

1951

Marcella Jensen Tuttle and Richard Dale Tuttle v.  
Pacific Intermountain Express and Heath H.  
Cornette : Respondents' Answer to Reply Brief

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.

NO. 7619

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## RESPONDENTS' ANSWER TO REPLY BRIEF

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## **RESPONDENTS' ANSWER TO REPLY BRIEF**

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As the purported "Reply Brief" of appellants contains much argument that is repetitious, there will be some repetition in the answer to such brief..

We feel, too, that it should be observed that the appellants' original brief was served upon respondents on or about the 2nd day of April, 1951, and consisted of 66 pages of printed material, and the brief was filed after an ex-

tension of time granted by this Court to appellants of substantially more time than a month beyond the usual time based upon the stipulation of the parties.

Within twenty days thereafter respondents had to reply but a stipulation was secured extending the respondents' time to file their brief to the 20th day of May, 1951; despite the stipulation, the time allowed to respondents to file their brief was reduced to a few days prior to May 8th, 1951, and before such time had expired, the case was set for oral argument on May 8th, 1951. Within the reduced time, respondents filed their brief and the case was argued at the time indicated.

At the oral argument, counsel for the appellants indicated that they had not had an opportunity to prepare a Reply Brief and asked leave for a limited period, which it is recalled in the absence of a record, to have been about fifteen days, within which to file a Reply Brief.

Approximately one month later, to-wit on June 6th, 1951, respondents received a copy of an order from Hon. George W. Latimer, Justice of this Court, extending appellants' time to file Reply Brief to June 22nd, 1951. This order was made without any communication or contact with counsel for respondents and without their stipulation or agreement. Since that time, there has been no contact by the appellants or the Court with the respondents with respect to any further extension, but, nevertheless, no Reply Brief was served upon respondents until August 8th, 1951, when the purported "Reply" of 44 pages of printed matter was received, which is in no proper sense merely a "Reply" but repeats largely many of the arguments in appellants' principal brief of 66 pages, and also advances in connection therewith, some new arguments and claimed

authorities which are not properly included in any reply.

Thus, exactly three months after the case was orally argued and permission granted for appellants to file a Reply Brief within fifteen days, and without any stipulation or agreement made as far as respondents are concerned, appellants filed a recapitulation and re-emphasis of their argument contained in the original brief, together with various new points advanced with a view of meeting comments of members of the Court during the oral argument. Respondents have been given leave to file this response.

### FACTS OF CASE

The position of the appellants seems to be that if there are claimed eye-witnesses to an occurrence, the jury should be instructed to believe them as a matter of law no matter how confusing, misleading, absurd, impossible and untenable their testimony might be. According to appellants, their asserted eye-witnesses must be believed though it was physically impossible for the occurrence to have happened as they testified. They assert in substance that they must be believed even though the physical facts were such that they could not see, as testified to by one (another disinterested witness) who was with the McPhies, the claimed eye-witnesses, whose testimony was so much relied upon by counsel for appellants (Tr. 422). Counsel for appellants assert that the Supreme Court should disregard the testimony which the jury knew was true, and believe the testimony of these claimed eye-witnesses, even though the jury had the opportunity to observe the demeanor of the witnesses called by the appellants, and to consider the absurdity of their testimony and would not and could not believe them. That is the position of the appellants.

Counsel reiterate that the McPhie testimony is corroborated by the testimony of Stevenson, Cornette and even Mrs. Ellis. Cornette, as it may be recalled, was the driver of the PIE truck involved in the collision. Stevenson admitted that he did not see the impact (Tr. 393). He admitted that before driving up to the wires near the place where the Tuttle car and the PIE vehicle had come to rest, he stopped for an appreciable length of time and then drove slowly up to the wires (Tr. 399-400). There were other people he did not know who came from the east side of the road before the pedestrians arrived and before he got out of his car (Tr. 401-403).. These could have been no others than Holt and Beardall. Mrs. Ellis saw them also (Tr. 81). Cornette, the driver, had several different stories as to how the thing happened. One has to but read his testimony to see how the jury could not believe it. Upon cross-examination, Mrs. Ellis stated that a car that could have been none other than the Beardall car was on the east side of the road where it had been driven as testified to by Holt and Beardall, when the Stevenson car was driven up to the wires (Tr. 81-82). After all, if the Beardall car was where Mrs. Ellis saw it when the Stevenson car was driven up as was testified to by Holt, Beardall and other witnesses, then Stevenson was wrong in his assumptions and the McPhies could not see as was testified to by the witness, Elmer Roberts. Stevenson's negative testimony that he didn't see the Beardall car there could not stand against all the other testimony that it was here. The fact is that because of the physical facts, the clear and unequivocal testimony of the plaintiffs and all the surrounding circumstances, the jury was convinced of the fact that Beardall drove his car just where he said he did and at

the time he said he did. He drove it to the east side of the road just after the impact and it was there where other witnesses saw it, at the time the Stevenson car came up to the wire. We do not feel that counsel should again and again bring this matter before the Court, both in their original brief and in their so-called Reply Brief. If the jury believed the impossible testimony of their witnesses, and if the physical facts had corroborated their testimony, the result would have, of course, been different. If the Beardall car was on the east side of the road as believed by the jury and as testified to by witness after witness, if it was there as it was in fact, then, despite counsel's frantic and desperate attempts to have it somewhere else, then Tuttle, just prior to the impact was driving north, as was the fact, and the verdict of the jury should stand. That should be sufficient. *Lowder vs. Holley*, \_\_\_\_\_ *Utah*\_\_\_\_\_, 233 P (2nd) 350. This should be sufficient, despite the impossible, untenable, absurd testimony of the claimed eye-witnesses, who, it would appear, had spent most of the night after the occurrence with the driver of the truck, while Tuttle was fighting for his life, working out the details of an impossible story suggested by Stevenson when talking to the truck driver when he tried to figure out in his own mind what had happened to the Beardall car he had been following. At the time the details of this impossible story were being worked out, Beardall and Holt, who knew what had happened, were helping the family and friends of Tuttle in his fight for life.

