When it passed you was there any other car in the vicinity? A. It was passing a car.

“Q. You say you turned away from the snow, as I understand. Which way did you turn? A. South.” (T-57)

ON CROSS-EXAMINATION, HOWEVER, HE ACKNOWLEDGED THAT BECAUSE OF THE WIND AND SNOW FROM THE TRUCK, HE TURNED HIS BACK TO THE TRUCK AS IT PROCEEDED SOUTH. WE QUOTE:

“Q. You say, Gordon, when this truck went past you it caused a lot of wind and snow to come whirling at you? A. Quite a bit.

“Q. And you sort of ducked your head to avoid that, did you? A. I turned my back to it.

“Q. YOU TURNED YOUR BACK TO IT, AND THE TRUCK PROCEEDED ON SOUTH (T-59); IS THAT RIGHT? A. YES. (T-60)

“Q. At the time you observed it, had the truck started to pass one or two cars? A. ONE, AS I CAN REMEMBER.” (T-60)

As to the accident he testified:

“Q. Did you or did you not see the other



car with which the car collided before the accident occurred? A. No, I didn't see it.

“Q. And you didn't see the accident, or the actual impact between the truck and the car, did you? A. No.” (T-66)

That Gordon had no actual knowledge of the cause of the accident is further self-evident from his statement admitted in evidence and which was taken the day immediately following the accident, January 16, 1949, at a time when admittedly the matter was clearer in his mind than at the time of trial. (T-72) This statement was taken in the presence of his father, Earl E. Elliott, and was countersigned by the father, who vouched for the fact that the statement contained his sons version of the accident. It read:

“Provo, Utah. January 16, 1949. My name is Gordon Elliott. I am thirteen years of age. I live with my folks on Highway 91 in the south end of Provo, Utah. On January 15, 1949, it was shortly before nine at night, it was dark, I was out in front of our home. I was out alongside the highway. A large truck went by while I was out on the highway. I watched the truck go south. It was in the center lane. It was passing some other cars. It had sounded its horn as it was passing these other cars. After the car got some distance south of our place I heard a bang and I could see the truck was skidding. I did not see the other car until after I went up to the accident. I don't know just how the accident occurred. I don't know which way this other car was traveling. I was the only one in my family that saw the truck. The rest of my folks were in the house. I have read the statement and it is

correct.” Signed “Gordon Elliott”. And underneath, “The above is my son’s version of the accident.” Signed “Earl E. Elliott”. (See Exhibit “1” Prime) (T-77, 78)

When the rule is applied, namely that a witness’ testimony on direct examination is no stronger than as modified or limited by his further or cross examination, the negative testimony of the foregoing witness, as well as that of Beardall, Holt and Carol Ellis, is insufficient to establish any facts in proof that the Tuttle car was travelling NORTH, or to establish or prove the accident occurred in any other manner than as proven by the eye witnesses.

#### HEARSAY NOT COMPETENT EVIDENCE

Counsel for respondent, page 8 of his brief, says “Mrs. Ellis testified that she first thought that the car that had been following was the car involved in the accident (Tr. 90), but changed her mind when she talked to Mr. Stevenson. (Tr. 107)” The only reason given by this witness was, therefore, based upon HEARSAY.

Testimony, having as its SOLE BASIS hearsay is not probative evidence and when that element is eliminated from Miss Ellis’ testimony AS IT SHOULD BE, her testimony being no stronger than shown on cross examination, in very fact corroborates the other eye witnesses. She clearly testified how the truck passed the car she was riding in with Stevenson immediately before the accident; that they were following another passenger car immediately ahead; that she had observed the tail lights of the passenger car immediately ahead;



did not observe the impact but observed that the tail lights disappeared immediately following the impact. She saw no north bound cars in the immediate vicinity whatsoever. She was aware of the fact that there were some pedestrians by the immediate side of the road (the McPhies and Mr. Roberts). Referring to the time of the accident, she was asked and she answered the following questions:

“Q. I see. And at that time you were under the assumption that the car you were following had been involved in this accident with the truck, were you not? A. That’s right.

“Q. And that was based upon the impression you received there that night? A. That’s correct.” (T-96)

Her statement given two days following the accident when she acknowledges “the facts were fresh” in her mind (T-99-100) further evidenced what she saw when the accident occurred. See pages 24-30 our original brief.

## DISPUTE AS TO BEARDALL CAR

When it is considered that the electric wires did not come down instantly at the time of the collision and that the Stevenson-Ellis car parked on the west or right hand side of the road whereas Beardall, as he came up, arrived after the wires were down and went to the east side of the road where he flashed his lights on the wreck and immediately became engaged in the activities which he described, it is understandable that some dispute might arise as to which of the two cars, the Stev-

enson's or Beardall's actually arrived first.

Referring to the wires, Carol Ellis testified:

"Mr. Stevenson was undecided as to whether to try to go underneath them or to back up, and we stopped. AND FINALLY LIGHTS WENT OUT AND WIRES CAME DOWN, and he was gone a few moments and came back and decided to move his car out of the highway so he pulled over into the snow bank and left me, and I stayed in the car."

"Q. Which snow bank was that? A. On the right side of the road. \* \* \* Well, there were people over by the car and standing around."

