

1952

Keith Winegar dba Intermountain Oil Distributors v. Slim Olson, Inc. : Brief of Plaintiff and Appellant

Utah Supreme Court

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McKay, Burton, McMillan and Richards; Attorneys for Defendant and Respondent;

Recommended Citation

Brief of Appellant, *Winegar v. Slim Olson Inc.*, No. 7780 (Utah Supreme Court, 1952).
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**IN THE SUPREME COURT
of the
STATE OF UTAH**

KEITH WINEGAR, doing business
as Intermountain Oil Distributors,

Plaintiff and Appellant,

vs.

SLIM OLSON, INC., a corporation,

Defendant and Respondent.

Case No.
7780

BRIEF OF PLAINTIFF AND APPELLANT

McKAY, BURTON, McMILLAN
AND RICHARDS,

MAR 14 1951

*Attorneys for Defendant
and Respondent.*

Utah Supreme Court, Salt Lake City

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	3
STATEMENT OF FACTS	4
STATEMENT OF POINTS RELIED UPON	
Point No. I:	
The Court erred in granting a nonsuit in this case.....	6
Point No. II:	
The Court erred in its finding of Fact No. V wherein the Court finds that the evidence of the plaintiff was insufficient to show that defendant failed to use due and proper care and skill	6
Point No.III:	
The Court erred in entering a judgment of nonsuit for the reason that said judgment is not supported by the findings and conclusions, and the findings and conclusions are not supported by the evidence or the law.....	6
Point No. IV:	
The Court erred in its finding of Fact No. 4 in defining the duty of defendant as one to use due care and skill, whereas, by stipulation defendant held itself out as an expert and defendant is required to perform its duties pursuant to the highest degree of skill	6

TABLE OF CONTENTS (Continued)

	Page
Point No. V:	
The Court erred in its finding of Fact No. 5 that plaintiff failed to show "that defendant failed to use due or proper care and skill" and failed "to show that defendant was guilty of any negligent acts."	7
Point No. VI:	
The Court erred in its Conclusion of Law No. 1 "that defendant is entitled to judgment of nonsuit."	7
ARGUMENT	7
CONCLUSION	31

TABLE OF CASES CITED

Barlow v. Salt Lake and Utah R. R. Co., 57 Utah 312, 194 Pac. 665..	31
Graham v. Ogden Union Railway and Depot Co., 79 Utah 1, 6 Pac. (2d) 462	8, 28
Robinson v. Salt Lake City, 37 Utah 520, 109 Pac. 817.....	7, 8
Smalley v. Railroad, 34 Utah 423, 98 Pac. 311	29
Valiotis v. Utah Apex Mining Co., 55 Utah 151, 184 Pac. 802.....	9

TEXT BOOKS

53 American Jurisprudence 255, 256, 257, 273, 782.....	24, 25, 28
--	------------

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PRELIMINARY STATEMENT

This is an action to recover damages for the total loss of a Diesel engine, which loss was caused by reason of the negligent installation of an oil filter bag by the defendant's employees.

At the conclusion of plaintiff's case the defendant moved to dismiss plaintiff's complaint, no cause of action. (R. 172) The Court granted the motion. The defendant did not offer any evidence.

Thereafter the Court entered Findings of Fact, Conclusions of Law and Judgment in favor of defendant. From the adverse judgment plaintiff appeals.

STATEMENT OF FACTS

This is an action to recover damages for the total loss of a Diesel Engine, which loss was caused by the negligent installation of an oil filter bag by the defendant's employees.

The plaintiff Keith Winegar is doing business as Intermountain Oil Distributors, operating a fleet of trucks distributing petroleum products throughout the Intermountain area.

The defendant Slim Olson, Inc., operates a large service station advertising and holding itself out as expert in Diesel truck service and lubrication.

For some period of time prior to January, 1951, the defendant had been servicing the trucks of plaintiff in greasing, lubricating, making oil changes and furnishing as incident thereto the filters, sump bags, gaskets and other items determined necessary in doing this work by defendant's experts.

