2001

Thomas LaMar Dewsnup v. Bailey's Moving and Storage Company & Allied Van Lines : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT
OF THE STATE OF UTAH

THOMAS LAMAR DEWSNUP,

PLAINTIFF AND
RESPONDENT,

CASE NO. 14408

VS.

BAILEY'S MOVING AND STORAGE
COMPANY, A CORPORATION, AND
ALLIED VAN LINES, A CORPORATION,

DEFENDANTS AND
APPELLANTS.

BRIEF OF APPELLANT BAILEY'S MOVING AND STORAGE COMPANY

APPEAL FROM JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE J. E. BANKS, JUDGE

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IN THE SUPREME COURT

OF THE STATE OF UTAH

Thomas LaMar Dewsnup,

Plaintiff and
Respondent,

Case No. 14408

vs.

Bailey's Moving and Storage
Company, a corporation, and
Allied Van Lines, a corporation,

Defendants and
Appellants,

BRIEF OF APPELLANT BAILEY'S MOVING AND STORAGE COMPANY

NATURE OF CASE

This is an action by plaintiff to recover damages for personal injuries sustained in a tractor and semi-trailer roll-over accident.

DISPOSITION IN THE LOWER COURT

The jury returned a split Special Verdict in favor of the plaintiff in the sum of $329.364.31, of which $250,000.00 was awarded as general damages (R. 1000-1003). The general damage award exceeded the amount prayed for in plaintiff's Complaint by $50,000.00 (R. 675-681) and the trial court reduced the general damage award to $200,000.00 and entered judgment in the total sum of $279.364.31, but retained jurisdiction of the matter until it ruled on whether plaintiff was entitled to the $50,000.00 general

damages awarded in excess of the amount prayed for in his complaint (R. 107). The trial court subsequently ruled in favor of plaintiff and entered an Order Amending Judgment on the Verdict which increased the judgment to a total of $329,364.31 (R. 1075). The trial court also entered judgments in favor of defendant Allied Van Lines on its cross-claim against defendant Bailey's Moving and Storage Company in the same amounts as awarded in favor of plaintiff against both defendants.

The motion of defendants Bailey's Moving and Storage Company and Allied Van Lines for judgment notwithstanding the verdict or in the alternative for a new trial which raised the issues of excessive damages, insufficiency of the testimony of plaintiff's expert and of errors in law committed by the trial court (R. 1014-1015) was denied (R. 1072).

RELIEF SOUGHT ON APPEAL

Defendant Bailey's Moving and Storage Company seeks reversal of the judgments awarded against it in favor of the plaintiff and cross-claimant Allied Van Lines on the ground that plaintiff's evidence is insufficient to sustain the judgment in favor of the plaintiff, and consequently the judgment over against it in favor of the cross-claimant Allied Van Lines; or in the alternative for a new trial on the grounds that the trial court committed prejudicial error in receiving certain evidence as more specifically set forth hereinafter; or in the alternative that the judgments in question be modified to award no more general damages than prayed for in plaintiff's Complaint.

STATEMENT OF FACTS
(Recited most favorably to plaintiff)

The plaintiff was employed in March, 1967 (Abs. 24) as a lease-operator driver by defendant Bailey's Moving and Storage Company, a local agent of defendant Allied Van Lines. He was the owner and operator of a 1967 Peterbilt tractor which was leased to defendant Bailey's Moving and Storage Company and used to pull a 1967 forty-foot Electronics Van semi-trailer, which was leased to defendant Bailey's Moving and Storage Company by C & J Bailey, a partnership. Plaintiff operated this combination rig for approximately seventeen months (Abs. 20) traveling in excess of 100,000 miles (Abs. 23) before the accident in question occurred on August 3, 1968.

In the fall of 1967, plaintiff noticed a rattle which had developed in the rear end of the trailer and "cupping" wear on the trailer tires (Abs. 20). In the summer of 1968 when he was in Sacramento, California, another driver told him his rear end suspension was loose and he then noticed that the front torsion bar was "sloppy" (Abs. 20).

When he returned to Salt Lake City, Mr. Linnell, manager of Bailey's Moving and Storage, told him to take the trailer to Utility Trailer and have it checked. Mr. Lee Wareham at Utility Trailer examined the trailer and told him repairs would cost approximately $600.00 and take four days to complete. Mr. Linnell did not authorize repairs at that time and told him they had a shipment that had to go and asked him if he knew of someone else who could look at it.(Abs. 21).

At plaintiff's suggestion and Mr. Linnell's consent (Abs. 24), plaintiff took the trailer to Slim Olson's where Mr. Dell Rees repaired the front torsion bar by shimming it (Abs. 21, 71-72). This work was done on May 22, 1968 (Abs. 72). After this work was completed, the trailer was considerably quieter (Abs. 21) and plaintiff did not consider he had any problem with it after that time (Abs. 24).

On August 1, 1968, three days before the accident on August 3, 1968, plaintiff signed as driver, the thirty-day inspection report made by Mr. Gilbert Wilburn, Bailey's mechanic, which stated above his signature, "All defective items listed herein have been corrected." This report indicated that the tires, wheels and suspension system of both the tractor and trailer as being okay (Abs. 25). Also, the plaintiff, as driver, filled out daily inspection reports up to the time of the accident indicating that the tires and steering were okay, and until the accident occurred, he had no complaints regarding the running gear of either the tractor or trailer (Abs. 25). Even after the accident, he made no complaints to either Slim Olson or Bailey's of any defect in the tractor or trailer (Abs. 25).