On the other hand, the testimony of the witnesses for plaintiffs was clear and convincing and in accord with the physical facts and human reason. General statements made by counsel that the other side has engaged in state-

ments and conclusions calculated to confuse and distort will not close the eyes of the Court to the facts as shown by the record of the testimony in the case.

Counsel for the appellants even go so far as to say that the testimony of all witnesses who allegedly saw the collision was undisputed. Such testimony was disputed and proved impossible by respondents on every hand, and for counsel to say it was undisputed is as absurd and as far from the facts as is the testimony they seek to uphold.

Counsel for appellants spend a good deal of their brief trying to upset the witness Holt's testimony. Holt, it may be recalled, was a friend of a friend of the Tuttles.

We will admit that Holt couldn't identify the Tuttle car from its lights coming from the south. The fact was that after the truck had passed the Beardall car, he couldn't observe the lights of the Tuttle car coming from the south, as his vision was obstructed by the truck, which Holt said was crossing over past the center and on the east and left hand side of the road.

It is interesting to note in connection with Holt's testimony that the Elliott boys who were standing somewhat north of Lou's attempting to get a ride to Springville testified that the truck passed them about the same time it was passing a car. They testified that there was at least one car following the car the truck was passing (Tr. 45, 47), and that there was no other car in front of the truck going south (Tr. 50, 51). The truck didn't honk any more after it passed the Elliott boys (Tr. 51). There is little question but that the Beardall car was the car the truck was passing when it was passing the Elliott boys and that the Stevenson car was following. This would have given the northbound car seen by Holt time to reach the scene

of the impact where it was struck by the PIE truck. There is little question but that the pedestrians Stevenson observed after the truck passed him were the Elliott boys instead of the McPhies and Roberts as he had assumed. Bear-dall was in front of Stevenson and Tuttle was coming from the south, and was struck on the east and left hand side of the road.

We agree with the statement of counsel to the effect that the witness' testimony on direct examination is no stronger than as modified or limited by further examination or by cross-examination, but, of course, we must realize that the record of the testimony must in this case be read in the light most favorable to the party for whom the trier of facts has found, and we should take into consideration all of the testimony. *Lowder vs. Holley, supra*. Looking at the testimony of the appellants, to the physical facts and to the cross-examination, it is easy to see why such testimony did not stand up. This testimony was reviewed in respondents' original brief and should not be repeated. . On the other hand, there was nothing brought out on cross-examination or otherwise at all inconsistent with the theory of respondents.

Counsel object to the testimony of witness Charles M. Roberts, Douglas A. Payne, Jean Elliott, Dellis and Gordon Elliot that the PIE truck was going approximately 50 miles per hour just prior to the impact. Counsel says that their testimony was only estimates as to speed. That may be so, but of course we have the speed recorder that fixed the speed of the truck at least 50 miles an hour just prior to the impact (Tr. 326), and Stevenson said that the truck was going between 50 and 55 miles per hour at that time (Tr. 408). How can counsel object to this testimony?

The testimony of these witnesses is fairly summarized on pages 6 and 7 of respondents' original brief and the general reference by counsel as to the negative character of such damaging testimony should not mislead anyone. Counsel talk about friendly witnesses. Charles M. Roberts, Douglas A. Payne, Jean Elliott, Gordon Elliott, Dellis Elliott, Carol Ellis, Ernest L. Holt, and in fact all witnesses of the plaintiff, except Beardall and Mr. and Mrs. Tuttle's family were unacquainted with the deceased and his family prior to the decedent's death. What is this talk about friendly witnesses? Of course, they were friendly in that they testified as to what they saw and as to the facts, which facts were corroborated by physical evidence on every hand.

All through their brief, appellants snatch bits of testimony from the record, but even that does not appear damaging at all to the respondents' theory and case. They quote from the testimony of Douglas A. Payne and say that he did not see the truck after 1½ or 2 blocks after it passed him but they did not refer to his testimony that it went away in a whirl of snow, nor did they mention its terrific speed to which he testified.

Of course, the Elliott boys would not remember all the cars that passed them in a course of ten minutes, but they did remember particularly the PIE truck because it was far out of line. The fragments of testimony of the Elliott boys snatched by counsel from the record should avail them nothing. The testimony of Gordon that he turned his back to the truck as it came on seemed to worry counsel. They would have us believe that Gordon Elliott testified that as the truck came from the north throwing up a lot of wind and snow that he turned his face to the north. The wind and snow would be coming from the north, and,

of course, he turned to the south as he testified (Tr. 57, 66) and watched the truck as he testified, and as set out in the Reply Brief of appellants on pages 10 and 11. The testimony of the boys, however, was clear and unequivocal that there was no other car south of the one that the truck was passing when it was passing them; and the car which the truck was passing at the time could be no other than the Beardall car. Stevenson testified that the PIE driver continued to honk the horn until after the truck passed him. The Elliott boys testified that after the truck passed the car almost directly opposite them the truck quit honking (Tr. 46). There is no question that the Stevenson car was behind the Beardall car, and when the truck passed the Beardall car it quit honking and began sliding across the road because it went out of control and then struck the Tuttle car on the east side of the road.