The particular truck involved is a Kenworth truck equipped with a Cummins Diesel Engine. This truck had been left with defendant for servicing on January 24, 1951, and had received no other servicing between

that time and the occasion when the engine was entirely destroyed on February 1, 1951, because the engine had been starved of oil through the clogging of an oil line by the sump bag installed by defendant, disengaging from the confines of a spindle to which it was attached, which resulted from the improper installation of the sump bag by defendant's employees.

The case was tried before the Court and two days were consumed in presentation of the testimony of three expert Diesel mechanics, who testified to the improper installation and resulting loss of the engine by reason of the faulty work of defendant. Testimony was also introduced as to damage and the facts incident to the operation of the truck during the five or six days between the servicing and failure.

At the conclusion of plaintiff's case the defendant made a motion to dismiss plaintiff's complaint, no cause of action, "upon the grounds and for the reason that there has been no negligence shown or proved to the Court sufficient to make a prima facie case." (R. 172) The Court granted the motion, stating:

"I'll grant a nonsuit in this matter. I think it is conjecture as to whether that clog was in the crank shaft or in the feed line. It's a matter of conjecture. *I don't think there is any evidence as to where the stoppage was.* If there was an investigation of the feed line from the cylinder to the crank shaft, any evidence on that would be most conjectural. So at this time I'll grant a nonsuit on it."

The sole question presented to the Court on such motion is whether evidence had been introduced showing the faulty installation of the bag; whether as a result of such faulty installation the bag had come off the spindle and clogged the oil line; whether the clogging of the oil line starved the engine of oil and caused the damage.

STATEMENT OF POINTS RELIED UPON

POINT No. I.

THE COURT ERRED IN GRANTING A NONSUIT IN THIS CASE.

POINT No. II.

THE COURT ERRED IN ITS FINDING OF FACT No. V WHEREIN THE COURT FINDS THAT THE EVIDENCE OF THE PLAINTIFF WAS INSUFFICIENT TO SHOW THAT DEFENDANT FAILED TO USE DUE AND PROPER CARE AND SKILL.

POINT No. III.

THE COURT ERRED IN ENTERING A JUDGMENT OF NONSUIT FOR THE REASON THAT SAID JUDGMENT IS NOT SUPPORTED BY THE FINDINGS AND CONCLUSIONS, AND THE FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE OR THE LAW.

POINT No. IV.

THE COURT ERRED IN ITS FINDING OF FACT No. 4 IN DEFINING THE DUTY OF DEFENDANT AS ONE TO

USE DUE CARE AND SKILL, WHEREAS, BY STIPULATION DEFENDANT HELD ITSELF OUT AS AN EXPERT AND DEFENDANT IS REQUIRED TO PERFORM ITS DUTIES PURSUANT TO THE HIGHEST DEGREE OF SKILL.

POINT No. V.

THE COURT ERRED IN ITS FINDING OF FACT No. 5 THAT PLAINTIFF FAILED TO SHOW "THAT DEFENDANT FAILED TO USE DUE OR PROPER CARE AND SKILL" AND FAILED "TO SHOW THAT DEFENDANT WAS GUILTY OF ANY NEGLIGENT ACTS."

POINT No. VI.

THE COURT ERRED IN ITS CONCLUSION OF LAW No. 1 "THAT DEFENDANT IS ENTITLED TO JUDGMENT OF NONSUIT."

ARGUMENT

As the above numbered points are interrelated, they are combined as one for the purpose of the argument.

The points of law for which we contend are contained in the following:

1. On a motion for nonsuit nothing is before the Court except the question whether, in view of the evidence before the Court, the case is one which should be determined as a question of law.

Robinson v. Salt Lake City, 37 Utah 520,
109 Pac. 817.

2. Whether the evidence is strong or weak, or whether there is some evidence of contributory negligence or not, is not the test. The test is whether or not there is some substantial evidence in support of every essential fact which a plaintiff is required to prove in order to entitle him to recover.

Robinson v. Salt Lake City, supra.

