

1952

The Mountain States Telephone & Telegraph Company v. Consolidated Freightways et al : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. L. Schoenhals; J. Royal Andreasen; Attorneys for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *Mountain States Telephone & Telegraph Co v. Consolidated Freightways*, No. 7755 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1619

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Case No. 7755

IN THE SUPREME COURT

of the
STATE OF UTAH

FILED

JAN 2 1902

Clerk, Supreme Court, Utah

THE MOUNTAIN STATES TELE-
PHONE & TELEGRAPH COM-
PANY, a corporation,

Plaintiff and Respondent,

vs.

CONSOLIDATED FREIGHTWAYS,
a corporation,

Defendant and Respondent,

and GORDON RAY, doing business
under the name RAY TRANSPORTATION COMPANY,

Defendant and Appellant.

7755

APPELLANT'S BRIEF

E. L. SCHOENHALS,
J. ROYAL ANDREASEN,

*Attorneys for Defendant and
Appellant Gordon Ray.*

INDEX

	<i>Page</i>
Statement of Facts	1
Statement of Points	6
Argument	6
Points Argued	
The evidence is insufficient to support the finding of the court that plaintiff's damage was caused by negligence of Gordon Ray	6
The trial court erred in overruling defendant Gor- don Ray's motion to strike testimony of witness Sackett regarding Gordon Ray's speed.....	11
Summary	14

CASES CITED

Brown v. Southern Paper Products Company, 24 S.E. 2d 334, 22 N.C. 626	8
Kruta v. Gibbon, 21 So. 2d. 744, — La. App. —	8
Patton v. Kirkman, 109 Utah 487, 167 P. 2d 282.....	8, 9, 14
Rice v. Franklin Title & Trust Co., 184 S.W. 2d 896, 299 Ky. 142	8
Short v. Robinson, 134 S.W. 2d 594, 280 Ky. 707.....	8

STATUTES CITED

57-7-121, Utah Code Annotated 1943	8
--	---

IN THE SUPREME COURT of the STATE OF UTAH

THE MOUNTAIN STATES TELE-
PHONE & TELEGRAPH COM-
PANY, a corporation,

Plaintiff and Respondent,

vs.

CONSOLIDATED FREIGHTWAYS,
a corporation,

Defendant and Respondent,

and GORDON RAY, doing business
under the name RAY TRANSPOR-
TATION COMPANY,

Defendant and Appellant.

Case No. 7755

APPELLANT'S BRIEF

References to pages of the record are designated
"R....."

STATEMENT OF FACTS

The Mountain States Telephone & Telegraph Com-
pany, hereafter referred to as plaintiff, sued defendant
Consolidated Freightways, hereafter referred to as Consoli-

dated, and defendant and appellant Gordon Ray, doing business under the name Ray Transportation Company, hereafter referred to as Gordon Ray, for damages to a telephone pole, cross arms, braces and wires located adjacent to the highway, arising out of an accident which involved trucks and trailers belonging to defendant Consolidated Freightways and defendant Gordon Ray. The case was tried without a jury. Judgment was rendered for plaintiff against defendant Gordon Ray, and for no cause of action against defendant Consolidated Freightways. Gordon Ray's motion for a new trial was denied.

Highway 30 extends westward from Brigham City toward Tremonton. During the extraordinarily heavy snows of February, 1949, snowplows had left banks of snow approximately three (3) feet high on each side of highway 30 west of Brigham City. (R 75, 105) At a point approximately three miles west of Brigham City a tower holding electrical wires was located 11 or 12 feet north of the northern edge of the concrete surface of the highway. (R 82) Plaintiff's pole was located nearby. The highway is straight where it passes the tower and plaintiff's equipment. The concrete surface of the highway at this point was 20 feet wide. (R 68)

On February 14, 1949, the date of the accident, the roads to the east and west were generally clear. (R 6) But near the scene of the accident on account of the terrain and the prevailing wind, the highway had varying amounts of snow blown upon it for a distance of about one mile. This mile-long area extended about $\frac{1}{4}$ mile to the east of the tower which adjoined the highway and $\frac{3}{4}$ mile to the west. (R 54, 60, 63) Within this mile-long area the snow

had drifted most heavily onto the highway in an area 400 to 600 feet long. (R 22, 74, 106) With respect to this shorter area where drifts were heaviest, the tower was located toward the western end of the heavy drift, being 50 to 150 feet from west end of the heavy drift, (R 33, 74) and 350 to 400 feet from the east end of the heavy drift. (R 33, 74, 110)