Beardall did not, on the other hand, arrive until the wires were down a few seconds after he heard the impact. After he brought his car to a stop, he immediately pulled directly over to the east side of the highway, casting his lights on the two vehicles and immediately engaged himself at the scene of the wreck. He testified:

"A. Well, as the truck passed me it was only a few seconds or some time until we heard a collision, terrific impact and a light flash from the at the light up there.", and I said, "Yes, Look at the car across the road.", and as I glanced at the car he said, "Stop the car. The wires are in front of you.", and as I pulled my car to a stop the wires was about eight inches from my car.

"Q. All right. Was there any car at all in front of you? A. I never seen a car in front of me, no sir. (T-113)

"Q. And what did you do then, Mr. Beardall? A. I IMMEDIATELY OPENED MY LEFT-HAND DOOR AND LOOKED AROUND TO SEE IF THERE WAS ANY TRAFFIC

FOLLOWING ME, AND TURNED MY CAR IN A DIAGONAL POSITION ACROSS THE HIGHWAY AND ONTO THE EAST SIDE OF THE ROAD AND PULLED MY LIGHTS UP UNTIL THEY HIT THE SCENE OF THE ACCIDENT.

“Q. When you say you pulled your car to the east side of the road, how did you make that operation? A. I turned my wheels to the right, this way, (Indicating) and made a diagonal turn across the highway.

“Q. And how long after you came up to the wires did you do that, Mr. Beardall? A. Immediately.

“Q. Immediately? A. Yes, sir.

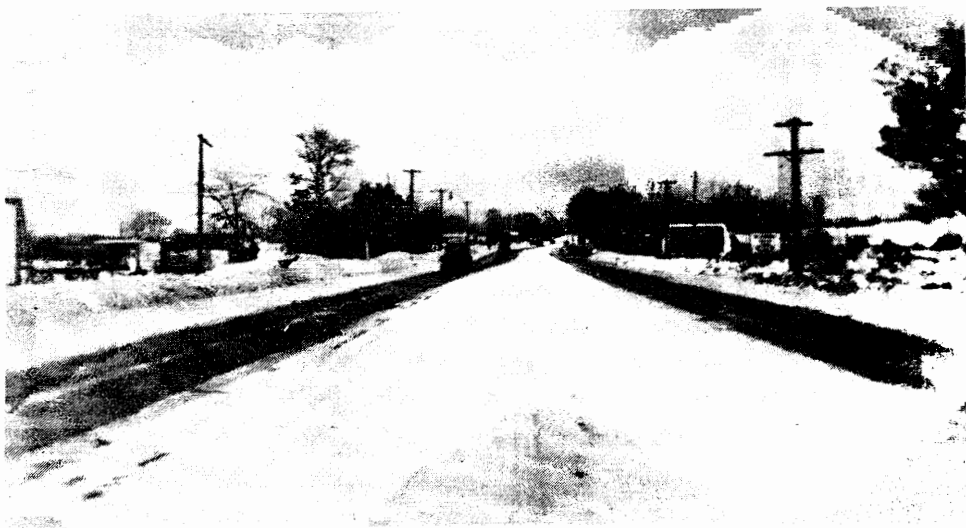
“Q. Then what did you do? A. Then we—I got out of the car and opened the trunk and took a large spotlight out of the car which I had in the car. (T-114)

“Q. At that time was there anyone at the scene of the accident? A. There was no one at the scene when I arrived there THAT I NOTICED.” (T-115)

At pages 32-33 of our original brief, we quoted from the record, showing that neither Beardall nor Holt saw the accident and their first intimation of the accident was when they saw the flashing of the wires. It is evident from the record just quoted above that in stopping, Mr. Beardall IMMEDIATELY concerned himself with turning his car diagonally across the highway and over to the scene of the wreckage on the east side. Under such circumstances, it is easy to see a possibility which prompted counsel for the respondents to raise an issue

as to which car, Beardall's or Stevenson's, arrived at the scene of the accident first. However, a dispute as to that matter could not constitute any affirmative evidence showing how the accident in fact occurred, and the fact that respondents rely entirely upon negative testimony is indicative that plaintiffs' entire case was based upon pure supposition. None of the witnesses whose testimony he relies upon saw the accident. They could not consistent with their oath testify contrary to the testimony of the disinterested eye witnesses and established physical facts.

The McPhies had no possible interest in the case. They were standing right by where the accident occurred. Their testimony is corroborated by the physical facts, by the further sworn testimony of defendants' driver, Stevenson and by Carol Ellis as shown on cross examination. When there are disinterested eye witnesses, there is no reason to assume the accident occurred in some other manner found upon supposition and speculation.



## PHYSICAL FACTS

The physical facts and eye-witnesses show that the impact and collision occurred on the west side of the highway in the lane of traffic next to the center line. True, the exact center of the highway could not be known by any of the eye-witnesses because the two center lanes were covered with packed snow, as shown in defendants' Exhibit 7 reproduced herein. A careful reading of the testimony of all eye-witnesses, even those of respondent (who were not eye-witnesses to the collision) and who were within a quarter of a mile of the scene of the accident, shows that the truck was on the west side of the center of the highway and that the left wheels, while close to the center, did not vary much over a foot either way.

