

1953

Tom Northern v. General Motors Corporation et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

TOM NORTHERN,

Plaintiff and Respondent,

— vs. —

GENERAL MOTORS CORPORA-
TION, et al.

Defendant and Appellant.

} Case No.
7973

Brief of Appellant

Appeal From District Court, Salt Lake County
Hon. David T. Lewis, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

TOM NORTHERN,

Plaintiff and Respondent,

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GENERAL MOTORS CORPORA-
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Defendant and Appellant.

Case No.
7973

Brief of Appellant

STATEMENT OF FACTS

This action was brought by Tom Northern against the General Motors Corporation for damages arising out of an accident to a 1951 one and one-half ton Chevrolet truck owned by Tom Northern and sold to him by the Central Motor Company at Grand Junction, Colorado.

Plaintiff alleges that the defendant General Motors Corporation was negligent in the manufacture, in that

the truck was defective and dangerous for use; that they failed to properly inspect, test and perfect the steering mechanism; plaintiff further alleges that General Motors Corporation was negligent in the inspection of the truck.

The defendant General Motors Corporation admits having manufactured and assembled the truck, but denies that the truck was defective and denies that it was negligent in the manufacture and inspection of the truck while it was being manufactured and assembled and before it was sold and delivered to a dealer.

In particular, plaintiff alleges that the steering mechanism on the truck broke and that as a result of such breaking the truck went out of control and upset, causing personal injury.

In this case the pitman sector shaft of the steering mechanism was found to be broken *after* the accident. The broken parts (Plaintiff's Exhibits G1, G2, G3 and G4) are in evidence and also photographs of the same parts (Plaintiff's Exhibits J, K, L, O, P, and W; Defendant's Exhibit 4) and can illustrate and explain better than can be written here. Defendant's Exhibit 7 is a blueprint in evidence, which shows the relation of the pitman sector shaft in the operation of the steering mechanism.

The accident in question occurred about a mile and three-quarters westward from a mountain pass in the State of Nevada known as Sacramento Pass on Highway No. 6 between Delta, Utah and Ely, Nevada (R. 86, 87)

when the plaintiff, the driver of the truck, was going toward Ely, Nevada (R. 86).

The road at the point of the accident is a downward grade from Sacramento Pass and is part of a large compound curve and it was after making a gradual curve to the right where the truck turned over (Plaintiff's Exhibits Q, R and S).

The plaintiff testified he was in the business of cleaning cesspools and septic tanks (R. 73) and that on May 18, 1951 he traded a Dodge truck for the Chevrolet truck in question. The transaction was made with the Central Motor Company of Grand Junction, Colorado (R. 76). After the purchase, plaintiff placed a 740 gallon tank and a sludge pump upon the truck (R. 77; Plaintiff's Exhibit A). After working in Colorado and Utah, plaintiff was in Monticello, Utah, on or about June 5th and he had driven the truck about 975 miles (R. 80, 81). While traveling between Monticello and Price, Utah, the plaintiff experienced the following (R. 81):

“A. Yes, sir. Coming down a little grade that I was driving between 50 and 60, no more than 60; I don't know if it happened, it seemed like it was a low road, or maybe my wheels would need balancing, or something made it so rough in the road.

“Q. How would you describe that?

“A. A thrill sort of like a near weaving.

“Q. How much of a weave was that? Did you cross over the center line of the highway?

“A. No, sir, it was just a slight weave in the road, wobbly.

“Q. Did the truck leave the hard surface of the highway?

“A. No, sir, it did not.”

Also, on cross-examination and regarding this same experience plaintiff testified (R. 116, 117):

“A. You mean the feeling I got from it?

“Q. Yes.

“A. It was near in the steering wheel. It gave me a funny feeling.

“Q. You felt the impulse, whatever it was in the steering wheel?

“A. Yes sir.

“Q. At that time. Was it a sensation of the steering wheel just for a very few moments going to the right and to the left?

“A. No sir, you couldn't say it was that way. It was just a wiggle.

“Q. Just about what you are illustrating, is it not?

“A. Yes sir.

“Q. You are illustrating of it going quickly from the right to the left?

“A. Yes sir. You couldn't say it went no foot and a half or two feet. Just little bobbles.”

Upon arriving at Price, Utah, plaintiff had driven the truck and its added equipment about 1300 miles and at that place took the truck into the Redd Motor Com-

pany of that city for its thousand mile checkup. Among other things complaint was made of the front end "kind of acted funny" but the Redd Motor was not apprised of the previous "weaving" experience (R. 82, 83). The truck was then driven from Price, Utah, to Grand Junction, Colorado and back to Price, Utah; thence to Salt Lake City; thence back to Price, Utah; thence to Spanish Fork, Utah; thence to Delta, Utah, and thence to the place of the accident and (except for a distance immediately prior to the accident) the truck operated perfectly (R. 82, 83, 84, 85 and 86).

After leaving the top of Sacramento Pass and traveling downgrade toward Ely, Nevada, the plaintiff testified that while traveling near sixty miles per hour he went on down around a curve and then "the first thing I knowed I was in the middle of the road from the right side; and I turned by truck back into the right side again, and when I went to turn it again, which the steering wheel had completely turned plumb around and the truck went on about its business." (R. 89.)

On cross-examination and on this same subject, plaintiff testified that after leaving the top of Sacramento Pass and after rounding a curve to the right he got over to the left of the center line of the highway and that he gradually pulled it back to the right hand side (R. 127). Also plaintiff admitted describing the occurrence on previous deposition as follows (R. 130, 131):

"Q. I will ask you whether or not at that time in the deposition you made this statement: 'Well,

it was just like, oh, just didn't have the blacktop out, you know, to the ditch. It was a smooth road there. And I snatched it back up on the road and pulled it back. When I pulled it back I never could straighten it up again.'