3. If the evidence and the inferences are of a character which would authorize reasonable men to arrive at different conclusions with respect to whether all the essential facts were or were not proved, the question is one of fact and not of law. This is so although the evidence on some points may be very unsatisfactory or doubtful.

Robinson v. Salt Lake City, supra.

4. In making motions for nonsuit and directed verdict the moving party is required to "specifically state the grounds upon which the motion is based for the purpose of apprising the plaintiff of the particulars wherein it is claimed his proof is deficient, so he may supply it if he is able to do so and prevent the expense and necessity of a retrial of the case."

Graham v. Ogden Union Railway and Depot Co., 79 Utah 1, 6 Pac. (2d) 465.

5. The trial court must give to the plaintiff the

benefit of every fair and reasonable inference that might properly be drawn from the evidence.

Valiotis v. Utah Apex Mining Co., 55 Utah 151; 184 Pac. 802.

The motion of the defendant appears at Page 172 of the transcript as follows:

“Comes now the defendant in this cause and moves the court to dismiss the plaintiff’s complaint, no cause for action, upon the grounds and for the reason that there has been no negligence shown or proved to the court sufficient to make a prima facie case.”

Following the noon recess the defendant appears to add to his motion the following:

“* * * before lunch, I moved for a nonsuit in this case on the ground that the plaintiff’s evidence did not constitute or make a prima facie case. I desire to add to that motion at this time the further grounds, or assign as further grounds for my motion for nonsuit, that the evidence of the plaintiff in itself shows contributory negligence.”

In ruling on the foregoing motion the Court, at Page 173 of the transcript, makes the following decision:

“I’ll grant a nonsuit in this matter. I think it’s conjecture as to whether that clog was in the crank shaft or in the feed line. It’s a matter of conjecture. I don’t think there is any evidence as to where the stoppage was. If there was an

investigation of the feed line from the cylinder to the crankshaft, any evidence on that would be most conjectural. So at this time I'll grant a nonsuit on it."

Witness Anderson, an agent and employee of defendant, testified to having performed the work on January 24, 1951, in changing the lubricating oil and the oil filter back or sump bag, together with other work, all of which appears in Plaintiff's Exhibit A, and for which a charge was made by the defendant.

A Diesel engine is lubricated in much the same manner as the ordinary automobile. The particular Diesel engine involved in this action is equipped with an oil filter bag located in a sealed circular compartment in the pan of the engine. The bag is approximately eight inches wide and twenty-six inches long and is attached to a spool. On each end of the spool is a flange about four inches in diameter and small enough to clear the walls of the compartment into which it is inserted. The bag is attached by clamps to the spool inside the flanges, and together with a separating wire mesh screen is wrapped around the spool inside the flanges. The purpose of the screen is to keep the bag surfaces separated as it is wound on the spool and to permit the oil to flow from the bag.

At one end of the spool, and in the center of the flange, is a male connection which on installation fits into a female connection from the oil line which comes from the oil pump. The oil is forced through the spool,

through the bag, into the cylindrical compartment and through an outlet into the oil distribution system of the engine. The outlet is located on the same end of the cylinder as the inlet and spaced an inch and a half or two inches from the inlet. When the filter unit is inserted into the cylinder, the flange is approximately one inch away from the outlet hole. The flange serves the purpose of keeping the bag in place as it expands when the oil is pumped through.

Plaintiff's complaint and evidence were directed to show that the bag had been improperly installed on this spool, so as to permit it to get beyond the flange and into the discharge line. This starved the engine of lubricating oil, seared the bearings and totally destroyed the value of the engine.

Evidence as to the cause of the damage was produced by three experts called by the plaintiff. The first was Clarence R. Miller, Service Manager of Cummins Intermountain Diesel Company. Mr. Miller is a factory-trained mechanic and has been service manager of this company since 1942. (Tr. 2)

The truck was towed to the shop of Cummins Intermountain Diesel. Witness Miller was present when the filter unit was taken from the cylinder in the crank case. At Page 14 of the transcript he testified:

“Q. And did you see Exhibit D extracted from the cylinder?”