In referring to the truck at the time of the impact Mrs. McPhie said, "There is to (two) lanes on the west side of the road. He was on the east one of those two." (T-343)

Mr. McPhie testified:

"Q. Mr. McPhie, at the time of the impact do you know whether the truck was on the east side of the road or the center line or on the west side? A. It was on the west side." (T-373-374)

Even Beardall and Holt at a point substantially north of the accident were unable to say that the truck got any substantial distance over the center line. Beardall testified:

"Q. Did you observe the position of the truck on the highway? A. Yes, very much. That night on the road was the traveled portion



of the highway in near the center line — lane of the lefthand side of traffic, and we were traveling where it was most worn, because that was the part of the highway not as slick as the rest of the road, and of course when the truck passed me it would have to be over the center lane, in double lane traffic.” (T-112)

While counsel for respondent attempted by leading and suggestive questions to elicit from Holt that the truck went onto the east side (T. 136-7), it was clear on cross-examination that even when the truck passed the Beardall car the left wheels were not far over the center. Mr. Holt testified:

“Q. And which lane was the truck traveling in when it passed you? A. Center lane, with the left wheels across the highway. Across the center line, I should say.

“Q. How far would you say those left wheels were across the center? A. At least a foot at the time they passed us.

“Q. The center of the highway was covered with snow? A. That’s right.” (T-141)

It was also clear that Holt did not know either the position of defendants’ truck or the Tuttle car when the collision occurred. We quote:

“Q. Then I take it, Mr. Holt, that you, from your observation there that night, could not state what the position of the truck or the Tuttle car was when the impact occurred? A. Not at the time of the impact, no. Just prior to that I mentioned where the truck was.” (T-141)

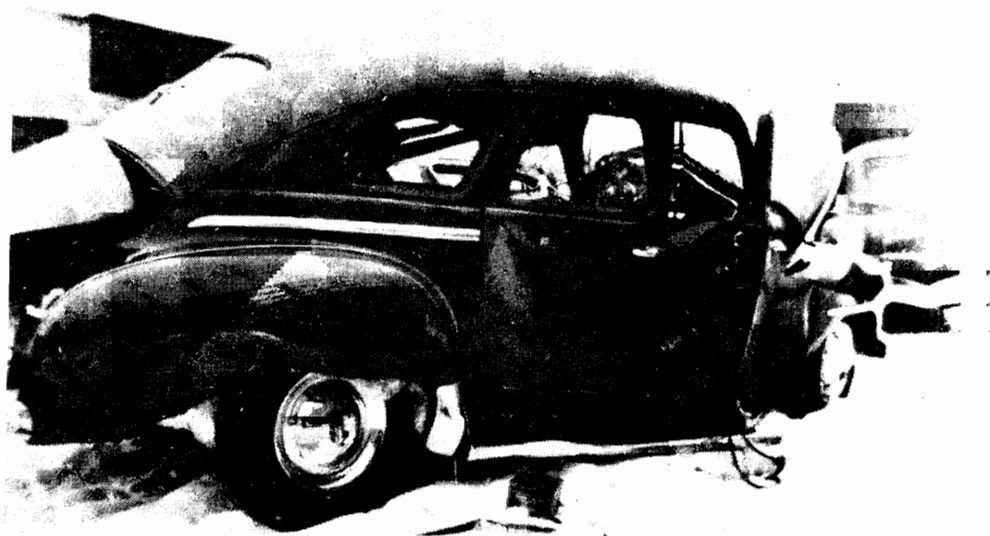
Officer Halladay of the Provo City police, who was called to the scene of the accident, identified fresh visible

scratch marks covering the highway from west to east. To illustrate the location he wrote the word "scratches" crossing the center line of the highway (T-226, 227, 228), written in pencil on Exhibit "GG". While the word "scratches" is only faintly shown on our photostat following page 6 of our original brief, it is more clearly shown on the original exhibit. Referring to these marks Officer Halladay said:

"They were visible to the naked eye. I could see them very plain. Of course it was pretty lighted around there at that time, but I could see them all right. They looked like something had drug along the top of the ice there."

"Q. Could you tell us whether the marks had the appearance of being fresh or old marks?  
A. They were fresh. You could tell from the way the ice was kicked up there." (T-228)

There was no evidence, either physical or otherwise, that the collision occurred on the east side of the highway. The sole and only argument of respondents is based upon the claim that the Tuttle car would not have stopped at a point on the east shoulder north of the defendants' truck and trailer if the Tuttle car was travelling south as the eye-witnesses described.





We have inserted herewith a photostatic copy of defendants' Exhibit 3, 4 and 9 which show the damaged condition of the Tuttle car caused by the impact of the truck. It is clear that the front of the truck struck the left side of the Plymouth practically broadside. As all of the eye-witnesses described, the truck, following the impact, jack-knifed, sliding over onto and along the east shoulder. While expert witnesses were not used by either party to determine the possible course or position in which the vehicles would be likely to come to rest under such circumstances, logic and reason certainly tend to corroborate those who saw the accident occur. The Plymouth under such circumstances could tend to take three possible courses. If it were stationary upon the highway and struck exactly in the center with the weight evenly distributed, it might tend to be pushed continuously in front of the truck until it came to rest. Dependent upon other and varied circumstances, it might be thrown or sloughed off to the side in either direction, east or west, prior to the time the truck stopped. With the heavy part of the Plymouth being lodged in the front end carrying the engine, and with its movement or direction of travel being towards the east, it is only logic to believe it would skid or slide off in that direction, that is easterly or rather southeasterly, by reason of the force of the impact. The truck, on the other hand, having a greater speed and momentum would naturally tend to travel a substantial distance further.