Plaintiff acknowledges that Mr. Rees told him the shimming job he did was a temporary repair and plaintiff expected to have further work done on the suspension system, but he drove a minimum of 12,000 from the date the repair work was done to the date of the accident (Abs. 27).

The accident in question occurred on an old narrow two-lane

highway at a point of substantial downgrade (Abs. 4) approximately one-tenth of a mile downhill from the crest of the hill (Abs. 3). The right duals went off the right side of the road and traveled approximately 225 feet before they came back on the blacktop where the rig veered across the road and off the left shoulder. The left shoulder of the road is a steep embankment and the rig was airborne for approximately forty-eight feet as it went off the left shoulder. The rig turned on its left side as it hit the ground and then skidded on its side for an additional ninety feet ten inches (Abs. 3 & Exh. 15).

The maximum distance the right duals went off the right shoulder was four feet (Abs. 3). The left duals left no marks upon the blacktop during the time the right wheels traveled the 225 feet off the blacktop on the right shoulder, but both the right and left duals left scuff marks on the highway as the rig came back across the road to the left as it crossed and went off the left shoulder (Exhs. 9 & 15). These marks indicated the brakes were not applied at the time they were made (Abs. 3). There were no tire marks on the roadway prior to the point where the right duals went off on the right shoulder (Exh. 15).

Plaintiff's first notice of the accident was a feeling as though he had been rear ended by a car. He was thrown forward and the rig was jerked off the right side of the road. He glanced in the rear view mirror and saw the trailer coming behind him in a jackknifed position to his left (Abs. 22-23).

The plaintiff's sons, Kendall who was nine years old at the

time of the accident, and Alan, who was fourteen years old at the time of the accident, both stated that the first thing they recalled about the accident was a loud bang. The next thing they both heard was the screeching of tires on the asphalt as the truck veered off the right side of the road (Abs. 13 & 15). However, both Kendall (Abs. 14) and Alan (Abs. 15) acknowledged that when their depositions were taken in December, 1971, they had not mentioned anything about a bang occurring prior to the rig going off the right hand side of the roadway. They both acknowledged that when their depositions were taken that they testified that at the time of the accident it felt like their trailer brakes had locked up (Abs. 14 & 16). Alan also testified that in discussions with his father at the hospital after the accident, his father told him that it seemed to him like the brakes had set up. His father never gave him any other explanation as to the cause of the accident (Abs. 17).

The accident was investigated by Officer Ritchie of the Wyoming Highway Patrol. His investigation consisted of inspecting the vehicle, taking photographs and making measurements of the scene. From his measurements, he prepared Exhibit 15 (Abs. 3).

From his inspection of the vehicle, he did not remember seeing any blown tires or steering defects (Abs. 4). However, the estimate of repairs to plaintiff's tractor shows one tire with fifty percent wear requiring replacement (Exh. 48).

Officer Ritchie did notice a fresh break in what he termed

a spring shackle (correctly designated a frame bracket) on the right rear tandem of the trailer. During the half an hour or longer while he was in the immediate area of the vehicle inspecting and taking pictures, he did not notice anything unusual about the front or rear torsion bars running between the front and rear dual wheels (Abs. 5). Other than the broken shackle on the right rear of the trailer, he did not observe anything else in the suspension system that appeared to be broken or out of place (Abs. 5).

With respect to the duals, the back one was canted slightly to one side. He explained that the duals looked straighter in photograph 4-P than they did in 5-P and 4-P is the photograph looking down from the tractor toward the back of the trailer (Abs. 5-6).

He made no attempt to take a photograph showing the fractured spring shackle (Abs. 6).

After being recalled, Officer Ritchie stated that the two Dewsnup boys at the scene of the accident told him that they heard a loud noise and the truck jerked or lurched and their father started fighting the steering wheel to control the vehicle and it then went back across the road and over the embankment (Abs. 6). He also had a conversation with George Mason, the wrecker driver, who stated they would have to chain the rear axle ahead before they tipped it over. However, he was not with Mr. Mason when the latter righted the rig and brought it back to Casper (Abs. 7).

The trailer was righted and brought back to Casper, Wyoming by George Mason who owns Mason Wrecker Service. Mr. Mason came to the scene with two rigs, a twin-boom wrecker and oil field wrecker, one of which was operated by his employee. They up-righted the trailer without unloading it, brought it onto the highway, turned it around and brought it back to Casper. They used the oil field tractor equipped with a fifth wheel, but due to the length of the unit, they were unable to lock the trailer within the fifth wheel of the tractor and therefore secured it by a chain and winch line while they towed it back to Casper. They did not change any tires or do anything to the rear wheels of the trailer to make them tow properly. They experienced no difficulty in towing the trailer into Casper (Abs. 18-19).

Mr. Mason stated he did not remember telling plaintiff's counsel in 1971 that one of the air sacs on the suspension system was collapsed nor did he at this time remember one of the sacs being collapsed (Abs. 19).

The trailer was brought back to Bailey's yard at Ogden, Utah by Mr. Wilford Bingham. Mr. Bingham picked the trailer up at Mason's lot in Casper, Wyoming. He put some bands around the front part of the trailer compartment (front end) where it had been broken open in the accident, but he made no repairs to the tires or suspension system. Mr. Mason said nothing to him about any chain on the suspension system and he did not see one. After he checked the tires, brakes, turn signals and stop lights, he pulled the trailer back to Ogden at speeds of approximately 50 miles per hour without incident (Abs. 66).