A. Yes.

Q. * * * Now, will you tell us where that piece of cloth or that part of the bag was located as far as this pan is concerned at the time you first observed it?

A. Well, we had to pull it out. This part here was out the discharge hole.

Q. When you say 'this part here' point to the area.

A. You can see the rings.

Q. Around the holes and the wrinkles around the hole.

A. Yes.

Q. And that was inside the discharge hole. Is that correct?

A. Yes."

At Page 29 of the transcript, on cross-examination Miller's testimony is as follows:

"Q. Now, what part of the bag was in that discharge hole?

A. The edge of it.

Q. The edge of it?

A. Right there.

Q. This is the correct one?

A. That's right.

Q. And about half way in the bag, a little less than half way. How long is the bag?

A. About 28 inches, something like that.

* * *

Q. When you pulled it out, that was tight. It was in there so tight that it required some pulling?

A. That's right.

Q. Or did it come easily?

A. No. It required some pulling.

Q. As you pulled it out, what was the condition of this bag in relation to this screen, the spacer mat?

A. The spacer mat was in position and the bag was out.

Q. Just this part of the bag?

A. That's right.

Q. The end then was tucked under?

A. That's right."

As to the cause of the bag getting off the spool and into the discharge hole the witness Miller at Page 20 of the transcript testified:

"THE COURT: I say, state how you arrived at that opinion. You said you have an opinion. State what the opinion is.

- A. The bag had to get behind the end blade of this spool here in order to get in the discharge hole.

THE COURT: All right.

- A. And I don't know of any other way it could have got there unless it was out there to start with when the bag was installed.

THE COURT: What do you mean when you say 'Blade'?

- A. That is that casing on the end."

At Page 20 of the transcript the witness testified how the bag should be properly installed on the spool. This is to the effect that a ring is inserted in the bag and the bag with the ring clamped to the spool, the wire mat placed over the bag and the bag and wire mat wrapped around the spool. At Page 21 the witness stated:

- "Q. Now, you say that in your opinion that got over the end of that plate at the beginning, you mean at the time of installation?

- A. That is what I believe."

At Page 22 of the transcript the witness demonstrated the manner in which the bag was improperly installed on the spool by showing that it had been wound at an angle so as to leave a portion of the bag protruding

over the side of the flange of the spool, and then inserted into the cylinder with the bag hanging over the edge of the flange.

At Page 27 of the transcript, on cross-examination, the witness demonstrated for defendant's counsel how the spool is inserted in the cylinder with the bag hanging over the edge of the flange.

At Page 31 of the transcript, on cross-examination, the Witness Miller testified as follows:

"Q. * * * Now assume then, Mr. Miller, that a truck had the servicing done and the filter bag and filter put in such as Exhibit D was installed, and as you say in such a manner that the bag was out, we'll assume that, and that equipment then, that truck was then driven 2190 miles, is it still your opinion that that is the only thing that could have caused it, that it was installed in the first instance that way?

A. That's a fine question, isn't it?

Q. Well, you understand what I mean, don't you?

A. That's right.

Q. Is it still your opinion?

A. Yes, I believe it is.

Q. Now, your statement is that you don't know

of any other way it could have happened except that, is that correct?

A. That's right."

At Page 31, on cross-examination, Mr. Miller stated that he had seen this type of thing happen before in one instance. At Page 32 the witness testified that this is standard equipment and that this type of equipment was furnished on the new current engines.

At Page 14 Miller testified:

"Q. What was the condition of the motor itself as far as the bearings and so on are concerned?

A. Number five main bearings seized to the shaft and turned in the block."

Witness Leslie Holt, the shop foreman of Cummins Intermountain Diesel, a mechanic with over ten years' experience, testified at Page 44 of the transcript that he was present when the spool or filter unit was taken from the pan, and by defendant's counsel was asked the question:

"Q. * * * Did you see the bag in the discharge hole?

A. Didn't see the bag in there. I seen the pieces of it in there.

MR. AADNESON: You did. The pieces only?