In negotiating a turn across the highway, the physical facts show that the Plymouth at the time it was

struck was substantially across defendants' lane of traffic. The first point of impact would be toward the rear end of the Plymouth unless it, the Plymouth, could have reached a position directly diagonal and at right angles with the highway. This initial impact being toward the rear of the Tuttle car would tend to turn it and slide it off.

### TIME OF ACCIDENT

Nor could the direction of deceased's travel be determined by speculating as to the time Tuttle left Springville. Before the case was tried, plaintiffs had the benefit, through deposition and interrogatories, of the approximate time of the accident as registered by the truck tachometer, 8:36 P.M. If Tuttle left Springville at around 8:30 as testified to by Mrs. Tuttle, of course, it is possible he might have reached the scene of the accident on his way to Provo. However, clocks and watches are not all accurately set as to time nor do they always keep or record accurate time. Certainly, this bit of SELF-SERVING TESTIMONY is insufficient to fix or determine or prove the direction of travel at the scene of the accident as against the testimony of disinterested eye witnesses who observed to the contrary.

No one was expecting the accident to occur and others, though close friends and relatives, did not claim to know the exact time. Mrs. Tuttle and her mother, Mrs. Jensen, were expecting to attend an M-Men basketball game in Springville. The first game commenced at 7:00 P.M. (T-154, 178). They were in-

tending to see the second game commencing when the first ended, presumably at 8:00 P.M. (T-154), while they said the game in which they were interested had started when they arrived (T-180-1), they did not say how long it had been going. While it was mentioned that Tuttle was going to bowl (T-153), no one knew anything about the details as to the bowling arrangements. Tuttle hadn't bowled before and no one was able to give names of any of the fellows with whom he intended to bowl nor the place or location thereof. It was a Saturday night (T-161-62). They were just figuring on forming a league (T-181). What was actually in Tuttle's mind and just where he went or intended to go or do could only be a matter of speculation.

## RESPONDENTS' AUTHORITIES

The authorities relied upon by respondents were decided upon the basis of the particular facts and circumstances existing in those cases. The legal rules and principles therein discussed should, of course, be judiciously and not abstractly applied, having due regard first and foremost to the end that the case should be decided upon the basis of fact as distinguished from speculation or inference based upon inference. Probative facts from which the casual relation is proven or reasonably inferred must be established to satisfy the burden of proof. Mere speculation should not be allowed to serve the duty of probative facts.

There is a very fundamental and distinguishing

difference in the cases recited by the respondents from the instant case in that in the instant case there were disinterested as well as interested witnesses in the immediate vicinity of the accident who observed and saw the accident occur, which evidence is corroborated by the physical evidence.

*Perrin v. Union Pac. R. R. Co.*; 59 Utah 1, 201 P 405, page 15 respondents' brief, was an action brought under the Federal Employers' Liability Act. There were no eye witnesses to establish deceased's contributory negligence as in the instant case. Under the circumstances, it was held that plaintiff was entitled to the benefit of the rule given in the court's instruction that "there is a presumption that the deceased, A.C.P., used due care in and about his work." The court then pointed out that assuming plaintiff was in the exercise of due care, then there was evidence the accident could not have occurred except for the negligence of the defendant. While indulging in the presumption, however, the court made it clear that had there been eye witnesses as to how the accident occurred, plaintiff would not have been entitled to the instruction given. Said the Court:

"The instruction is applicable only in the absence of evidence as to just how the accident happened. There was no eyewitnesses. It is only in such cases that litigants are entitled to this or a like instruction."

Under the court's instructions in the instant case, we have pointed out the error and misleading manner

in which the court permitted the jury to indulge in such a presumption.

*Coray v. Ogden Union Ry. and Depot Company*, 111 Utah 541, 180 P(2) 542, page 15 of respondents' brief, is likewise brought under the Federal Employers' Liability Act. Here again there were no eye witnesses who observed how the accident occurred and the presumption of due care on the part of deceased is only presumed by reason of the lack of such evidence.

*Gagos v. Industrial Commission*, 87 Utah 101, 48 P(2) 449, page 15 respondents' brief, was an industrial case involving a hernia. Claimant was the sole witness and there were no disinterested witnesses as to the fact in issue.

The general rules quoted from *Jensen v. Logan City*, 96 Utah 522, 88 P(2) 459; *Hearstrich v. Oregon Short Line R. R. Co.*, 70 Utah 552, 262 P 100; and *Leavitt v. Thurston*, 38 Utah 351, 113 P 77; pages 15 and 16 respectively, respondents' brief, should logically be invoked in favor of the contentions of appellants, because the testimony of all eye witnesses, corroborated by the physical facts, should not be disregarded, especially when plaintiffs' theory is based upon supposition and purely negative testimony.

## DEFENDANTS' MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN SUSTAINED

Defendants' motion for a directed verdict (T-454) was based essentially upon the fact that all of the probative evidence showed that deceased's own negli-

gence was a proximate cause of the collision and plaintiffs failed to affirmatively prove any facts constituting a cause of action, and any verdict in favor of plaintiffs would necessarily rest upon speculation and conjecture. Such motion, made at the conclusion of all of the evidence, was renewed on all grounds at the time of filing defendants' motion for a new trial (T-254) filed May 25, 1950.