It is interesting to note that the appellants did not call the Elliott boys at the first trial although their investigator took a statement from Gordon shortly after the accident (Tr. 70). The statement of Gordon Elliott quoted on pages 11 and 12 of the original brief of appellants is not inconsistent with the testimony and the theory of respondents. This statement was written by the investigator for the appellants in his own handwriting, and as Gordon stated upon his examination, did not contain other matters he told to the investigator which would have been more damaging to appellants' case. Even in that statement, the investigator could not get Gordon to say that the collision involved a southbound car. It is interesting to note further in the statement that the truck at about the time it went past Gordon Elliott, was passing some other cars, not one car, but cars; and there is no question but what it passed both

the Stevenson car and the Beardall car, and that the Beardall car, at the time it was passed, was further south than the Stevenson car. The words put into the mouth of the young boy by the investigator still would not avail the appellants.

There was nothing brought out on cross-examination or in any other testimony of the witnesses, Holt, Beardall and Ellis that established anything other than the fact that the Beardall car was the one that the truck passed after it passed the Stevenson car and that it was the one that Stevenson mistakingly believed may have been the Tuttle car.

Counsel argue that hearsay evidence is not competent evidence, and object to the testimony of Mrs. Ellis as to when she changed her mind as to the direction the Tuttle car was traveling. She testified that she had so changed her mind when Stevenson told her thy had been mistaken. This testimnoy merely established a point of time. She could not account for the car which she saw on the east when the Stevenson car first arrived at the scene (Tr. 82) (Tr. 97). She was very frank in her first impression that the Stevenson car had been following the Tuttle car, but when she learned that they had been following the Beardall car instead of the Tuttle car, she could account for the car being on the east side of the road which she observed when she first arrived at the scene. This, among other reasons, she testified, was why she changed her mind from her first mistaken impression which was seized upon by the driver and the investigator (Tr. 97). Mrs Ellis also testified that she told the investigator information such as the speed of the truck, etc. which he left out of the statement which she

gave him, testimony which would have been damaging to the appellants' case.

### **Dispute as to the Beardall car.**

Counsel for the appellants try to confuse the matter as to whether the Beardall or Stevenson car arrived first. In order that the Court will not be misled by the parts of the testimony of the witnesses, we quote in full the testimony of Beardall, the driver of the car, and Holt, his passenger, with respect to the wire:

### **Direct examination of Clifford Beardall:**

"Now will you state, Mr. Beardall, just what happened as the truck passed, if anything, or after the truck passed?

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 poles, and Mr. Holt spoke to me and said, 'Look 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.

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 on to the east side of the road and pulled my lights up until they hit the scene of the accident."

### Cross-examination of Clifford Beardall:

“Were the wires coming over the—laying up against semitrailer of the truck?

A. No. I think the semi had gone past them. Probably hit them at one time or another but gone by. The pole on the west side was still up.

Q. But the wires had come to rest, or were down when you got there were they not?

A. Still moving, yes.

Q. Still moving which way, Mr. Beardall?

A. How would any wire knocked down be moving?

Q. If there was any current in the wires they would be moving around I guess, wouldn't they?

A. That's right.

Q. What I had reference to was the wires were not falling at the time you got there?

A. No. No, they were at their destination, I think.”

### Direct examination of Ernest L. Holt:

“A.. Ordinarily when a truck passes you it stays in the lane to the right of the center line, or gets into the lane farthest to the right. In this case the truck went over into the other inside lane of the northbound traffic.

Q. And then just state what happened.

A. Well, the next thing we saw was a flash of light caused by the utility pole being broken off, and I saw this line fall across the highway and I called Mr. Beardall's attention to hurry and stop the car before he hit it.

Q. And then what was done?

A. We stopped about a foot away from the line and we immediately, Mr. Beardall I should say, im-

mediately backed the car across the highway so that the lights would be directed on the car that was sitting off to the side of the highway.

Q. All right. Now when you got up to the wires, were there any other cars?

A. There were no other cars there.

Q. And then what did you do?

A. We had a railroad lantern in the back of the car. I grabbed that and got out of the car and tried to stop the cars that were coming so they wouldn't run into the car.

Q. Then what happened?

A. Well someone, after we got the cars that were coming to a stop, someone raised this wire to let the cars go by, and someone else come along and took the wire off the pole and threw it to the other side of the highway."

No cross-examination of Ernest L. Holt with respect to this.

We must also remember the testimony of Mrs. Ellis that there was a car at the scene to the east side when she arrived in the Stevenson car, where it had been driven as Holt and Beardall testified (Tr. 81-82) (Tr. 97). Stevenson also testified that before he drove up to the wire he had stopped his car some distance to the north and then proceeded slowly up to the wire (Tr. 399). Payne also testified that when he drove up to the scene he parked on the east side behind a car that could have been no other than the Beardall car (Tr. 37). Beardall stopped his car within a few inches of the wires as they fell down (Tr. 137). Stevenson's car was not there then. Elmer Roberts, who was one of the pedestrians with the McPhies came up to the scene after the Stevenson car arrived and was parked in front of the wire. Roberts saw Beardall standing in the

middle of the road as soon as he arrived (Tr. 423). There is the inescapable conclusion that Beardall and Holt were at the scene first. It is interesting to note that the street lights on the east had gone out at the impact but there were lights showing on the Tuttle car when Roberts arrived. These lights could have been from no other place but the Beardall car. Roberts arrived at the scene before the McPhies. The fact is that the Beardall car was the car Stevenson mistakingly thought was the Tuttle car and that is what the jury believed, and there is ample evidence to support the findings of the jury. Beardall testified that he heard the impact (Tr. 113).