A. That's right.

At Page 45 the witness stated:

"A. When the spool was removed from the shell or cylinder, part of it was protruding out and over the metal shield which had all the indication —" (Counsels' discussion and argument) (Answer continued) "The portion of the bag was protruding over the end of the shield, and from all indications it had been in the discharge hole of the fitting.

Q. Now, you indicate you did have an opinion as to what caused the bag to get in the discharge hole. What is that opinion?

A. My opinion would be that it was faulty installed.

THE COURT: When you say 'faulty installed', explain what you mean by 'faulty installed.'

A. The bag, or a portion thereof must have been over the end at the time of the installation."

At Page 57 of the transcript, Witness Holt testified:

"Q. Mr. Holt, I don't know whether I asked you this or not. This damage that you testified that had occurred to the block itself, that is, to the bearings and so on, what had caused that damage?

MR. HUGHES: Just a moment. Will you read that question back?

THE COURT: He is asking what the cause of the damage to the motor block was.

Q. That's all.

THE COURT: In your opinion, what caused the damage to the motor block?

A. It was an oil starvation to the crank shaft which created internal heat, and the cast iron block was pulled from excessive heat.

Q. Did you determine, from your examination, what caused the oil starvation?

A. Yes, sir; the discharge line from the filter cut off oil to the crank shaft."

At Page 48 of the transcript, Witness Holt on cross-examination testified:

"Q. Do I understand, Mr. Holt, that it's your opinion that the cause of this oil failure which damaged the engine in question was an improper installation of the filter bag and spacer screen as you call it?

A. Spacer mat.

Q. Spacer mat on the spool, the three of which constitute Exhibits C and D. Is that correct?

A. That's correct."

Exhibit C, the oil pan from the engine, was introduced in evidence, and the cylinder into which the filter unit is installed contained a crack across and lengthwise

on the cylinder. The wall of the cylinder is metal of approximately a quarter inch thickness. At Page 170 of the transcript, with reference to this crack, Witness Holt stated his opinion as to how the crack occurred as follows:

“Q. And the pressure then inside the cylinder would be caused from what?

A. The pressure created by the restriction, in my opinion is what cracked the bag. In other words, it would have broken at the weakest point.

Q. You said ‘cracked the bag.’

A. The bag shell.

Q. The cylinder shell?

A. That’s right.

Q. Tell me this, in your opinion, if the bag could have been forced into the discharge pipe with the crack appearing in the cylinder, in other words, had the crack in the cylinder appeared first, could that bag have been forced into the pipe?

A. In my opinion, no. That would automatically create a bypass.”

The third expert witness for the plaintiff was William R. McLelland. Mr. McLelland had been employed twenty years as a mechanic on Diesel engines for the Interstate Motor Lines. His present occupation is a

rebuilder of Diesel engines for this Motor Lines, which operates approximately fifty Diesel units.

At Page 144 of the transcript the witness McLelland demonstrates the proper way to install a filter bag on this spool. At Page 146 of the transcript he was shown Exhibit D, the filter bag unit involved in this action, and testified as follows:

"A. I would say no, that it is not properly installed.

Q. Will you point out to the court in what manner it isn't?

A. It's not according to what — I can see it's not perfectly true across here which, when that bag is rolled, a man installed that is going to have to keep that over to keep it inside the spool. Your length on this side is much shorter than it is on the other side.

* * *

Q. I'll ask you for your opinion on it, Mr. McLelland.

A. On what?

Q. As to what would be expected from installing the bag so that it isn't exactly straight with the lines or the edge of the sprocket?

A. Any time you have to pull the bag to force it into position, there is your possibility of that bag overlapping this flange. It's not

properly installed if it does not roll true inside the spool.”

On Page 149 of the transcript the witness stated:

“A. My opinion, after looking at this bag, is that it was installed overlapping, and your pressure going through that bag has forced it into the discharge hole.”

At Page 149 of the transcript the Court asked to have it clarified for him — which was the discharge line into which it was claimed the bag had been pulled and clogged. At Page 150 the witness McLelland was shown Exhibit B, a picture of a Diesel engine, and he pointed out to the Court on that picture the discharge line, identifying it as the line marked “No. 4”.