The trailer was eventually brought to Utility Trailer's yard in Salt Lake City where it sat for approximately one and one-half years before it was repaired (Abs. 9). Utility Trailer purchased the trailer as salvage to rebuild and sell (Abs. 8). At the time repair work commenced, Mr. Robert Lee Wareham, the shop foreman, observed that one frame bracket had broken loose from where it had been welded to the frame, two of the four air bags were blown and it was blocked between the frame and the beams to hold the trailer up. Also, one axle was chained forward to make the trailer towable (Abs. 8).

Mr. Wareham did not know how long the trailer had been sitting elsewhere before it was brought to Utility's yard or what may have happened to it before it got to Utility's yard (Abs. 9). He stated that the entire trailer, including the suspension system was rebuilt by Utility Trailer after the accident. He assumed that the break in the frame bracket, as well as all of the other damage he observed, occurred in the accident. (Abs. 9). Mr. Wareham could not even estimate the year when Utility Trailer repaired the trailer because it has been seven years since he worked for Utility (Abs. 10).

The frame bracket that was torn loose along the weld line was rewelded back to the frame. There was also other welding done such as welding breaks in the cross members of the trailer floor (Abs. 10).

Both torsion bars were in place when Mr. Wareham inspected the undercarriage approximately a year and a half after the accident (Abs. 11).

The parts list for the repair work performed on the trailer after the accident indicated one tire was recapped, one tube was replaced, one torsion bar was replaced and one bushing was replaced. The total cost of repairing the trailer was $4,315.00. (Abs. 12).

According to Mr. Wareham's best recollection, it was the left front frame bracket that was broken at the weld line (Abs. 12).

A trailer was also worked on by Mr. Arnold Schmidt who was a working foreman on the night shift for Utility Trailer in 1967. He remembers seeing the trailer being brought into the yard by a wrecker, but he did not examine it at that time. He did not recall any kind of a chain around the suspension system and did not recall seeing a broken frame bracket when he worked on the trailer, but stated it may have been welded up by the day shift before he noticed it. (Abs. 59). He did notice one of the torsion bars not being properly in place. The bolt which holds the torsion bar in place had a notch worn out where it fits through the slot into the torsion bar. At each end of both torsion bars, a steel plate had been welded on the beam and two of these plates were still in position, but one plate on the front bar and one plate on the rear bar were missing. The U bolts which hold the axle under the trailer on the beam were also twisted and replaced. (Abs. 58).

Mr. Schmidt did not know when the accident in question occurred, or what had been done with the trailer prior to the time it came into Utility's yard or prior to the time Utility commenced working on it. He had no way of identifying the trailer

in his memory other than it being a Bailey's trailer. He had worked on other Bailey's trailers, but did not recall any others having as extensive damage. (Abs. 58-60).

However, Mr. Schmidt recalled that the trailer he was talking about was worked on in about April, 1967. He started to work for Utility on February 1, 1967 and estimates that he started working on the trailer of which he was speaking in April, 1967, approximately two months after he was hired (Abs. 59-60).

After being rebuilt by Utility Trailer, the trailer in question was sold to Bender Moving Company of Reno, Nevada. Shortly before trial, the trailer was examined by Mr. Melvin Mullikin of Universal Testing Company who stated that his examination revealed that the left front frame bracket and some supporting members thereof had been welded to the frame more than once (Abs. 68).

Plaintiff's expert, Mr. Lionel George Wildey, stated that, in his opinion, the accident in question was caused by a torsion bar coming part way out of one of the frame brackets which would transfer additional load to the opposite frame bracket and this overstressing might be sufficient to tear the opposite frame bracket from the chassis, which would then allow the whole axle to pivot and cause the trailer to push the tractor off the road (Abs. 34). Mr. Wildey stated that he had not examined the failed parts and the sum total of the evidence available to him upon which he based his theory of ground-induced steering was the photographs (Abs. 36). However, he acknowledged that he had carefully examined the photographs and that the best evidence

from the photographs is that the torsion bars were still in place after the accident (Abs. 36). Further, Mr. Wildey admitted that in arriving at his opinion, he had to make assumptions that are not demonstrated in the photographs (Tr. 274 (reference inadvertently omitted in abstract)).

Mr. Wildey explained that the screeching sound heard by the Dewsnup boys at the beginning of the accident sequence was the misaligned duals being drug along the paved surface of the roadway (Abs. 37), which action he would expect to leave scuff marks on the highway, but admitted there was no evidence of any such scuff marks (Abs. 39).

Mr. Wildey also acknowledged that the only evidence he had of the misaligned axles which caused the ground-induced steering is the photographs, and that since one of the frame brackets had been sheared at the time the photographs were taken, there would be a sideways tension by gravity pull of the wheels and beams of the suspension system and that the axles would not be expected to be in perfect alignment as the trailer laid on its side when the photographs were taken. Mr. Wildey admitted that the photographs do not permit a determination of when the misalignment first took place, but explained "It's all we have got". (Abs. 38, Tr. 262). He admitted that it is possible that the frame bracket broke in the impact (Abs. 40).

Mr. Wildey had never had occasion to examine an accident involving a similar type suspension system. He had not previously examined any trailers where a torsion bar had purportedly come

out and he has had no experience with the particular suspension system in question (Abs. 41).

ARGUMENT

POINT I

THE OPINION OF PLAINTIFF'S EXPERT WITNESS WAS BASED ON SPECULATION AND IS INSUFFICIENT TO SUSTAIN THE VERDICT

The jury was instructed to return a Special Verdict in which the issue of defendant Bailey's Moving & Storage Company's liability was set out in interrogatories which submitted the issues of whether the accident was caused by a defect, was the defendant Bailey negligent, did defendant Bailey breach its agreement with plaintiff to inspect and maintain the trailer so that it was safe to operate with the tractor, and if the findings were in the affirmative, whether one or both of said issues were proximate causes of the accident.