Counsel for appellants further make the statement that McPhies were allegedly standing right by the point where the collision occurred. Of course, this is not the fact, and even if the testimony of the McPhies is to be believed they were standing at a point approximately 600 feet north of the point of impact. But even at that, according to Roberts, who was with the McPhies, it was impossible to see because of the snow being thrown up by the truck (Tr. 422). The testimony of Carol Ellis does not corroborate that of the McPhies, as contended by counsel for appellants.

On page 16 of their brief, counsel have had one of the exhibits printed, being a photograph of the highway taken sometime after the collision. It is in the brief apparently to give a distorted picture of the width of the part of the road covered by snow. An expert called by the respondents stated that the picture was distorted because it was taken from the center of the road and would make the snowy portion appear much wider than was the fact (Tr. 451.) Even in looking at the picture some distance down

the road one can see that the darker portions and the center portions are more nearly the same width. The other exhibits should be observed in order to show the true picture. We call particular attention to defendants' exhibit 12. We should remember here in determining whether or not the PIE truck was over to the east or wrong side of the road that the paved or hard surface of the highway was 40 feet (Tr. 19-21).. Each marked lane of traffic was 10 feet. Stevenson, one of appellants' witnesses, testified that he drove his car down the darkened portion of the road that can be seen on the right side of the photo which appears on page 16 of appellants' brief. Stevenson testified that the center of the dark portion would be at about the line dividing the two southbound lanes of traffic (Tr. 388). That was the portion upon which he was traveling. That was also the testimony of officer Paul S. Anderson who came to the scene of the occurrence (Tr. 165). This would mean that the Stevenson car, in driving south, would be approximately  $2\frac{1}{2}$  feet on the inside lane of the southbound traffic. The truck, according to the driver's testimony, was 8 feet wide (Tr. 268). When the truck passed Stevenson, there could only be  $7\frac{1}{2}$  feet available for the truck on the southbound portion of the road if there were no distance at all between the truck and the Stevenson car when the truck passed. Standing side by side with the Stevenson car without any space between, the truck would have been over beyond the center of the highway at least one-half foot. He would have had to have some room to pass, as according to Mrs. Ellis the trailer swerved all around them when it passed them (Tr. 86). They gave it plenty of room (Tr. 86). Stevenson's car traveled in same lane (Tr. 80, Tr. 275 and Tr. 388), according to Mrs. Ellis,

Cornette, the driver, and Stevenson, and so it is inescapable that at all times in the vicinity of the collision the truck was over the center of the highway as much as several feet. Beardall testified that he was driving in the dark portion of the highway, and Cornette testified that both the Stevenson car and the car he thought was the Tuttle car was driving in the dark portion of the highway (Tr. 275). Holt testified that while they were driving in the dark portion of the highway and at the time the truck passed them it went way on the east side of the highway, and Gordon Elliott testified that when the truck went around a turn of the road it cut across the turn more to the east side of the highway. The speculation of the McPhies and others that the truck was on the west and correct side of the highway falls upon the testimony of Stevenson, Officer Anderson, and other witnesses, and even upon the testimony of the driver Cornette, which testimony again shows it was physically impossible because of the width of the truck to have had its east wheels west of the center part of the highway, and in fact, according to Holt, it was way over to the east or wrong side of the highway at the time of the impact (Tr. 137).

### **Physical Facts**

On page 20 of their Reply Brief, counsel for appellants have inserted copies of the photos, defendants' exhibits 3, 4 and 9. On page 7 of their original brief, they have shown the plat of the scene of the impact, plaintiffs' exhibit "GG". On the plat of the scene of the impact the driver Cornette has drawn on the west part of the four-lane highway his version of the occurrence. The truck is marked with a figure "2" and the car he claimed was the

Tuttle car is marked with a "1". It may be noted that in his diagram he claimed the Tuttle car at the time of the impact was facing to the southeast and that the truck first struck the car from the left side of the rear at the time the Tuttle car allegedly turned in front of the truck. The driver testified that the right hand side of the bumper of his truck first struck the car "Kind of diagonal" (Tr. 263). If this were so, the force would be from the rear to the front of the Tuttle car. However, if we look at the defendants' exhibits which appear on page 20 of appellants' Reply Brief and particularly at the first two that appear on the top of the page, we may note that the force was from the front to the back of the Plymouth automobile. This would be entirely in conformance with the theory of the respondents that Tuttle was traveling north and turned to the right to avoid the PIE truck which went out of control over to the east side of the road.

Counsel on page 21 of their Reply Brief try to explain how the Plymouth automobile could end up east and quite a distance north of the point the PIE truck came to rest on the east side of the highway. We must remember that the PIE outfit, weighing between sixty and sixty-four thousand pounds, was going south at a rate of almost fifty-two miles per hour. If the Plymouth auto, weighing under two tons, turned in front of the PIE truck as appellants assert, it would have been thrown way down the highway in front of the PIE truck, and would have been way to the south. If it had happened as Cornette represents on his diagram appearing on page 7 of the original brief of appellants, it would have been thrown way to the west and south of appellants' truck. Counsel assert that the momentum from the truck would have carried it further than

the Plymouth auto. We must not forget, however, that the momentum of the truck struck the Plymouth auto as the auto showed evidence of the tremendous impact. It is unthinkable that if the car turned at an angle in front of the truck as testified to by the McPhies, going little more than five miles per hour, that it could have made the big truck, going more than fifty miles per hour, and weighing more than thirty times the weight of the Plymouth, turn to the east, and then have the car end up further to the north and east than such PIE truck (Tr. 263, 368). The theory is incredible. No wonder the jury could not believe it.