It was the aim and practice of the highway department, where possible, to plow a channel 20 to 22 feet wide through the drifts. (R 99) In the area of heavy drifts, however, because of the amount of snow which blew into the plowed channel and accumulated mostly on the south side of the highway, the snowplows had been unable to clear a channel all the way over the south side of the highway, and in that area the plowed channel was not straight, but veered away from the south side of the highway, (R 68, 98, 99), with the southern side of the channel toward the center lane of the highway. (R 42, 43, 75, 99)

On the morning of February 14, 1949, the usable portion of the road through the area of heaviest drifts was still further reduced in width by a large amount of snow which had blown into the plowed channel since the last plow had been through. (98, 99) The drifted snow was 30-36 inches deep at the south side of the plowed channel and tapered off to the north side where it was very shallow. (R 99)

Except in the area of heavy drifts, the highway was wide enough for two lanes of traffic. The width of the passable portion of the highway in the area of heaviest drifts was no more than 17 feet and probably no more than

14 feet. (R 14, 61, 86) Since the Ray and Consolidated trucks were each 8 feet wide (R 64) it is very doubtful whether the passage was wide enough to permit the two vehicles to pass. (R 73, 77, 80, 86, 106, Plaintiff's complaint, paragraph 5)

William Felton was a motor transport operator for Gordon Ray. He had driven heavy equipment of the sort involved in the accident, a large truck and trailer, for two years prior to the accident. His job was to leave Tremonton about 11 o'clock p.m. February 13, 1949, with an empty truck and trailer, drive to Salt Lake City, load the truck and trailer with gasoline, and return to Tremonton early in the morning of February 14th.

He had slept in preparation for the trip and awoke just before leaving Tremonton in the late evening of February 14, 1951. He loaded the truck and trailer with gasoline in the early morning of February 14, 1949, and drove to Brigham City, where he stopped for coffee. Leaving Brigham City Felton drove westward on highway 30 towards Tremonton. As he approached the east end of the mile-long area where snow had blown onto the road it was about 6:10 a.m. He still had the truck in 3rd gear and was proceeding at no more than 30 miles per hour. (R 41)

As he approached the eastern edge of the mile-long drift area he applied the trailer brakes and slowed down about 5 miles per hour. As the trailer passed from the dry highway about 150 feet before reaching the mile-long drift area the trailer began to skid, so Felton released the brakes and gave the truck enough throttle to straighten out the

trailer. (R 22, 32) The trailer immediately straightened out and Felton drove the truck westward under perfect control for several hundred feet. The truck traveled steadily and normally in a straight line, with no wobbling, weaving or zigzagging. (67, 83, 48)

The vehicle of defendant Consolidated Freightways, driven by Mr. Bankhead (who was still employed by Consolidated at the time of trial), was a large motor transport and trailer, and was proceeding eastward on highway 30 at 30 miles per hour. (R 73, 79) The Consolidated truck did not slow down. (R 56, 57) The Gordon Ray truck entered the narrow lane first, and when it had proceeded westward 100-200 feet into the narrow passage through the area of heaviest drifts, the Consolidated truck entered the western end. (R 25, 36, 76, 79)

In entering the narrow passage the Consolidated truck turned to the northern or left hand side of the highway. The right hand wheels of the Consolidated truck were on or near the center line of the highway. The Consolidated and Ray trucks were each eight feet wide. The west bound Gordon Ray driver crowded to the northern side of highway taking about a foot of snow from the bank, in hope that the two vehicles could pass. (R 45) The point where the two trucks would have met was about even with the tower. The Consolidated vehicle continued on in the northern part of the highway in the Gordon Ray lane of travel. (R 45, 58, 59, 77, 79, 108) To avoid colliding with the Consolidated truck the Gordon Ray driver crowded still further to the north, and the Gordon Ray truck ran off the highway, coming to rest against the tower (R 48) The Consolidated truck passed by as the Ray truck struck

the tower. (R 33, 36, 76) Because the Ray truck pulled off the highway, the two trucks did not collide. (R 33) The driver of the Consolidated truck had moved to the east of the tower by the time of the flash which produced the fire. The jar of the truck against the tower broke one leg of the tower. An electrically charged wire fell down and ignited gasoline fumes from the truck. The fire spread first over the truck and then the trailer, and the plaintiff's pole and attached wires were burned.