When there are disinterested eye witnesses who saw how the accident occurred and when there are physical facts corroborating such eye witnesses and when plaintiffs have failed to prove any affirmative facts giving rise to a cause of action, a verdict should be directed in favor of the defendants. There is then no reason to speculate that one of the cars was going in the opposite direction to which it was seen to have been going and further add inference upon inference to build an imaginary accident. Such negative evidence is not sufficient to prove affirmative facts as against the undisputed testimony of disinterested witnesses corroborated by physical facts.

*East Grouse Creek Water Co. v. Frost*, 66 Utah 587, 245 P 338.

*Anderson v. Union Pac. R. Co.*, 76 Utah 324, 289 P 146.

We respectfully submit that defendants' motion for a directed verdict should have been sustained.

## ERRONEOUS AND MISLEADING INSTRUCTIONS

Plaintiffs here admit that if the accident occurred as all of the eye witnesses say it did when the Tuttle



car turned left in front of the truck, then there should be no recovery because deceased's own negligence would of necessity be the proximate cause of the collision.

*Verrill v. Harrington* (Me.), 163 Atl. 266.

*Probst v. Smith Hardware Co.* (La.) 141 So. 508.

*Young v. Cerrato* (Cal) 37 P (2) 1063

*Litherbury v. Kimmet* (Cal.) 195 P 660

*Madron v. McCoy, et al* (Idaho) 126 P(2) 566

*Dudley v. Surles* (La.) 11 So. 2nd 70

*Cederlof v. Whited*, 110 Utah 45, 169 P(2) 777

(See pages 34-38 of our original brief)

However, in the court below, counsel did not proceed on the theory that the direction of travel WAS THE SOLE AND ONLY ISSUE, but rather submitted forty-four requested instructions (see transcript 149-196) consisting almost entirely of ABSTRACT PROPOSITIONS OF LAW seeking to recover on ANY ONE OF THE NUMEROUS ALLEGED GROUNDS OF NEGLIGENCE, in nearly all instances without regard to the direction of travel and without any application to the facts and circumstances of the case. Many of these requested instructions were adopted by the court verbatim as requested simply in the abstract. They were calculated and directed to mislead, confuse and prejudice the jury, and defendants were effectively denied a fair trial.

## JURY DID NOT DETERMINE TUTTLE CAR WAS TRAVELING NORTH

The trial court below did not leave it to the jury to simply determine which direction the Tuttle car was travelling. Had respondent at the pretrial limited this to the sole issue and consequently had the trial court done so, and had this simple issue alone been submitted to the jury as the sole determining factor without mingling and submitting all abstract allegations of negligence, a verdict in favor of defendants would undoubtedly have been the result.

No request was made by plaintiffs for a special interrogatory or verdict determining the direction of travel of the Tuttle car. The jury, confused by the muddle of abstractions and confused notions of counsel, did not so find. Respondents here for the first time take the position that there was only one question, namely the direction in which the Tuttle car was travelling. If so, that issue only should have been submitted and the utter confusion avoided.

Nor, did the court proceed upon the theory that deceased was as a matter of law free from contributory negligence if the jury found he, Tuttle, was travelling north.

Plaintiffs by their requested instructions Nos. 11, 12 and 13 (T-159-61) also 17 (T-166) requested that the jury be instructed that deceased, Tuttle, was free from negligence or contributory negligence as a matter of law if he was travelling north. In denying these



requests and in denying defendants' motion for a directed verdict on all grounds argued on the several grounds stated at the close of all the evidence (Tr. 454), the trial court took the position that the issue of contributory negligence was one for the jury, whichever direction deceased was travelling.

While the trial court did instruct the jury that plaintiffs claimed Tuttle was driving north, defendants, on the other hand, claimed he was driving south. That is as far as the matter went, and it was never determined by the court nor was the jury instructed that the direction of travel was the **SOLE ISSUE** and the question of deceased's contributory negligence was left to the jury in either instance. By instruction No. 3 (T-223), the court instructed the jury to return a verdict for plaintiffs if Tuttle was driving north, provided further:

“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.” (T-223)

As a counterpart, the court by its instruction No. 4 (T-224), in substance instructed the jury that plaintiffs could not recover if Tuttle was driving south, provided it further found:

“That the deceased, Dale Tuttle, was negligent in suddenly turning in front of defendants' truck and that such negligence proximately caused or proximately contributed to cause the collision.”

## DEFENDANTS' THEORY OF THE EVIDENCE DENIED

Having left all issues for the jury to determine and to assure each party a fair and impartial trial, it was incumbent upon the trial court to submit the respective theories of each party, not merely as an **ABSTRACT PROPOSITION**, but as applied to the particular facts of the case.

The lower court in substantially adopting plaintiffs' requests, though specific and repeated exceptions were duly taken by appellant, nowhere instructed the jury respecting the specific legal duties, statutory or otherwise, as they applied to contributory negligence; that is as they applied to Tuttle's conduct under the facts and circumstances of the case. In other words, the whole matter of contributory negligence, whatever view the jury took of the evidence and whichever the direction of Tuttle's travel, was left in the abstract. The jury was left without any guidance or help from the court so they could properly apply the law. This, tied in with respondents' numerous and repetitious allegations of negligence and abstract instructions, enabled counsel for the respondents to completely confuse, mislead and prejudice the jury.