On the other hand, the physical facts show that the PIE truck was over on the east side of the highway, cutting across the curve, flashing its lights on and off and Tuttle, approaching from the south, turned to the right to avoid the impact and was struck somewhat from the front as the photos show on page 20 of appellants' brief. The truck jackknifed and the momentum of the car carried it north and east of the truck. There is no question but that those are the simple, inescapable facts.

Counsel, as did Cornette in his diagram on page 7 of appellants' original brief, assumed that the first point of impact with the Plymouth was toward the rear of such car, the force then would have been from rear to front, but the photos on page 20 of appellants' Reply Brief show and demonstrate that the force was from front to back, and as may be seen from their own exhibits their theory will not hold water.

## **Time of Accident**

Many witnesses for the respondents set the time of the departure of Dale Tuttle from Springville (Tr. 145, 154, 177, 183, 189). That was the testimony believed by the jury, the arguments of counsel for appellants were all advanced in their argument before the jury. The testimony of all the witnesses as to the time of the departure of Dale Tuttle, their opportunity to observe and reasons for observation was all clear and convincing. It would certainly appear unnecessary to reiterate and go over this testimony, time and time again. The fact is that appellants could not and cannot now explain the time element.

## **Respondents' Authorities**

The objection that counsel have to the authorities is mainly premised upon their belief that the jury had to believe their purported eye-witnesses which they did not and could not believe because of the impossibility of their testimony. If they believed that they were not telling the truth, which is the inescapable conclusion, then there were no eye-witnesses to the occurrence. We agree in the main to the general principles stated by the appellants that the cases should be decided upon the facts, and that the cases should not be decided upon mere speculation. We do not believe that testimony of alleged eye-witnesses whose testimony is impossible and contrary to the physical facts is entitled to any credence. It is in fact no testimony at all. Counsel argue that the holding in the case of *Perrin v. Union Pac. R. R. Co.*, 59 Utah 1, 201 P. 405 militates against respondents' position. In that case there was a question of the contributory negligence of decedent and it was there stated that in the absence of evidence

there was a presumption that decedent was using due care. In the instant case, the jury did not believe the testimony of the witnesses for appellant, they did not believe that the decedent was traveling south at the time of the impact. There was no evidence as to his conduct in driving north toward Provo, and the Court's Instruction No. 6 that "In the absence of evidence to the contrary, there is a presumption that the deceased used due care for his own protection," was properly before the jury. *Ryan v. Union Pac. R. R. Co.*; 46 Utah 530, 151 P. 71. *Duhren et al v. Stewart*, 39 CA 2nd 201, 102 P. 2nd 784.

The cases referred to by respondents on pages 15 and 16 of their original brief support their theory. The physical facts do not corroborate any testimony of the appellants but on the contrary entirely corroborate the evidence of respondents. Respondents' evidence is direct and positive, and contrary to appellants' contention is not negative. The facts which the respondents' evidence show, could result in no verdict other than the verdict as given by the jury.

**Defendants' motion for a directed verdict was properly denied.**

We cannot see the necessity of rehashing the Court's action in denying defendants' motion for a directed verdict. Appellants' and defendants' contentions were treated in detail in respondents' brief pages 12 to 20 inclusive. Appellants inject nothing new in support of their contention in their so-called "Reply Brief." Their assertions are fully answered in respondents' original brief. They still reiterate that the jury was by law required to believe the testimony of their so-called eye-witnesses, whose testimony was

strictly at variance with physical possibility, and was absurd, far-fetched and contrary to the facts. That is their main contention to support their motion for a directed verdict. The positive, clear and convincing testimony of respondents in accordance with the physical facts and human reason was believed by the jury. There could have been no other decision.

### **Appellants' reference to instructions.**

There is no question but that the Court submitted to the jury in fair and impartial language the controlling question as to the direction of travel of decedent, just prior to his death. There is no question but that the jury decided that the decedent was traveling north. Appellants' objections to the instructions were also treated fully on pages 20 to 32 of respondents' original brief. Appellants' so-called reply is merely a rehash and reiteration. There is nothing new in their arguments in this connection.

### **Determination by jury of direction of travel.**

The argument of counsel that the jury did not determine that the Tuttle car was traveling north is brought to an interesting light in referring to appellants' Exceptions to the Instructions of the Court. We call the Court's attention to the language of counsel in their exception to instruction No. 5 of the Court (Tr. 462):

“Excepts to the Court's Instruction No. 5 and to the whole thereof, for the reason that the Instruction is not justified under the evidence in that it makes the sole issue in the case whether the deceased's car was going northbound or southbound, and eliminates the question of contributory negligence if deceased was

going northbound. Also, that there is probative evidence that deceased was northbound.”

Again in their brief the counsel for appellants gather portions of instructions in a hope of getting a misleading interpretation. Both in their opening statement to the jury and in their argument to the jury, counsel for the appellants stated that the sole question was the direction of travel of the deceased. Counsel for respondents concurred in that statement. The instructions of the Court made this issue clear and correctly stated the law. In an effort to confuse, the appellants quote part of the material instructions, and although the instructions 3 and 4 were quoted in respondents’ original brief on pages 25 and 26, we again quote them in full with instruction No. 5 to again emphasize to the Court the clear picture and questions given by the instructions and to show how unfair counsel for appellants are attempting to be. The instructions follow:

“No. 3. You are instructed that plaintiff’s 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.