STATEMENT OF POINTS

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT PLAINTIFF'S DAMAGE WAS CAUSED BY NEGLIGENCE OF GORDON RAY.

2. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT GORDON RAY'S MOTION TO STRIKE TESTIMONY OF WITNESS SACKETT REGARDING GORDON RAY'S SPEED.

ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT PLAINTIFF'S DAMAGE WAS CAUSED BY NEGLIGENCE OF GORDON RAY.

Findings of Fact, paragraph 5, (R 11) states that defendant Gordon Ray "negligently drove a truck carrying two tanks of gasoline off said highway and against the Utah Power & Light high transmission tower, causing the contents of said truck to explode and burst into flame." Paragraph 6 (R 12) states that the foregoing conduct proximately caused plaintiff's damage.

In so holding, the court erred. The record fails to show that Gordon Ray negligently drove the truck from the highway. The record does show that Consolidated Freightways negligently forced the Gordon Ray truck from the highway and that Consolidated's negligence was the sole proximate cause of the damage.

Though the Gordon Ray trailer skidded slightly upon leaving the dry pavement, the driver quickly regained full control, and maintained control for at least several hundred feet before being forced from the highway. All witnesses who saw the truck stated that it traveled in a straight, normal and usual manner prior to leaving the highway. All testimony regarding its tracks in the snow shows its path to be straight and not erratic. (R 48, 67, 83) Skidding did not cause the Ray truck to leave the road.

The Consolidated truck and the Ray truck were each eight feet wide. (R 64) The highway through the area of heavy drifts was not wide enough for the two trucks to pass each other. Mr. Bankhead stated that he had passed *cars* in the general drift area, but he did not say he had passed *trucks*. Tippin, who drove the road twice daily, stated that the practice for several days in the heavy drift area had been for vehicles to stop and allow oncoming vehicle to clear the narrow passage. (R 77) True, Bankhead estimated the passage to be 17 feet wide, but this was a self-serving statement and was in contradiction to Bankhead's statement that he drove as far to the south as drifted snow would permit. (R 59, 113) After the accident the southernmost wheeltrack was 8 feet from the south bank of the plowed channel, and Bankhead may have driven further north than that for the southernmost

track was not known to be his. Even assuming the original plowed channel to be the maximum of 22 feet wide, by Bankhead's testimony the width of the passable lane through the heavy drifts, therefore, could not have been more than 14 feet. Felton, the Ray driver, and Tippin, the driver who was following Bankhead, both estimated the channel to be about 14 feet wide. (R 22, 86) Mr. Sackett, the patrolman, doubted whether the vehicles could have squeezed by each other without taking more snow than Bankhead, the Consolidated driver, took.

It would appear that the law applicable to this situation is not the rule of Section 57-7-121, Utah Code Annotated, 1943, as construed by *Patton v. Kirkman*, 109 Utah 487, 167 P. 2d 282. That rule applies only to "roadways having width for not more than one line of traffic in each direction," but does not have application to situations, as here, where the roadway is not wide enough to permit a line of traffic in each direction. Where the road is too narrow for traffic in each direction the law of the road governs. In such a situation the law of the road makes it the duty of a motorist reaching a bridge or a passage in the highway too narrow for two vehicles to pass after another motorist approaching from the opposite direction has practically or actually driven into the narrow passage to stop until such other motorist has crossed over it and cleared the way. *Short v. Robinson*, 134 S. W. 2d 594, 280 Ky. 707. *Rice v. Franklin Title & Trust Co.*, 184 S. W. 2d 896, 299 Ky. 142. *Kruta v. Gibbon*, 21 So. 2d 744, La. App. The case of *Brown v. Southern Paper Products Company*, 24 S. E. 2d 334, 222 N. C. 626, held that where weather conditions had narrowed the road to a 10-foot lane the right of way belonged to him who entered before the other

approached and it was the duty of the other, in the exercise of proper care, to yield it to him, provided conditions were such that he could have observed them had he kept a proper lookout.