Respondents' procedure of injecting numerous allegations of negligence and an unreasonable number of purely abstract instructions not only effectively confused the jury but was undoubtedly an influencing factor in causing the trial court to adopt respondents' requests, effectively resulting in a denial of practically

all of defendants' requested instructions bearing upon the negligence of deceased, defining his duties and obligations as such related to the traffic and conditions existing upon the highway. We fail to appreciate the justice in such procedure.

Because of the confused state of the record and the likelihood of the jury misunderstanding the application of law under the particular circumstances, the language of this court in *Morrison v. Perry*, 104 Utah 151, 140 P(2) 772, quoted at the top of page 57 of our original brief, is especially pertinent. There it is clearly pointed out that each party is entitled to have his case submitted to the jury on any theory justified by proper evidence, and the giving of general instructions is condemned.

Defendants' requested instructions Nos. 5 (T-202), 8 (T-205), 9 (T-206), 10 (T-207) and 11 (T208) discussed page 54-60 our original brief, related to the law of contributory negligence and correctly defined certain statutory and common law duties of the deceased, Tuttle, in relation to other traffic. In failing to give any of such requests or similar instructions, the defendants were denied a substantial right, the right to have the jury instructed on defendants' theory of the case.

Without the benefit of these or similar instructions, the jury was so confused with the numerous repeated allegations and abstract instructions that they had no idea as to what laws were involved or how they should

be applied concerning the rights and correlative duties of the respective parties or the law of the particular case as applied to particular facts and circumstances.

## PROCEDURE AND ERRORS CALCULATED TO DO HARM

Respondents, while acknowledging that there were errors in the court's instructions and that they were given essentially in the abstract, argue, however, that such errors were not prejudicial within the rule stated in *Jensen v. Utah Ry. Company*, 72 Utah 366, 270 P 349, quoted page 32 respondents' brief, as follows:

"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."

However, counsel omitted the rest of the language of the court which continuing reads:

"However where the committed error is of such nature or character as calculated to do harm, or on its face as having the natural tendency to do so, prejudice will be presumed, until by the record it is affirmatively shown that the error was not or could not have been of harmful effect. Thus, if the appellant shows committed error of such nature or character, he, in the first instance, has made a prima facie showing of prejudice. The burden, or rather the duty of going forward, is then cast on the respondent to show by the record that the committed error was not, or could

not have been, of harmful effect. *State v. Cluff*, 48 Utah 102, 158 P 701; *Jackson, Stone, et al v. Feather River & Gibsonville Water Co.*, 14 Cal. 19; *Thelin v. Stewart*, 100 Cal. 372, 34 861; 2 *Hayne*, New Trial and Appeal (2d Ed.) pp. 1608-1614.”

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

## PROCEDURE CALCULATED TO PREJUDICE

The procedure pursued by counsel for respondents and its influencing effect upon the manner in which the court below instructed the jury, shows a deliberate plan and purpose to confuse and which was well calculated to do harm, and in fact did have a natural tendency to do so. Flagrant errors in the court’s instructions, induced through counsel’s procedure which placed greater duties on defendants than the law requires, are further proof that they were calculated to do harm.

We have called attention to the fact that matters relating to the control and speed were unreasonably repeated in plaintiffs’ complaint, there being at least five sub-paragraphs, (a), (b), (e), (h), and (j), which were duplicitas in the extreme and were repeated verbatim in the court’s instruction No. 1 (T-219-21). That the palpable and flagrant errors committed in the court’s instruction No. 15 were intentionally done at the insistence of respondents is evident when reference is made to plaintiffs requested instructions Nos.

22 (T-171), 28 (T-178) and 29 (T-179), all of which related to precisely the same matters and all of which INCORRECTLY QUOTED THE STATUTE, Section 57-7-113, U.C.A. 1943, by requiring such speed as to prevent "COLLIDING WITH ANY PERSON, VEHICLE OR CONVEYANCE ON OR ENTERING THE HIGHWAY." The court's instruction No. 15 was apparently taken verbatim from plaintiffs' requested instruction No. 29.

Instructing the jury in such manner was especially unfair to defendants when the court entirely rejected defendants' requested instructions Nos. 16 and 17 (T-213-4). These requests, discussed pages 49 and 50 our original brief, or similar qualifying instructions, would have at least limited the jury to claims of negligence based upon "speed" or "being over the center line of the highway" to circumstances where such might reasonably found to be A PROXIMATE CAUSE OF THE COLLISION. In other words, there was no application of the abstract instructions given as to the particular facts and circumstances, and counsel for respondents was permitted to confuse and mislead the jury as to proximate cause and to cause them to believe that if defendants' truck could not under the circumstances avoid a collision or if defendants' driver was going one mile per hour over the regulated speed limit or the left wheels of defendants' truck were any degree over the center line, then defendants were liable. These matters were emphasized beyond all reason, HAVING BEEN BROUGHT INTO THE CASE AT



THE CONTINUED INSISTENCE OF COUNSEL FOR RESPONDENTS BY HIS NUMEROUS AND REPETITIOUS ALLEGATIONS AND REQUESTED INSTRUCTIONS AND WERE CLEARLY CALCULATED TO INFLUENCE AND MISLEAD THE JURY. Clearly, a greater duty was placed upon the defendants than required under the statute.