The primary question in this appeal is whether there was sufficient evidence for the jury to find there was a defect in the trailer which caused the accident.

To establish the defect, plaintiff relied upon the testimony of an expert, Lionel George Wildey, who said that in his opinion the plaintiff lost control of the unit because of "ground induced steering" by the trailer, which would take charge of the tractor, forcing it off the road. He stated this resulted from a misalignment or malalignment of the trailer axles which, in his opinion, was caused by a torsion bar coming part-way out of one of the frame brackets. This transferred additional load

to the opposite frame bracket causing over-stress, which may have been sufficient to tear the opposite frame bracket from the trailer chassis, allowing the whole axle to pivot, causing the trailer to head toward the west (plaintiff's right) and push the tractor off the road to the east (plaintiff's left) (Abs. 34). Wildey had not examined the damaged parts, and he based his theory of "ground induced steering" solely on photographs of the rear dual wheels and tractor suspension system taken at the scene after the accident occurred (Abs. 36). He acknowledged that he had carefully examined the photos and that they showed the torsion bars were still in place after the accident (Abs. 36). Further, he admitted that in forming his opinion, he had to make assumptions that are not demonstrated in the photos. His testimony on cross-examination is quoted verbatim as follows:

> Q. Actually, Mr. Wildey, in looking at these photographs with the torsion bar still in place as you look at the photographs, that fact alone tends to discount the theory that you have about how this accident occurred--
>
> A. Well, we can't--
>
> Q. Let me finish the question. You have to make assumptions that are not demonstrated in the photographs?
>
> A. That is true.
>
> Q. In other words, if you just took the photographic evidence alone, from what you can see of that suspension system, you would have to say that those torsion bars still appear to be in place?
>
> A. Or out of place and just resting.
>
> Q. Yes. And you can't see that they are out of place in the photographs?

A. There is no conclusive evidence in the photographs. I am using my experience in assessing the self-induced -- the ground induced steering theory.

Wildey's testimony on cross-examination was speculative as to which torsion bar came out of which frame bracket, causing the frame bracket on the opposite side to tear out. After repeated questions, he finally concluded that the torsion bar "drifted out from the right side." He said:

Q. If it is one or the other, it seems to me it is a possibility.

A. It is reasonable that it drifted out from the right side.

Q. Well, is that the testimony that you want to say is the basis of your opinion?

A. Yes. Yes.

Q. I mean pick whichever one you want, but is this the one?

A. Yes, I think so, yes.

Q. And so then that breaks the left -- the left rear frame bracket?

A. That could possibly break the left rear frame bracket and tear it loose at the frame.

Q. Well, you keep telling me that it possibly could, so I guess it possibly couldn't. Is it your testimony that it did?

A. Well, without examining the failed parts, I have to make a probability kind of a statement.

Q. Well, as a practical matter, Mr. Wildey, isn't it true that you are basing your opinion on the fact that there is an apparent misalignment of the rear axles of this trailer that you have examined from the photographs?

A. That is true. I am basing my whole theory on its ground induced steering.

Q. And the fact is you haven't really considered anything else other than merely looking at those photographs, have you?

A. That is the sum total of the available evidence that I can examine. (Tr. 252).

Wildey qualified his theory that the torsion bar came out of the frame bracket by saying it was a "very strong possibility." He did not rule out that it could have worked vice versa (Tr. 251) Officer Ritchie, who investigated the accident, observed the bracket (he termed it a spring shackle) on the right rear tandem axle of the trailer was broken, that the break appeared fresh, there was no rust in it (Abs. 4). Other than the broken shackle on the right rear of the trailer, the officer did not observe anything else in the suspension system that appeared to be broken or out of place (Abs. 5). It is significant that Wildey testified it was possible that the frame bracket was broken in the impact (Abs. 40).

Wildey said that the "screeching sound" heard by the Dewsnup boys at the beginning of events in the accident sequence was caused by the misaligned dual wheels being dragged along the paved surface of the roadway (Abs. 37), which he would expect to leave scuff marks on the highway, but admitted that there was no evidence of any such scuff marks. He conceded that the photos do not permit a determination of when the misalignment first took place because the axles would not be expected to be in alignment as the trailer lay on its side after the frame bracket had been sheared. Referring to the photos, he said, "It's all we got" (Abs. 38, Tr. 262).

It is elementary that for the opinion of an expert witness to be admissible in evidence, a sufficient foundation must be laid to show that his conclusions are based upon evidence adduced in the case. In Day vs. Lorenzo Smith & Son, Inc., 17 U.2d 221, 408 P.2d 186 (1965), this Court, in reversing a judgment in favor of the defendant because the trial court erroneously permitted a highway patrolman to testify as to point of impact between two vehicles, said:

> An expert or skilled witness can give an opinion upon facts previously testified to by him, but not on facts known to him but not communicated to the jury. The witness must testify as to the facts upon which he bases his opinion and the facts should be related to the opinion. Otherwise, the testimony would be of little assistance to the court and jury, and there would be no way of testing the validity of the opinion.
>
> Opinion testimony, such as Sherwood's, is admissible only when the subject matter is such that a jury cannot be expected to draw correct inferences from the facts. There is no need for expert opinion with reference to facts involving commonplace occurrences. Expert testimony is not admissible solely because the witness has some skill in a particular field, but is admissible, if at all, only because the witness can offer assistance on a matter not within the knowledge or common experience of people of ordinary intelligence.
>
> Applying the foregoing principles to the instant case, we hold that it was error to permit Sherwood's testimony as to the point of impact because his opinion was not supported by sufficient facts and, what meager facts he did testify to were not connected up or related to his opinion. They were inadequate to support his conclusion. (Emphasis added)