At Page 150 the witness was asked this question:

“Q. Now, what is the effect of the filter bag being drawn up in the hole of the discharge line?
MR. HUGGINS: We object to that, if the Court please.

THE COURT: There is only one thing. It stops it off.

Q. That’s obvious. Now, what is the effect of that on the overall system, the lubricating system of the motor?

A. That is your main oil line to the side of the block which from there goes through your cam shaft, oils your main bearing. From

your main bearing to your conrods; that's your main pressure line.

THE COURT: What creates the pressure in that line. Is there a pump that pulls it in there?

A. Yes. Your oil pump is here. This is your oil pump here."

At Page 152 the witness McLelland stated as to the time it would take a bearing to go out if it is starved of oil, and he answered:

"A. Well, if the oil is blocked off it's just a matter of seconds, I would say."

At Page 162 of the transcript, on cross-examination Witness McLelland was asked as to whether the pressure of the oil into the bag would not straighten it up and prevent the occurrence of the bag clogging the discharge line, and he stated:

"A. Not as it was overlapped. I wouldn't say so.

Q. Why do you say that, Mr. McLelland?

A. Well, I have seen two of the same thing in our business, identical.

Q. Two what?

A. Of this same deal which is blocked off the oil discharge and burned out the bearing in the block.

Q. Now, you have no way of knowing, in those two that you have mentioned, no way of knowing what caused them, other than what someone told you, have you?

A. I tore them down.

Q. You tore them down?

A. In my business, yes; not this one.

Q. In your business?

A. Yes. That is my job to tear down when there is a motor that comes in burnt up. I have to find out about it and make the statement as to what caused it.

Q. Well, that is an opinion of yours, isn't it?

A. Yes.

Q. Tell me, do you remember where the holes, approximately where the holes were in the bag of those that happened before?

A. No.

Q. You don't remember that. Would their relative positions in the bags have a difference, in your opinion?

A. It would be a matter of inches, one way or another, I would imagine."

In ruling on the foregoing motion Judge Hendricks stated that he thought it was conjecture as to whether the clog was in the crank shaft or in the feed line. He said, "I don't think there is any evidence as to where the stoppage was." During the argument of the motion Judge Hendricks' position was that because the engine was not dismantled, starting with the oil lines, before the filter bag was taken out of the cylinder, we could not then say that the filter bag had been in the discharge line because the witnesses could not see beyond the flange when the unit was pulled out of the cylinder. He chose to ignore the witnesses' statement that there was only one place that the bag could have been punctured, wrinkled and drawn to a point and that was in the discharge line. He chose to ignore the testimony of experts that it was obvious from the appearance of the hole in the bag, the wrinkled condition of the bag around the hole, the portions of cloth in the discharge line, the bag being pulled to a point where it had been sucked into the line, as conclusive evidence that it had been sucked or forced into the line and clogged that line completely.

In ruling on the motion the following propositions should have guided Judge Hendricks:

53 Am. Juris. 782

"The trial judge sitting without a jury must deny a motion for a nonsuit where the evidence

and the inferences reasonably arising therefrom are legally sufficient to prove the allegations of the plaintiff's declaration, complaint or petition."

53 Am. Juris. 255

"A motion for a nonsuit presents the question whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, is sufficient in matter of law to sustain a judgment."

53 Am. Juris. 256

"According to the great majority of cases, hearsay evidence received without objection should, or at least may, be given consideration, and the same is true of conclusions and opinion evidence according to most cases."

53 Am. Juris. 257

"In passing on the defendant's motion for a nonsuit the evidence on behalf of the plaintiff must be accepted as true, and all conflicts in testimony must be resolved in plaintiff's favor."