The harm in giving such instructions (primarily relating to speed) is further evident in the fact that such instructions could only be applied and effectually argued as against the defendants. There was no claim of speed on the part of the deceased, Tuttle, he having made an improper turn. (See defendants' answer — T-23-4) Such instructions were calculated to harm defendants and were effectively used with undue emphasis on matters not shown to have been a proximate or actual cause of the collision.

### ERROR CALCULATED TO PREJUDICE

The court's instruction No. 15 was particularly vicious in that it left out the important and qualifying portions of the statute, *Section 57-7-113*, and required defendants' driver unqualifiedly to drive at such speed that he could "AVOID COLLIDING WITH ANY PERSON, VEHICLE OR OTHER CONVEYANCE ON OR ENTERING THE HIGHWAY.' This clearly cast upon defendants a duty that is greater than is required not only under the statute but under rule of law generally.

In *Knutson v. Luri*, (Iowa) 251 N.W. 147, an

instruction much like that in the instant case was held to erroneously define the duty of defendant and was reversible error. The instruction first stated in general terms that it was the duty of the defendant to exercise ordinary care, but added that if there was danger of collision, "it is his duty to reduce the speed of his car so \* \* \* he can bring his vehicle to a stop and avoid injury." The court said that this instruction was erroneous because it required her to avoid injury "whether a reasonable prudent person could do so or not. \* \* \* Obviously the instruction, even when read with the remainder of the court's charge was prejudicial."

In *Loony v. Parker* (Iowa) 230 N.W. 570, an instruction requiring the defendant "to maintain such control of his car as to enable him to stop without hitting the car ahead of him" was erroneous as requiring the driver to exercise such control as to "avoid collision whether he was negligent or not."

In *Gregory v. Suhr* (Iowa) 268 N.W. 14, a new trial was properly granted where an instruction had been given which tended to impose upon the defendant the absolute duty of having his automobile under such control as to avoid a collision. See also *Fry v. Smith*, (Iowa) 253 N.W. 147.

In *Boutelle v. White* (Ga.) 149 S.E. 805, an instruction among other things requiring defendant to exercise "the degree of diligence \* \* \* necessary to avoid injuring others" was properly refused as imposing the duty of an insurer. And in *Giles v. Voiles*



(Ga.) 88 S.E. 207, the giving of an instruction containing the same language as in the Boutelle case was held reversible error, the court saying:

“This imposed on defendant the duty of observing the diligence required of an insurer and eliminated all such questions as accident, contributory negligence, and the duty of plaintiff to exercise ordinary care to avoid the consequences of defendant’s negligence.”

In *Grandhagen v. Grandhagen* (Wis.) 225 N.W. 935, it was reversible error to instruct the jury “that it is the duty of every driver of a motor car upon the highway to keep his automobile at all times under control, and if he fails to have his car under control he is guilty of want of ordinary care.” The court said that this “imposed an undue burden upon the defendant. The duty of Oscar Grandhagen was to exercise ordinary care to keep his automobile under control. The instruction imposed the absolute duty to keep the automobile under control at all times, regardless of the question of whether ordinary care was exercised in so doing.”

See also *Saltas v. Affleck*, 99 Utah 381, 105 P(2) 176, discussed page 47 our original brief.

The court’s instruction No. 14 (T-234), set forth page 46 of appellants’ original brief, was similarly calculated to cause the jury to believe that defendant was required to “avoid a collision with another vehicle or person upon the highway reasonably within the range of his vision.”

While the court did modify respondents' original requested instruction No. 28 by requiring defendant to take such measures as are "reasonable", it still in substance and effect led the jury to believe that under the law defendant was *required* absolutely to avoid a collision. The clear and palpable error in the court's instruction No. 15 was thereby re-emphasized.

It cannot be claimed that other instructions cured the error because conflicting instructions, or instructions which are misleading or have a natural tendency to mislead, are presumed to have had an influencing effect upon the jury.

*Sorenson v. Bell*, 51 Utah 261, 170 P. 72;  
*State v. Green*, (Utah) 6 P. (2d) 177;  
*Martin v. Sheffield*, (Utah) 189 P. (2d) 127;  
*Saltas v. Affleck*, *supra*.

### COURT'S INSTRUCTION NO. 13

The court's instruction No. 13 (T-233) given verbatim from respondents' requested instruction No. 27 (T-176) also viciously imposed upon the defendants' driver a duty far greater than the law requires. It was well calculated to injure defendants and arouse prejudice in the minds of the jury. It arbitrarily required that defendant be extraordinarily alert "BY CONSTANTLY keeping A LOOKOUT NOT ONLY AHEAD BUT TO THE SIDES OF HIS VEHICLE." Yet, there was not even any evidence that defendants' driver failed to keep a lookout. He at all times saw the Tuttle car and was observing the highway ahead of him. Even if there had been evidence as to lack

of lookout, still the instruction was erroneous and prejudicial in requiring a greater lookout than the law imposed. The instruction also brought in facts not even involved in the case, such as intersections. It IMPOSED LIABILITY upon defendant if he did not "CONSTANTLY KEEP A LOOKOUT NOT ONLY AHEAD BUT TO THE SIDES OF HIS VEHICLE". It was qualified only by the limitation of contributory negligence stated in general terms not adequately covered in other instructions.