“No. 4. You are instructed that the defendants claim in their pleadings herein that at the time of the accident that both cars or vehicles involved in this accident were traveling south, the Tuttle car being in the west lane or shoulder, and defendants’ truck being in the lane next west to the center line, and that just as defendants’ truck was going to overtake and pass the car driven by Mr. Tuttle, Mr. Tuttle suddenly made a left turn in front of the defendants’ truck, causing the collision.

“You are further instructed that if you find from the evidence that both drivers were in fact traveling south and that the deceased, Dale Tuttle, was negligent in suddenly turning in front of defendants’ truck and that such negligence proximately contributed to cause the collision, then plaintiffs cannot recover and your verdict must be in favor of the defendants against the plaintiffs, no cause of action.

“No. 5. The fact that I have instructed you on the law applied to the conflicting contentions of the parties should not be taken by you as an indication the court believes that the defendant was going either southbound or northbound, but are given to enable you to decide the case under the law, according to whether you feel the deceased was southbound or northbound.” (Emphasis ours.)

How can counsel be serious? The jury had to determine the direction of travel of decedent in order to decide,

and there is no question but that they determined that he was going north. There was no question in counsel's minds at the time their exceptions were taken after the submission of the case to the jury that the instructions of the Court were such that the case should be decided upon the question as they had stated in their opening statement and argument before the jury, that if the deceased, prior to the impact, was going north there should be recovery, and if going south there should be no recovery. Appellants attempt now to confuse the whole matter by quoting portions of instructions which do not give the true picture.

### **Defendants' theory of the evidence submitted to jury.**

Again counsel wants to rehash the issues. There is no question but what appellants' theory was clearly submitted to the jury and upon their opening statement, their theory was that the decedent was traveling south just before the impact. The defendants' requests which the 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. The ultimate question of direction of travel of the deceased was properly submitted to the jury. In examining defendants' requests for instructions and particularly Nos. 5, 8, 9, 10, and 11 referred to on page 31 of their Reply Brief, we fail to find anything that should have been submitted to the jury under proper instructions, that was not submitted. Counsel makes the broad, general statement that because of the failure of the Court to give their requests, there was prejudicial error, even though the material substance of their requests was given, without repetition as was desired by the appel-

lants. The issues of direction of travel of deceased, and of contributory negligence were placed squarely before the jury in instructions No. 3 (J.R. 223) and No. 4 (J.R. 224) and No. 5 (J.R. 225), and we feel that it would have been error for the Court to give repetitious emphasis to the defendants' theory as requested. An instruction on their theory was requested in appellants' request No. 4 (J.R. 201). and their theory was presented to the jury by the Court.

**There were no "errors or procedure" calculated to do harm, as claimed by appellants.**

Of course, as appellants assume, there was no acknowledgment of errors in this case in the Court's instructions. The respondents' only acknowledgment rests in their statement, that even if we assume the appellants were correct in their contention that there was error, then there should be no ground for reversal because such errors as the appellants assumed were committed were not prejudicial. Counsel for appellants again refer to the case of *Jensen v. Utah Ry. Company*, 72 Utah 366, 270 P. 349. They refer in their brief to the statement made in such case that where there are errors calculated to do harm, they would be presumed to be prejudicial unless it is shown that they are not. The *Jensen* case was referred to in respondents' brief, 31 and 32.

In the instant case, we have demonstrated time after time that any error, claimed or assumed, by the appellants was not only not calculated to do harm, but could not have been in any way prejudicial. Whichever view the jury took on direction, determined the outcome. In fact appellants do not even contend that if the deceased just prior to the impact was traveling north, that they would not be

liable. The case of *Thelin v. Stewart*, 100 Cal. 372, 34 P. 701, cited by appellants further supports the respondents' view in this connection. From that case, the following is quoted from page 704:

"We think this but an admonition that errors, or defects, shall not be presumed prejudicial, to have resulted in miscarriage of justice and thus that harmful results are not to be presumed from, nor reversals granted, for mere error. In the language of the statute, the court, before it is warranted in reversing a judgment, 'must be satisfied' that a committed error resulted in prejudice of some substantial right. But how satisfied? Not by a presumption from mere error, but by something showing such prejudicial effect. How may that be shown? Some committed errors, *prima facie*, are not calculated to do harm. Hence no presumption of harmful effect is to be indulged. Nevertheless, the party against whom such errors are made may, by the record, demonstrate, if he can, that the rulings did result to his prejudice of some substantial right. On the other hand, error may be committed which, *prima facie*, is calculated to do harm and to affect substantial rights. From such error prejudice and harmful effect of such rights will be presumed until, by the record, it is demonstrated that the error did not have, or could not have had, such prejudicial or harmful effect; and, if not so demonstrated, then, ought the court to be satisfied that prejudice resulted."

In the instant case, we submit that there was not even error calculated to do harm, but have gone further than our burden should be and have demonstrated from the record that there could have, in fact, been no prejudice. The jury decided the ultimate fact in favor of the respondents and the appellants should not now be allowed to complain

because they were instrumental in submitting such ultimate fact to the jury in their requests, in their argument to the jury, and in their opening statement, the ultimate fact of direction of travel of deceased.

The case of *Clark v. Los Angeles & Salt Lake R. Co.*, 73 Utah 486, 275 P. 582, treats mainly with the presumption of due care in the absence of evidence to the contrary, and the holding in that case would support the Court's instruction that in the absence of evidence to the contrary, there would be a presumption that the deceased used due care. Nothing in that case would support the appellants' contention of any procedure or error calculated to do harm. The other authorities cited add nothing more to their contention.