53 Am. Juris. 273

"It has been said that motion for a redirected verdict is a quasi admission of the truth of the evidence. *It admits the facts stated in the evidence adduced, and it admits as true every fact which the evidence tends to prove, and any favorable conclusion in behalf of the adverse party that a jury might fairly and reasonably infer from the testimony.* Thus, the defendant by motion for a verdict on the evidence introduced by the plain-

tiff admits only the testimony to be true and also every conclusion which a jury might fairly or reasonably infer therefrom so far as the ruling on the motion is concerned."

It is submitted that in view of the foregoing authorities all that plaintiff was required to make a prima facie case were: (1) To show the bailment and undertaking to do the work. This was positively shown by admission of the defendant and testimony of its witness Anderson. Specifically was this shown by Exhibit A, which is the order slip showing the work done. It is clear that that work was done on the truck involved, and that fact was fully demonstrated by the evidence.

(2) The next fact was that the truck was the property of plaintiff, and that was proved. (3) The matter of damage was also established, and evidence introduced. No objection to these two facts was ever suggested or raised.

(4) The fact that the bag was improperly installed on the spool was clearly demonstrated by the witness McLelland, and he showed to the Court how the bag was put on in a lop-sided manner, so as to cause it to wrap unevenly and lap over the edge of the flange or shield at the end of the spool. That the filler bag was improperly installed was stated by the three experts. Our recital of the evidence above clearly demonstrates that this fact was proved.

(5) The next fact required to be proved was the

cause of the damage. Again, as the evidence shows, and as pointed out heretofore, the three expert witnesses detailed that the engine was starved of lubricating oil by reason of the filter sack lapping over the flange and being drawn into the discharge line, thereby preventing the oil from getting to the engine bearings. The sack got into the discharge line because of improper installation, as shown by the witnesses. It could only get into the discharge line by being improperly installed, as proved by the witnesses.

(6) The standard of care required by defendant is that of a skilled expert, for its holds itself out to furnish that type of service, and that was the contract of bailment. The evidence shows that Cummins Diesel puts out a manual showing the proper manner for wrapping and installing the filter. The three experts testified to the proper manner of installation. The three experts demonstrated how the defendant had failed to meet that standard and had improperly installed the filter bag.

The Court stated that we had not introduced evidence as to where the stoppage occurred. All three experts identified the point of stoppage. One stated that the pieces of cloth in the line were conclusive evidence, in his opinion, of the stoppage and the cause of stoppage. The appearance of the bag itself, the construction of the filter cylinder and of the mechanics of the operations of the lubrication system are such that there could be only one conclusion drawn, and that was to the effect that an improper installation resulted in a clogged oil line, starv-

ing of the engine and damage to the plaintiff. All of this was conclusively proved.

As a further point we would like to call the Court's attention to the fact that the Court had before it the uncontradicted testimony of three impartial witnesses. In the instant of two of the experts the business which they represented was also the same agency which repaired and serviced the trucks of defendant. Their testimony clearly established the facts required to be proved and established by plaintiff. This testimony being uncontradicted, and their being no basis for bias or prejudice, nor any reason for the Court not accepting their testimony, the Court was bound on this motion to accept their testimony as true. The Court must accept it and cannot disregard it in ruling on this motion. This proposition has been so clearly established by our Utah cases as to leave no question as to its verity.

It is further submitted that the Court could not consider the motion for nonsuit for the reason that the motion did not specify the particulars required and necessary to warrant the Court's consideration.

In 53 Am. Juris. at Page 255, it is stated:

“The grounds upon which the motion is based must be specifically stated.”

This Court in the case of *Graham v. Ogden Union Railway and Depot Co.*, 79 Utah 1, 6 Pac. (2d), stated:

"It is well settled in his jurisdiction that in making motions for nonsuit and directed verdict the movement is required to 'specifically state the grounds upon which the motion was based' for the purpose of apprising the plaintiff of the particulars wherein it is claimed his proof is deficient, so he may supply it if he is able to do so, and prevent the expense and necessity of a retrial of the case."