The record does not expressly indicate the precise rule of law applied by the trial court, but the questions of counsel and the court raise the inference that the rule of *Patton v. Kirkman*, supra, was applied in this case. (R 9, 83, 105) In so doing the court erred. The Gordon Ray truck had proceeded 100-200 feet into the narrow passage before the Consolidated truck veered to the northern or lefthand side of the highway and entered the narrow passage. (R 5, 36, 76, 79) The tower was located about one-fourth of the distance from the western end of the narrow passage and three-fourths of the distance east. (R 33, 74, 110) Thus, at the time the two trucks met the Ray truck had traveled two-thirds to three-fourths of the distance in the narrow passage and the Consolidated truck had gone only one-fourth or one-third of the way. The Ray truck was forced off the highway by the failure of the Consolidated truck driver to yield the right of way.

On the other hand, even assuming that the passage was wide enough for two vehicles to pass each other, and that the rule of *Patton v. Kirkman* did apply, it is still apparent that the failure of the Consolidated truck to yield the right of way is what caused the Ray truck to leave the highway. The maximum width of the plowed channel was 20 to 22 feet (R 99) After the accident the southernmost track in the drifted snow was 8 feet from the southern bank. It is possible that this southernmost track was made by a vehicle other than the Consolidated truck. Assuming, how-

ever, that the Consolidated truck did make the track and that the channel was the full 22 feet wide, there would have remained only 6 feet of clear space at the north side of the highway for the Ray truck. To avoid collision with the oncoming truck and trailer of Consolidated, the Ray truck would have been forced to drive 2 feet into the northern bank of snow and even then would have had no clearance between the two trucks. Mr. Tippin, the driver of the truck which followed the Consolidated truck, stated that the wheels of the Consolidated truck did not plow the snow, that the right wheels of the Consolidated truck ran on the center line of the highway and that the Consolidated truck was thus in the left hand lane at the time the two trucks passed opposite the tower. (R 79) Bankhead, however, stated (R 58) that he did not know he was operating into the left hand side of the highway and that he didn't pay too much attention to the position of the snowbank with reference to the center of the road. He further stated (R 59) that he was not plowing snow and that he made no attempt to decrease his speed at the time he passed the Ray truck. (R 57)

Thus, it conclusively appears, whether the highway was wide enough for one or for two lanes of traffic, that the Ray driver kept to the extreme righthand side of the road as he approached the tower and that the Consolidated truck and trailer approached in the wrong lane on the wrong side of the road at 25 to 30 miles per hour. The Ray driver had to choose between (a) a collision between the two trucks which threatened not only extensive property damage, but also personal injury and loss of life; and (b) steering his truck further into the snowbank. Any careful and prudent man would have done as the Ray

CORRECTION OF BRIEF OF APPELLANT GORDON RAY

THE MOUNTAIN STATES TELEPHONE	:	
& TELEGRAPH COMPANY, a	:	
corporation,	:	
Plaintiff and Respondent,	:	Case No.
vs.	:	7755
CONSOLIDATED FREIGHTWAYS,	:	
a corporation,	:	
Defendant and Respondent,	:	
and GORDON RAY, doing business	:	
under the name RAY TRANSPORTA-	:	
TION COMPANY,	:	
Defendant and Appellant.	:	

In the fourth and fifth lines from the bottom of page 11, the references to the record are incorrect in the printed brief. The testimony referred to actually appears on pages 103 and 104 of the record, instead of pages 86 and 87, as incorrectly cited in the printed brief.

driver did. His driving into the snowbank was an act of care and prudence necessitated by the Consolidated driver's negligent failure to return to the proper side of the road. The evidence therefore does not support the finding that the Ray driver negligently drove the truck off the highway.

2. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT GORDON RAY'S MOTION TO STRIKE TESTIMONY OF WITNESS SACKETT REGARDING GORDON RAY'S SPEED.