Wildey admitted that the photos taken of the trailer at the scene of the accident showed the torsion bars were in place

after the accident. Incidentally, this could also be observed by the lay jury. His theory that the torsion bars could have "drifted out" of the suspension assembly, caused the "ground induced steering" and then returned to position after the trailer came to rest is pure speculation. That the torsion bar or bars did not come partially out of the assembly to cause a misalignment of the axles is supported by the undisputed evidence that there were no scuff marks left by the left dual wheels on the asphalt surface of the roadway before the right dual wheels went off the hard surface onto the shoulder, or even after the right duals were off on the right shoulder and the left duals were traveling on the paved surface of the roadway. If the rear dual axle had pivoted, causing the driver to lose control as theorized by Wildey, considering the weight of the trailer, which was 2/3 loaded (Tr. 165), and had a capacity of 21,000 pounds (Tr. 169), there would have to be tire scuff marks left on the driving surface by the left dual wheel. According to Officer Ritchie's investigation, the unit traveled a distance of 225 feet partially off the roadway surface, with the right wheels on the shoulder and the left wheels on the surface, no scuff marks were left before the unit went onto the shoulder, or during the 225 feet the left wheels continued on the driving surface. The first scuff marks left by the wheels on both sides of the unit appeared at the point where the rig made the abrupt left turn across the highway and went off the left shoulder of the highway, traveling 48 feet through the air before hitting the barrow pit where it

slid on its side another 90 feet 10 inches. Certainly, if the unit left scuff marks because of the abrupt left turn across the highway, the conclusion is inescapable that if the rear trailer axle had pivoted, causing misalignment of the dual wheels, it would not only cause friction marks on the roadway surface, but there would also be evidence of damage to the tires, neither of which was observed after the accident. Haarstrich vs. Oregon Short Line R. Co., 70 U. 552, 262 P. 100 (1927), states the general principle that testimony contrary to uncontroverted physical facts does not constitute substantial evidence. If this rule is applicable to the testimony of a witness concerning an observed event, it should certainly apply to the opinion of an expert witness based upon the examination of photographs of a vehicle after the accident, which, in and of themselves, do not support his opinion.

The legal principle is well established that the testimony of a witness on direct examination is no stronger than that elicited in cross-examination. Alvarado vs. Tucker, 2 U.2d 16, 268 P.2d 986 (1954); State vs. Pratt, 25 U.2d 76, 475 P.2d 1013 (1970). The following language from Alvarado is pertinent to the situation regarding the lack of evidence of a defect in the trailer:

> The burden was upon the plaintiff to prove the charge of speeding. Such a finding of fact could not be based upon mere speculation or conjecture, but only on a preponderance of the evidence.

It is well established that if the probabilities as to the cause of an accident are equally balanced between two or

more causes and defendant would be liable only under one set of fact, plaintiff has failed in his proof. The Utah Supreme Court in Perrin vs. Union Pacific Railroad Company, 59 Utah 1, 201 P. 405 (1921) quoted with approval the following principle:

> If the probabilities are equally balanced that the accident was produced by a cause for which the defendant is responsible or by one for which he is not, the plaintiff must fail. Tremelling vs. Southern Pacific Company, 51 Utah 189, 170 P. 80,

which principle was reaffirmed in Alvarado vs. Tucker, supra. In discussing plaintiff's obligation to prove a particular fact by a "preponderance of the evidence" the Court stated:

> A choice of probabilities does not meet this requirement. It creates only a basis for conjecture, on which a verdict of the jury cannot stand.

In the case at bar, it is clear in considering Wildey's testimony in its entirety, as it must be considered, Alvarado vs. Tucker, supra, that his opinion is based merely on the possibility that a torsion bar might have drifted out of the frame bracket on one side of the suspension system causing the frame bracket on the other side to break. He acknowledged that his only evidence of the torsion bar being out is the photographs, but that in the photographs "it looks as though it is still in place" and that to support his opinion, one has "to make assumptions that are not demonstrated in the photographs."

Further, he acknowledges that the misalighment of the axles shown in the photographs are as consistent with the

frame bracket having been "broken in the impact" (a circumstance for which defendants would not be liable) as that the broken bracket was the cause of the accident. Such being the case, the jury could not have found from a "preponderance of the evidence" whether the frame bracket broke and caused the accident, or was broken in the accident. They would have had to speculate to arrive at either conclusion, and such speculation is not sufficient to sustain a verdict. See Denny v. St. Mark's Hospital, 21 U.2d 189, 442 P.2d 944 (1968) where plaintiff claimed an x-ray technician had injured her neck in positioning her for x-rays and plaintiff's expert, Dr. Hebertsen, testified such positioning could have injured plaintiff's neck, but his opinion was not otherwise supported in the evidence. In affirming a directed verdict for defendant, this Court stated:

> Such testimony is not sufficient to enable a jury to do more than speculate as to what was the cause of plaintiff's troubles.

In the case of Price vs. Ashby's Incorporated, 11 U.2d 54, 354 P.2d 1064 (1960), plaintiff's evidence went further than in the present case and did show a defect to exist in plaintiff's automobile which failed to negotiate a curve, but did not establish that the alleged defect was the proximate cause of the accident. In affirming the trial court's dismissal of the action, at the conclusion of plaintiff's case, the Court observed:

> The highway where the car left the road was in all respects normal and was a smooth oiled surface. The car could have left the road for any one or more of a number of reasons. For example, a driver could have been momentarily dozing or could have been inattentive and failed to observe the turn.