In *Smalley v. Railroad*, 34 Utah 423, 98 Pac. 311, the Court stated:

"It is urged that the court erred in directing a verdict because no grounds were stated for such action. This court has repeatedly held that the particular grounds upon which a motion for nonsuit is based must be stated in order that the attention of the court and counsel may be called thereto, and that the defects in the proof may be obviated and corrected, if such defects admit of correction. *Frank v. Bullion-Beck, etc., M. Co.*, 19 Utah 35, 56 Pac. 419; *Skeen v. O.S.L.R.R. Co.*, 22 Utah 413, 62 Pac. 1020; *Lewis v. Mining Co.*, 22 Utah 51, 61 Pac. 860; *Wild v. Union Pac. Ry. Co.*, 23 Utah 266, 63 Pac. 886, and other cases there cited. From the above cases it will be seen that a judgment of nonsuit in a number of them was reversed because the grounds upon which the motion was based were not sufficiently specified, regardless of the question of the sufficiency of the evidence to send the case to the jury. The general rule, when a motion is denied or an objection overruled, the moving party is permitted, on appeal, to urge only such grounds for a reversal as were specifically pointed out or made by him before the trial court, but when the motion

or objection is sustained, because of the presumption against error coming to his aid, a party is permitted, on appeal, to defend the ruling on any ground inhering in the record, was, either in effect or expressly, held, in a number of cases in this jurisdiction, not applicable to a motion of nonsuit. In the case of *White v. Rio Grande Western Ry. Co.*, 22 Utah 138, 61 Pac. 568, it was expressly decided that there is no difference with respect to the rule requiring a specification of grounds when the motion is denied and when the motion is sustained. In *McIntyre v. Ajax Mining Co.*, 20 Utah 332, 60 Pac. 552, this court held that 'an appellate court will not sustain a motion for nonsuit, except on the grounds alleged in the motion,' and approvingly quoted the syllabus, in the case of *Palmer v. Marysville Dem. Pub. Co.*, 90 Cal. 168, 27 Pac. 21.

“* * * To be in harmony with the prior decisions of this court requires a holding that a sufficient specification of grounds must be made, either in the motion or by the court in directing the verdict, to indicate the question of law that takes the case from the jury. If, in a case based on negligence, where the answer puts in issue all the material allegations of the complaint, and contains affirmative allegations of contributory negligence, fellow service, assumption of risk, and settlement, the court may, at the conclusion of all the evidence, direct a verdict for the defendant upon a mere general motion, without specifying grounds therefor, counsel have not, nor have we on appeal, any means of knowing upon what principle of law the case was taken from the jury. In such case there would be no means of knowing whether the direction was made upon the ground

that the evidence was insufficient to show negligence on the part of the defendant, or upon the ground that the evidence conclusively established one or more of the affirmative defenses pleaded in the answer. The court may not thus hurl a mere *brutum fulmen* in the midst of the case, and leave counsel in the dark to speculate upon the point or points struck at, and cast the burden on the appellate court to examine the entire record to ascertain if there is anything upon which such ruling could properly have been based.

In the case of *Barlow v. Salt Lake & Utah Railroad Co.*, 57 Utah 312, 194 Pac. 665, this Court stated:

“It has been repeatedly held by this court that a motion for nonsuit should be specific, and that a motion stating that the evidence fails to show negligence and carelessness is too general to be considered.”

We submit that the motion for nonsuit of the defendant being “upon the grounds and for the reason that there has been no negligence or proof to the Court sufficient to make a *prima facie* case” is “too general to be considered.”

CONCLUSION

In conclusion it is submitted that the uncontradicted expert and factual testimony of plaintiff made a *prima facie* case; that the motion for nonsuit of defendant was too general to be considered, and that the district court erred in disregarding the uncontradicted evidence

submitted by plaintiff; that the court erred in refusing to accept this evidence, and definitely and entirely disregarding the evidence and testimony of plaintiff; and committed error when it stated that plaintiff had failed to prove that the discharge line had become clogged by the filter bag.

It is submitted that the plaintiff is entitled to the order of this Court setting aside the judgment of the district court and directing a new trial.

Respectfully submitted,

McKAY, BURTON, McMILLAN
AND RICHARDS,

*Attorneys for Plaintiff
and Appellant.*