**There was no "procedure" in this case calculated to prejudice, as claimed by appellants in their Reply Brief.**

We hesitate to repeat in any way the substance of our original brief, but in view of the fact that the appellants' so-called Reply Brief appears to be merely a repetition of their original brief, some repetition on our part is inevitable.. Appellants again refer to the Court's instruction No. 1. The instruction as we have stated 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 upon which there was not ample evidence. The instruction also recited the claims of the defendants as to the conduct of the deceased, some claims upon which there was not any evidence introduced. There could be and was no argument but what speed was a contributing factor in the death of the deceased, as there was

ample evidence that the PIE truck went out of control before any impact (Tr. 389-390). If the jury had believed that the deceased was traveling south prior to the impact, then speed may not have contributed to the death of deceased, because if that had been so, under the instructions to the jury, plaintiffs could not recover; but the jury did not believe the contentions of the defendants, and could well have found upon the evidence and instructions that speed was a major contributing factor.

**There was no error “calculated to prejudice,” as claimed.**

All of the cases cited by appellants in objection to the Court's instruction No. 15 concerned situations where the giving of such instruction would be prejudicial. None of such cases are from this jurisdiction except *Saltas v. Affleck*, 99 Utah 381, 105 P.2d 176, where such an instruction was not considered as prejudicial error, as the case was reversed on other grounds.

Where, as in this case, the appellants have emphasized that the controlling question was the direction of deceased's travel, whether north or south, and that question has been submitted to the jury; then assuming, as we do not, that the Court's instruction as to speed was erroneous, it would not be prejudicial because if the jury had decided that the deceased was not traveling north at the impact, there could have been no verdict and judgment for the plaintiffs. The jury was instructed in effect that if the decedent was traveling south and turned in front of the defendants' truck as alleged by the defendants there could be no recovery. We have demonstrated throughout our arguments and brief time after time that instruction No. 15, assuming

that the defendants are correct in their assertions, could not have been prejudicial.

Counsel again reiterates their objection to the Court's instruction No. 14, and we say again that in instruction No. 14, no greater burden was placed upon the defendants than was proper. The Court's instruction is quoted as follows:

"You are instructed that in addition to the duty to keep a proper lookout, a driver must at all times maintain such control over his automobile and must take such measures as are reasonable to stop or turn to avoid a collision with another vehicle or person upon the highway reasonably within range of his vision. And in the event such driver fails or neglects to so keep his vehicle under control as set forth above, he is negligent. And where such negligence proximately causes injury or damage to any other person or property, the driver of such vehicle is liable for all resulting damage, unless such person is himself guilty of negligence which proximately contributes to produce the injury.."

The cases *Sorenson v. Bell*, 51 Utah 261, 170 P. 72; *State v. Green*, 78 Utah 580, 6 P.2d 177; treat with conflicting instructions and it could not be determined whether the jury was following the correct or incorrect instruction in reaching their verdict. That is very much different than here where the material matter they were to determine was the direction of travel of deceased. The case of *Martin v. Sheffield*, 112 Utah 478, 189 P.2d 127, held that where the Court failed to advise the jury as to the effect of alleged negligence on the part of plaintiff, should it find that such negligence proximately contributed to her own injuries, it was prejudicial error.

**No error in Court's instruction No. 13.**

Again the appellants quote a part of an instruction in order to give an unfair and biased picture. It may be noted that the Court instructs the jury that it is the duty of a driver of a motor vehicle upon the public highways in the state to at all times exercise due care and diligence in order to prevent injury to persons or property lawfully upon the highway. In order to give a clear picture of the instruction, we quote it:

“You are instructed that it is the duty of a driver of a motor vehicle upon the public highways of this State to at all times exercise due care and diligence in order to prevent injury to persons or property lawfully upon the highway. 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, and to actually see, as well as look for, all persons, objects and things which are reasonably within the range of his vision, and which may constitute a hazard. It is then his further duty after having seen, or after he should have seen, to use such care and diligence as a reasonable and prudent person, having due regard to all conditions of the highway, the presence of intersections, obstructions or any other condition which may produce a hazard, would use to prevent injury. And in the event that a driver fails or neglects at any time to exercise such reasonable care and diligence, he is negligent. And if, as a proximate result of such negligence, injury or damage is caused to any person, the driver so causing the injury or damage is liable to the person thus injured for all damages sustained by reason of such negligence, unless such person is himself negligent and his negligence proximately contributes to produce the injury.

“Thus, if you find from a preponderance of the evidence in this case that the defendant, while operating his truck-trailer, failed to use the degree of care and caution as set forth above, and that as a direct and proximate result thereof Dale Tuttle was killed, your verdict should be in favor of the plaintiffs, unless you also find that the deceased, Dale Tuttle, was also negligent in some respect and such negligence proximately contributed to produce the accident with its consequent death of deceased.”

In looking at the instruction as a whole, it may be observed that the Court did not impose an absolute duty and it is not a fact that it imposed liability upon the defendants if the driver did not “constantly keep a lookout not only ahead but to the sides of his vehicle”, as in considering the instruction as a whole, there could be no prejudice to the defendants, for if the jury found that the deceased was going south, it was instructed in find in effect for the defendants, and if he were going north, the instruction was wholly immaterial as the truck would be on the wrong side of the road. Even in the case of *Morrison v. Perry*, 104 Utah 151, 140 P.2d 772, cited by appellants in their original and reply briefs, the Court holds that under some circumstances there would be required a constant lookout. The Court as stated in our original brief, 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 the instant case, but the Court qualified his instruction more in favor of the appellants.