> There is no evidence here that the driver ever attempted to turn the steering wheel to cause the car to go to the left with the road. With two or more possible causes such as an inattentive driver and a mechanical defect that would have made it harder to turn; proof that it may have been either is not proof that it was in fact either. No evidence indicated that either cause was the more probable. (Emphasis added).

Also, re Beardall vs. Murray, 27 U.2d 340, 496 P.2d 260 (1972), where this Court affirmed the trial court's refusal to admit the testimony of an expert whose opinion was based on factors not shown in the evidence to be present. The Court said:

> . . . He arrived at his conclusion by use of a formula relating to the physics of a hypothetical case, based on weights, speeds of vehicles, angles of travel, etc. which were not shown to be connected with those extant here. Under such circumstances we cannot conclude that the court erred, as claimed on appeal, in sustaining an objection to the introduction of such testimony, - and we so hold.

POINT II

THE COURT ERRED IN PERMITTING WITNESS RITCHIE TO IMPEACH THE TESTIMONY OF WITNESS MASON WITHOUT PROPER FOUNDATION HAVING BEEN LAID

The testimony of witness George Mason was introduced by way of deposition. In the direct examination of Mason, he was asked the following question and answered as indicated:

> Q. And when you then towed it in, did you have to do anything to the rear wheels of the trailer to make them tow properly?
>
> A. The best I can remember, no.

On cross-examination by plaintiff's counsel, no further questions were asked of Mason regarding the rear wheels of the trailer.

However, in the direct examination of witness Ritchie by plaintiff's counsel, the Court permitted, over defendant's objection, Ritchie to testify that Mason told him in substance: I'll have to chain (expletive) up before I can move it (Abs. 7, Tr. 131-133).

It was error to permit Mr. Ritchie to impeach the testimony of Mason without having first asked Mason about the statement in question. As stated by Justice Wolfe in Jensen vs. Logan City, 89 Utah 347, 57 P.2d 708 (1936):

> Even where a witness states he does not remember any conversation with the proposed impeaching witness, that part of the alleged conversation which it is claimed would impeach him should be called to his attention, for it may yet serve to refresh his memory and give him the required opportunity to deny it specifically, or, if admitting to it, to qualify or explain it or testify as he thinks it actually took place."

Permitting Ritchie to so testify was extremely prejudicial to defendant's case since it gave plaintiff an opportunity to impeach one of defendant's important witnesses on a significant point without giving said witness an opportunity to deny or explain the statement in question.

The witness, Wilford Bingham, was sent to Casper, Wyoming, by the defendant to bring the damaged trailer back to Utah. He inspected the trailer, placed steel bands around the front of the trailer compartment to secure it. There were no chains on the rear suspension system. Before pulling the trailer on the return trip to Salt Lake City, he checked the tires and brakes and made no alteration of any kind to the suspension system. He towed the trailer on the return trip. He experienced no problem with towing the

trailer at a speed of approximately 50 miles per hour (Abs. 56), and noticed nothing unusual about the trailer while bringing it back (Abs. 67).

POINT III

THE COURT ERRED IN ADMITTING IN EVIDENCE TWO TIRES WHICH HAD BEEN REMOVED FROM THE TRAILER PRIOR TO THE AXLES BEING SHIMMED WHICH WERE NOT INDICATIVE OF THE CONDITION OF THE SUSPENSION SYSTEM AT THE TIME OF THE ACCIDENT

The Court admitted into evidence over defendant's objection plaintiff's Exhibits 22 and 23, which were two tires which had been on the trailer in question before the trailer was taken to Slim Olson's Service Station for shimming and were not on the trailer after the shimming work had been done, or at the time of the accident. The tires had large cups on their circumference showing uneven wear. The plaintiff testified that he did not remember whether they came off the right or left side or off the front or rear axles, but only that they were two of the tires which had been on the trailer when he experienced the rattling noise before the temporary repairs were made at Slim Olson's.

The plaintiff further testified that the two tires in question were taken off in the spring of 1968. The accident occurred in August, 1968. He testified that Slim Olson shimmed the torsion bars in May or June of 1968 and that the rattle was considerably quieter after the shimming (Abs. 21, 22). Thus, it is evidence that the condition of the torsion bars had been altered since the excessive cupping wear to the tires had taken place, and the condition of the tires was not probative

of any condition that existed at the time of the accident. Further, since plaintiff could not testify what wheels or even what axles the tires had come off from, and since Mr. Wildey's opinion was that the rear axle was the one which was misaligned and caused the accident, there was no foundation to support admission of the tires into evidence.

Since the tires showed excessive wear which may have been indicative of misalignment of the axle or wheels on which they were mounted and thus an indication of faulty maintenance by this defendant, admitting them into evidence was highly prejudicial to this defendant. They were large graphic exhibits and undoubtedly influenced the jury as they stood before them during several days of trial. Defendant was subjected to all of the unfavorable inferences which might be drawn from the appearance of these tires when it had not been established whether they were on the front or rear axle. If they had been on the front axle, the condition of the axle had been changed prior to the accident, and, accordingly, the tires had nothing to do with the accident and were not indicative of any condition that existed at the time of the accident.

Even assuming that the tires gave an inference that this defendant was negligent at some date prior to the accident, it is elementary that prior negligence is not admissible to show negligence on the date of the incident in question, especially when there has been a change in the circumstances involving the evidence purporting to show such prior negligence.