### ERROR IN SUBMITTING ALL ALLEGATIONS

Certainly the large number of respondents' requested instructions was an influencing factor in causing the court to give its instruction No. 1 (T-219-21) covering all of the naked allegations without regard to supporting evidence or proximate cause. In this respect we note that requests numbered 2 (T-151), 3 (T-154), 8 (T-157) 16 (T-165) and 33 (T-183) all called for a submission of each and every allegation of negligence, which were themselves duplicitous and in no wise connected up with the proximate cause of the collision.

### OVER-EMPHASIS AS TO DEFENDANTS' SPEED, ETC.

Respondents especially made it a point from the beginning to place such undue emphasis upon speed, control, presumptions, circumstantial evidence and other vague and abstract principles clearly calculated to confuse. In addition to his requested instructions numbered 11, 12 and 13 relating to speed and control,

requests numbered 20 (T-169), 22 (T-171), 23 (T-172), 24 (T-173), 29 (T-179) and 37 (T-187) related to similar matter.

### LIGHTS

There was no evidence that the lights on defendants' truck were blinding or that flashing lights on and off interfered with the vision of deceased, as alleged in paragraph (k) incorporated in the court's instruction No. 1 (T-219-21). True, the driver flashed his lights from low to high beam and back to low beam again (T-261) as a signal to the cars ahead of him which he was passing or intending to pass and which were travelling in the same direction in the righthand lane of traffic. Such practice is such a well-established one, used designedly for the purpose of signalling an intention to pass, that it is not necessary to convince this court of such practice. There is no evidence, however, and it would be pure speculation to assume, that such lights interfered with the vision of deceased, or to assume from the mere fact that he did blink his lights that deceased was blinded or that such had any casual connection with the collision. Clearly respondents injected this matter, as they did the other numerous allegations, for the purpose of misleading the jury and causing them to feel prejudiced against defendants. By making this and building up other hypothetical contentions they piled inference upon inference to utter confusion.

### ERROR AS TO PRESUMPTION

We pointed out, page 51 of our original brief,

that the court's instruction No. 6 (T-226) in effect permitted the jury to assume that deceased was presumed to be in the exercise of reasonable care. Such rule, however, has no application where there is proof to the contrary; in this instance clearly rebutted by disinterested eye-witnesses corroborated by the physical facts. *Perrin v. Union Pacific R. R. Co.*, 59 Utah 1, 201 P. 405, supra. See, also, *Saltas v. Affleck, In Re Newell's Estate* and other authorities cited at page 40 of appellants' original brief.

Here, again, the matter of presumption was asked for by at least three of plaintiffs' requests, namely, Nos. 5 (T-154), 12 (T-161) and 13 (T-162). On the other hand defendants' requested instruction No. 19 (T-216), which would have correctly instructed the jury on the matter, was refused over defendants' specific exceptions.

## OVER-EMPHASIS AS TO INFERENCES AND PRESUMPTIONS

The court's instruction No. 9 (T-229), added to the numerous other abstract and misleading instructions, permitted the jury to think that they could judge the case on general principles without application of particular laws and particular circumstances. This, again, caused the jury to lose sight of and completely disregard the matter of proximate cause. This type of instruction was induced by respondents' requested instructions numbered 14 (T-163), 34 (T-184) and 35 (T-185). We ask, how could the numerous and



irrelevant allegations and abstract instructions help but influence and mislead the jury?

### SUDDEN EMERGENCY MISAPPLIED

As a result of plaintiffs' requested instructions numbered 6 (T-154) and 18 (T-167) the court gave an abstract instruction relating to sudden emergency (see the court's instruction 22 (T-243)). This was especially harmful when counsel for respondents over-emphasized such matters as speed, control and driving over the center line, when in fact there was no proof that the same or other repetitious matters had anything to do with the proximate cause of the collision. There was no evidence that Tuttle was faced with an emergency. The evidence is he created one.

Except for the undue length of this brief we should point out other numerous and abstract instructions which tended to mislead and confuse the jury.

### INSURANCE INDEMNIFICATION

When counsel for respondents throughout the trial had made continued reference to Kunz and Platt (the mysterious investigators) and continually referred to various statements taken, it was unnecessary for Carol Ellis to volunteer "the insurance adjuster" even though the first reference thereto was in response to a question asked by the defense. She could have referred to "Kunz" or even "the investigator". Certainly, it was not necessary for her to later, when questioned by plaintiffs' counsel, to again bring in



the matter by volunteering the statement "he said he was from the INSURANCE COMPANY". Through cautioning Miss Ellis, a regular client of counsel for respondents, counsel could easily have avoided such reference.

## CONCLUSION

For lack of evidence, it appears counsel for respondents from the outset substituted multiple allegations of negligent and numerous and duplicitas abstract instructions of law calculated to mislead and confuse the jury. Such procedure, coupled with wholly negative testimony produced through friendly witnesses naturally sympathetic to deceased's family, should not in justice be substituted for proven facts based upon the unbiased testimony of disinterested eye witnesses corroborated by tangible physical facts.

Respondents suggestion that the case has been twice tried is a further play upon the sympathy of this court, while the record on the other hand shows a determined effort from the beginning on the part of respondents to confuse, mislead and prejudice the jury, as a result of which a verdict was finally obtained.

We respectfully submit that such verdict should be set aside, the judgment reversed and an order made directing judgment for the defendant in accordance with the facts of the accident.

If for any reason this court does not agree, although we feel certain it will, then that a new trial be

ordered with proper issues and instructions so defined as to assure a fair trial.

Respectfully submitted,

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