### **Submitting all allegations.**

For the reasons stated on pages 21, 22, and 28 of respondents' original brief, there was no error in submitting all allegations. Appellants add nothing to their original arguments in their Reply Brief, excepting that they allude to the number of requests of respondents apparently in connection with the Supreme Court's comments in the oral argument. The fact is that there was substantial evidence in the record to show negligence on the part of the defendants in every way alleged in the complaint, and that such negligence contributed to the death of the deceased, and was the proximate cause thereof.

### **References as to speed, etc.**

The main objection apparently made by appellants seems to be that there were too many requests which referred to the speed of truck and other matters, whether or not the requests were given by the Court. They do not contend that speed was not a contributing factor and that it was not proved at the trial of the case.

### **Reference to lights.**

True it may be that reference to the lights of the truck in the instructions would not be proper if the jury believed the fiction that prior to the death of the deceased he was traveling south. On the other hand it was proper to submit the matter to the jury because lights flashing on and off bright beam could well confuse and blind oncoming traffic. Further reference to this seems unnecessary as it has been covered in both the appellants' brief and the respondents' brief.

## References as to presumption.

Again we say in answer to appellants' reassertion, that there was no error in the Court's Instruction No. 6, and the Court, in accordance with the rule stated in the case of *Clark v. Los Angeles & Salt Lake R. Co.*, 73 Utah 486, 275 P. 582, correctly instructed the jury that in the absence of evidence to the contrary there would be a presumption that the deceased exercised due care for his own safety. The jury believed under the instructions of the Court that the deceased was proceeding north just prior to the impact, and there was no evidence as to any contributory negligence on his part at all. The theory was presented to the Court in plaintiff's requests Nos. 12 (J.R. 161) and 13 (J.R. 162).

Appellants' requested instruction No. 19 (J.R. 216) assumed that the jury must believe the alleged eye-witnesses against all reason and physical evidence and that the Court should so instruct the jury. Their request was made only upon their theory of the case based upon the fiction that the deceased was traveling south. It would have been improper and error to give such request as an instruction and the Court properly declined to give it. The instruction of the Court was correct. *Ryan v. Union Pac. R. Co.*, 46 Utah 530, 151 P. 71. See also *Duehren et al v. Stewart*, 39 C. A. 2d, 102 P.2d 784.

**There was no over-emphasis as to inferences and presumptions.**

Counsel's general statements as to the Court's instruction No. 9 should avail nothing. Counsel fails to and cannot point how such instruction is erroneous. The Court's instruction No. 9, we submit, was correct.

### **Sudden emergency.**

Instruction No. 22 (J.R. 2443) had as much application to the case on defendants' theory as well as plaintiffs' theory. If the defendants' theory had been believed by the jury, they might have thought that the driver of the PIE truck could have done something to avoid the accident, but under the instruction of the Court would not have held the defendants responsible because the driver failed to choose the wiser of two courses. Respondents' requests were not in any way in the abstract, but related to the actions of Tuttle. Appellants requested an instruction based upon their theory that if the deceased were traveling south and turned in front of the defendants' truck that there should be no recovery, whether or not there was an emergency created thereby even though the truck driver could have reasonably anticipated the actions of the driver in front and could have avoided the impact (defendants' requests No. 8, J.R. 205; No. 9, J.R. 206; No. 10, J.R. 207). Their theory was correctly submitted to the jury by the Court, and their requests would have been improper if adopted as requested. Of course, since the jury believed that the decedent, Dale Tuttle, just prior to the collision was traveling north, instruction No. 22 would apply to his actions.

### **Re insurance indemnification.**

The matter of insurance was first brought out by appellants on cross-examination (Tr. 90). It could not in any way be prejudicial. The matter, we feel, was fully covered in respondents' original brief, pages 32 to 38. Appellants' statements herein are mere reiteration. The jury

would know that the PIE could certainly answer in damages as well as an insurance company.

## CONCLUSION

All that respondents ask is that the Court examine the evidence as we are sure they will. We ask that they look at the testimony which for some reason or other the appellants refer to as negative. Perhaps they mean that it negates their fictitious and impossible testimony. Be that as it may, the occurrence could only have happened if the deceased were going north as there is ample evidence to show. Again we point out the fact that the only supposed argument the appellants have is that the jury should have been instructed to believe the testimony of their witnesses, no matter how impossible and absurd such testimony might have been, no matter how contrary to the physical facts. There is ample evidence to support the verdict of the jury, and their verdict should be upheld.

We have in no way sought to rely upon sympathy, nor did we at any time during the trial. The appellants were the ones who talked about sympathy in an effort to obtain special consideration from the jury by these tactics. We at no time sought to capitalize on the fact that the PIE is a large corporation. Appellants were the only ones who have emphasized this fact in an effort to get the jury, and now this Court, to sit up so straight that they lean over backwards; yet it should not be held against the defendants that they are a widow and a minor child, nor should it be taken as a matter justifying special consideration to the defendant company that it is a large corporation, well able to respond to any judgment that is justified by the facts and the law.

It would seem against the interests of justice to set aside the verdict of the jury so fairly reached, and the fact that the jury would not believe the defendants' witnesses because of their impossible and improbable testimony would seem no reason to so set aside the verdict of the jury. The fact that one of the members of this honorable Court commented during the oral arguments with respect to the large number of requests for instructions, and because of the fact that the appellants in their purported "Reply" Brief have repeatedly adverted to such matter, should certainly be no good reason for a reversal of the case, nor the proper subject for a Reply Brief. We feel confident that the Court will look beyond the general allegations of the appellants to the facts and law of the case as brought out by the record, and sustain what without question is a fair, well considered, and impartial verdict of the jury.

Respectfully submitted,

A. H. CHRISTENSON

A. SHERMAN CHRISTENSON

PHILLIP V. CHRISTENSON