POINT IV

THE COURT ERRED IN AWARDING PLAINTIFF GENERAL DAMAGES IN EXCESS OF THE AMOUNT PRAYED FOR IN PLAINTIFF'S COMPLAINT

The general law with respect to recovering damages greater than the amount plead is discussed in 22 Am.Jur.2d Damages, Section 276, page 371, where it is stated:

> While in the averments of damages it is not necessary to be exact and the plaintiff's right of action is not affected by the fact that he is unable to sustain the allegation as to the amount of damages or unable to prove damages in the amount alleged, it is essential that the sum stated in the conclusion be sufficient to cover the amount of plaintiff's real demand, for in general the complainant cannot recover greater damages than the amount, with interest, he has declared for and demanded in his pleadings, nor may the award include amounts not embraced within the averments of the complaint. As a general rule, though, amendments which merely increase the amount of damages claimed to have arisen from the cause of action originally stated in the pleadings may be allowed even as late as the time of trial.

There is no statute nor case law in the State of Utah indicating or holding that plaintiff is entitled to recover damages in excess of that which is set forth in the pleadings. Rule 54(c)(1) of the Utah Rules of Civil Procedure provides:

> (1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

This rule is similar to Rule 54(c) of the Federal Rules of Civil Procedure. The construction of Rule 54(c) of the Federal Rules of Civil Procedure is discussed in 6 Moore's Federal Practice, pages 1261 through 1271. It is easily understood from the reading of this treatise that the liberal

approach to granting the relief a party is entitled to even if such relief is not contained in the pleadings focuses on the type of relief and not the amount. This is clearly indicated in the following statement.

> If a party is entitled to any relief under the facts as established by the pleadings or proof, the claim will not be dismissed simply because complainant has erred as to legal theory and is not entitled to the relief prayed for. An amendment to the prayer is not necessary to obtain the substantive relief to which the claimant is entitled; but is usually necessary if the claimant seeks to change an equitable claim into a legal claim, or vise versa, for the purpose of obtaining a jury or court trial.
>
> While appropriate relief should be granted, this does not include relief as to a matter not made out in the pleadings or proof; and ordinarily, relief which neither party desires should not be forced on them. 6 Moore's Federal Practice, pages 1264 through 1266. (Emphasis added.)

Many of our sister states hold that a verdict in excess of that demanded in the complaint is erroneous. In Smith vs. Tang, 100 Arizona 196, 412 P.2d 697 (1966), an action by a decedent's spouse against the estate for the recovery of certain funds claimed to be owed here, the Court stated the following:

> The general law with respect to a verdict for more than the allegation of a complaint demand is that the verdict is erroneous. 89 CJS Trial Section 506. As stated in 65 A.L.R.2d 1331:
>
> > "In the majority of cases where a verdict or judgment entered upon such verdict was deemed erroneous because exceeding amount of damages claimed or demanded in the successful party's pleadings, it has been held that a new trial may be avoided by a remittur of the amount of the excess."

In Bliss vs. Board of County Commissioners of Laramie County, 244 P.2d 508 (Wyoming 1952), a case involving the adequacy of a

condemnation award, in refusing to allow a judgment for damages greater than that for which it was plead, the Court stated:

> The authorities seem to bear out the contention. Thus it is said in 23 Cyc. 795, 796:
>
> > "It is a general rule that a judgment cannot properly be rendered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration or complaint. And it is immaterial that the evidence may prove a greater debt or a greater amount of damage than was alleged by plaintiff."
>
> Numerous cases as cited. In 25 CJS, Damages, Section 143, page 787, it is stated that:
>
> > "Plaintiff is precluded from recovering but not from proving, a greater sum than that alleged in the petition or complaint."
>
> In 15 Am.Jur., Section 309, page 751, we find it said that:
>
> > "In general the plaintiff cannot recover greater damages than he has declared for and demanded in his declaration, complaint or petition."
>
> 41 Am.Jur., Section 112, page 368 states:
>
> > "But relief will not be granted beyond the fair scope of the plaintiff's allegation and prayer."

In the case of Chesapeake and Ohio Railway Co. vs. Blackburn, 188 Kentucky 456, 222 S.W. 99, the Court held that where petition itemizes the amounts of the various damages, recovery is limited to the amount specified, notwithstanding that the evidence might show greater damage.

In Strahm vs. Murry, 199 P.2d 603 (Okla. 1948), the Court held in a property damage case that:

> A judgment for damages in an amount greater than that sought in the complaint cannot be sustained although supported by the evidence.

Also, in Olwell vs. Nye and Nissen Company, 173 P.2d 652 (Wash. 1947), the Court stated:

> It is said by Sutherland, in his work on damages, (Section 415), that:
>
> > "The controlling part of the complaint as to the amount of damages is the prayer for judgment."
>
> And in Sedg. Meas. Dam. (8th Ed. Section 1260) it is said:
>
> > ". . . except as fixing a limit beyond which recovery cannot be had, the averment of the amount of damages is not a material one.
> >
> > In regard to the amount of damages to be avered, it is only necessary to lay them so high as to cover the injury: for no recovery can be had beyond the amount in the declaration." 3 Sedgwick on Damages, 9th Ed., 2590, Section 1258.

From the foregoing authorities, it is apparent that the general law adhered to by most states is that a party cannot recover damages in excess of that which they have plead in their complaint, although the Federal Courts are admittedly more liberal in this regard.