William Sackett, a highway patrolman, who came to the accident first as a member of the Brigham City volunteer fire department and who later made an investigation and report for the highway department, testified as to the Gordon Ray driver's speed. The trial was held over twenty-seven months after the accident, during which time the witness had investigated many other accidents.

On cross examinaiton ,it was revealed that Sackett had not seen his accident report, and that his testimony was based on a report shown to the witness by Mr. Richards, attorney for Consolidated Freightways, who had called Sackett as a witness, and that he did not know whether the report was true or not. Gordon Ray's objection to this evidence was overruled.

¹⁰⁴ The transcript shows the following testimony (R86,¹⁰³ 87):

"Q. Did Mr. Felton say anything to you with respect to how fast he had been traveling?

"A. As I remember he said about forty miles an hour.

“Q. That is your best recollection—about forty miles an hour?

“A. Yes sir.

“Q. And you are certain that that question was put to him and that he answered it in that manner?

“A. I didn’t review my accident report —

“Q. But that is your best recollection?

“A. Yes sir.

“MR. SCHOENHALS: I ask that be stricken, Your Honor, as not being the best evidence.

“THE COURT: The motion is denied.

“MR. LEWIS: That is all that I have.

“MR. RICHARDS: That is all.

“MR. SCHOENHALS: Just a minute.

CROSS EXAMINATION

“BY MR. SCHOENHALS:

“Q. Now why didn’t you bring your accident report with you when you came here?

“A. I was called yesterday afternoon and asked if I would come down. I said I would and so I didn’t have time to get to the Capitol Building to get a copy of it.

“Q. You examine quite a number of these people, don’t you, on things of this type?

“Yes sir.

"Q. And when you speak of that speed there you are just about guessing at it, aren't you, Mr. Sackett?

"MR. LEWIS: He said that was his best recollection?

"MR. SCHOENHALS: Just a minute. I object to that. Let me cross examine him here.

"Q. You were just about guessing at it, weren't you, Mr. Sackett?

"A. Since I come down here I seen a copy of an accident report. Whether it is true or not I don't know.

"Q. Is that what you made your observation from?

"A. And I made my observation from that there.

"Q. You saw a copy there and Mr. Richards showed it to you, did he?

"A. Yes sir.

"Q. And you made your observation and want to pin a forty mile an hour rap on this man for going forty miles an hour by virtue of a piece of paper that Mr. Richards showed you, is that right?

"A. I wouldn't say it was —"

The witness testified from a memorandum which he had no part in preparing. He did not know whether it was true or not. Counsel for Gordon Ray had no opportunity to examine any memorandum prepared by the witness or cross examine thereon. Permitting such evidence to stand notwithstanding objection of counsel constituted prejudicial error. A ruling upholding testimony of a witness

based not upon recollection nor witness' memorandum, but only upon writings prepared by partisan counsel can only open the door to abuse.

SUMMARY

1. The Gordon Ray unit entered the constricted area first. Since the tower struck was almost at the opposite end of the constricted area from where the Gordon Ray unit entered said area and since it is conceded that the units did not collide, the record shows that the Gordon Ray unit was in the constricted area first and, therefore, that the said Gordon Ray unit had the right of way, and that the failure of the Consolidated unit to yield this right of way to the Gordon Ray unit, forcing said unit off the road, was the sole negligence which caused the damage complained of. Moreover, should this court conclude that the *Patton v. Kirkman* case applies, still the record is conclusive on the fact that the Consolidated unit failed to share the space available, forcing the Gordon Ray unit off the road, which failure to share the space available was the sole proximate cause of plaintiff's damage. When faced with the necessity of either colliding with the oncoming Consolidated truck and trailer or of turning further into the snowbank at his right the Gordon Ray driver acted not negligently but with prudence and care in driving further into the snowbank.

2. The witness Sackett testified neither from his recollection nor from his own memorandum, but from a paper shown to him by the attorneys who subpoenaed the witness. The court's refusal to strike evidence thus obtained was certainly in error. It is also certainly prejudicial error since the sole basis of negligence, if any, would have to be based upon such erroneous evidence.

..... copies of the foregoing brief received this
day of January, 1952.

.....
.....
Attorneys for Plaintiff

..... copies of the foregoing brief received this
day of January, 1952.

.....
.....
*Attorneys for Defendant
Consolidated Freightways*