The Utah Supreme Court has adhered to the majority rule which allows the successful party to accept remittitur rather than requiring a new trial. In Adair vs. James M. Peterson Ban 61 Utah 159, 211 P. 683 (1922), the Supreme Court of Utah affirmed the general rule by holding that the plaintiff's acceptance of remittitur would obviate the need for a new trial since the verdict had been returned in excess of the amount prayed for in the complaint. The Court said:

> In passing on the motion for a new trial the Court should have required respondent to remit the Twenty Dollars ($20.00) from the amount of the judgment and, in case he refused to do so, to have granted a new trial. Foulger vs. McGrath, 34 Utah 86, 95 P. 1004. It is therefore ordered that, in case the respondent shall file with the Clerk of this Court, within twenty (20) days after notice of this decision, his consent to remit the sum of Twenty Dollars ($20.00) as of the date the judgment was entered, the judgment will stand affirmed, each party to pay his own costs on appeal; otherwise, the judgment is reversed, and a new trial granted, in which event appellant shall recover its costs on appeal. Id 61 Utah at 164.

The Utah Supreme Court has also adopted the general rule in principle as shown by its Jury Instruction Forms of Utah, compiled and edited by members of the Supreme Court seven years after the adoption of the Utah Rules of Civil Procedure. The Preface to this work commences:

> The purpose of this is to provide a set of patterns for jury instructions which may be looked upon with some degree of assurance as to their accuracy under the laws of Utah. . .

Section 90.1 of JIFU suggests that an appropriate concluding paragraph regarding the assessment of damages be:

> The amount of damages thus assessed (for all of the foregoing) must not exceed the sum of $_____, the amount the plaintiff prays for in (his) complaint. (Emphasis added.)

In addition to the legal authorities cited above, there are significant policy reasons for enforcing the rule that a party is limited to the amount of damages prayed for in his complaint. The prayer for damages set forth in plaintiff's complaint must establish the parameters in which the parties must operate. No one is in a better position to analyze and

evaluate the extent of one's injury or damage than the person who has been so injured or damaged. In addition, the amount claimed in a complaint in many circumstances is jurisdictional in nature and is so significant that unless certain requirements are met with respect to the jurisdictional amount, a party cannot proceed. Although that is not the point in consideration in the instant case, it does point up the significance and importance of the ad damnum clause.

One of the most significant problems in tort litigation relative to the ad damnum clause is that it is the prayer of the complaint which determines whether or not the defendant has complete insurance coverage for the alleged loss, or whether he has an exposure over the policy limits for which he should retain counsel to represent and protect. To permit recovery in excess of the prayer of a complaint would make it impossible for an insurance company to accurately fulfill its obligation to its insured to advise him at the commencement of litigation whether or not he has a personal exposure. To in all cases advise that a verdict could be rendered in excess of the prayer of the complaint would cause many concerned persons to incur the expense of retaining personal counsel when there was no actual reason for them to do so in order to be fully protected against the exceptional circumstances when it might be necessary or desirable to have retained personal counsel. In effect, if a verdict in excess of the prayer of the complaint is permitted to stand, the defendant is deprived of notice of the total claim which could be rendered against him and is

denied the procedural notice safeguard necessary to due process of law.

CONCLUSION

An expert witness, in expressing an opinion, may not assume facts not in evidence. Such an opinion would be "pulling itself up by its own boot straps." Wildey's opinion that a torsion bar had drifted out and allowed the rear axle to move back, causing misalignment and ground induced steering of the trailer, forcing the tractor off the road, was based solely upon the photographs, which he acknowledged, seem to show the torsion bar in place, and further admitted that his opinion was based on assumptions not shown by the photographs. Thus, it is clear that his opinion was based upon conjecture from which the jury could not find from a preponderance of the evidence that a defect caused the accident. He acknowledged that it was possible that the broken frame bracket could have been the result of, as well as a cause of the accident. Where there are two plausible explanations for the existence of a fact, for which the defendant could be responsible for only one cause, plaintiff has not met his burden of proof, and in order to return a verdict, a jury would have to speculate as to which explanation was correct.

Substantial prejudicial error was committed in allowing plaintiff to impeach the testimony of its witness Mason by plaintiff's witness Ritchie, when no foundation had been laid by affording Mason an opportunity to affirm, or even remember

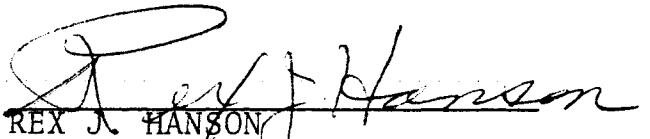
the impeaching statement. Likewise, the admission into evidence, over defendant's objection, of two tires showing extensive "cupping" wear which had been on the trailer prior to the change in condition of the forward axle effected by the repairs made by Slim Olson, which, by admission of the plaintiff's expert, had nothing to do with the accident, greatly prejudiced defendant's position.

Further, the Trial Court erroneously awarded judgment in excess of the prayer of the complaint.

WHEREFORE, defendant Bailey's Moving and Storage Company prays that the judgments awarded against it be reversed, or, in the alternative, that defendant be awarded a new trial, or, in the further alternative, that defendant be awarded remititur of $50,000 on the general damages award.

Respectfully submitted,

HANSON, WADSWORTH & RUSSON



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served two (2) copies of the Brief of Appellant Bailey's Moving and Storage Company upon Earl Jay Peck, Attorney for Plaintiff/Respondent, 410 Newhouse Building, Salt Lake City, Utah 84111 and Richard L. Stine, Attorney for Defendant/ Appellant Allied Van Lines, 2650 Washington Boulevard, #101, Ogden, Utah by mailing, postage prepaid this 3rd day of May, 1976.