"A. That is right, sir.

"Q. You made that statement, did you not?

"A. Yes sir, I did.

"Q. I will ask you, Mr. Northern, whether or not, on that occasion, you made this statement: 'No sir. When I tried to turn it back to the right again, after pulling it from the right side, pull it to the left, and after trying to straighten it back to the right again, I could not straighten it. That's when I hit the brakes.'

"A. Yes sir, I did.

"Q. And right after that do you recall this question: 'And what was the sensation on the steering wheel as you tried to pull it back from the right side of the road?'

"A. Well just wasn't nothing to turn it back with.' You made that statement, did you not?

"A. Yes sir, I did.

"Q. And will you listen to the following questions and answers, Mr. Northern, on the same occasion on the deposition: 'Q. You didn't try to spin it at all back?'

"A. Well it done happened, sir. Didn't have enough time to do all that. Just steering it, I imagining around eight, ten inches; something like that.'

"Q. Then you started tipping over?

"A. It was going over then.

“ ‘Q. You were going over then?

“ ‘A. Yes sir.’

“Did you testify to that effect upon the taking of this deposition?

“A. I don’t recollect that, sir.

“Q. Do you deny now, Mr. Northern, that you made such a statement on that occasion?

“A. No sir, I do not deny it. I just don’t recollect it.

“Q. And you could have made such a statement, is that right?

“A. Possible.”

Plaintiff’s Exhibits C and M and Defendant’s Exhibit 3, admitted in evidence, clearly shows the course taken by plaintiff’s truck to the time of the upset.

Plaintiffs then read into evidence the deposition of one Gordon Wertsderfer. Mr. Wertsderfer lived about two miles from the summit of Sacramento Pass (R. 159). He related that his occupation was that of a machinist and combination welder for forty-five years and that he had handled, examined and fashioned forms out of steel (R. 163); that he had observed metal surfaces but that he had no experience in regard to steering mechanisms nor in the automotive line (R. 172, 173). On voir dire examination this witness testified that he had learned by practical experience and that he had no schooling or technical training (R. 168, 169) and that his formal education was through the eighth grade (R. 172).

Mr. Wertsderfer testified that on June 15, 1951 he received word of an accident from one Mike Drakulich who runs a place of business on Sacramento Pass and that he went to the scene of the accident and saw the upset truck (R. 159). He saw the marks on the highway as shown by plaintiff's Exhibit C (R. 160). This witness examined the truck and "in looking at the steering arm" he found that it was broken and "that one-sixth of it had a flaw in it, that showed traces of rust where the flaw had been created" (R. 173). (These conclusions were allowed over defendant's objections.) He concluded that the rust condition was in the neighborhood of "six weeks old" (R. 173). Mr. Wertsderfer testified that he called the attention of his wife and Dr. Drakulich to the broken part at the scene of the accident. (R. 176). On cross-examination witness Wertsderfer described the broken part as chrome steel, eighteen percent carbon, medium carbon steel and upon further examination he had no knowledge of any other remaining elements of the metal, or its composition and structure. (R. 177-184 incl.) Mr. Wertsderfer agreed that the "splines" on Exhibit G-2 were twisted and that it would take great force to twist these splines on an inch and one-eighth shaft. The witness then described where he saw the discoloration on the faces of the fracture by marking the areas on Exhibit 4. No evidence of crystallization was present in the Exhibits. He stated that a crack or opening to allow rust could be visible to the eye *if* the opening was "a half a thousandth or over" (R. 200). In conclusion and on cross-examination this witness testified

that he had no idea how the "flaw" got in the part in question (R. 202). He later surmised that a "jolt" in the factory might have caused it (R. 201) although he had no knowledge of how the parts are made or put together in an automotive plant (R. 202).

The deposition of Mrs. Gordon Wertsderfer was read by the plaintiff. Mrs. Wertsderfer testified that her husband called her attention to the broken part and she observed signs that appeared to be rust (R. 204). On cross examination and at the time the deposition was taken, Mrs. Wertsderfer could not see the rust or discoloration that she had referred to upon her direct examination.

Plaintiff then presented Mr. Renold O. Jenson, who stated that he was in the auto repair business in Salt Lake City, Utah, and that he was the person who purchased the damaged truck from Mr. Northern (R. 205). Mr. Jensen testified that in the repair of the truck he replaced the pitman sector shaft; that the front wheels and drag link were not damaged (R. 138) and he described further repair work (R. 207). The witness gave his opinion that there was no blow on the front end because the front end was still on the truck (R. 208). He further described "stops" to prevent the wheels being turned beyond a certain angle (R. 208). In respect to lubrication of the broken part he stated that a sleeve or bushing covers it and that it has an oiled surface and in his opinion rust would not accumulate when the parts are assembled (R. 208, 209).

On cross-examination the attention of the witness was directed for the first time to the apparent twist on the splines of the broken part (R. 209) and he stated that it would require some type of pull to produce such a twist and take a lot of force to break the sector shaft and that a sudden jolt may do it (R. 210). From his experience, Mr. Jenson testified that it depends upon a lot of factors which part fails—sometimes one part fails—sometimes another, and it depends upon where the force is applied (R. 211, 212).

Plaintiff read into evidence the deposition of Frank Snyder. The witness described himself as a machinist of forty years experience (R. 216) and at the time of the deposition he was and had been employed as a machinist for Kennecott in Ruth, Nevada, for twenty-five to thirty-five years (R. 217). The witness had never done any testing of metals (R. 219) and no special studies (R. 220), no knowledge of chemistry or chemical content (R. 232), hardness (R. 233, 234), heat treatment (R. 234), load requirements (R. 234, 235), modern milling processes (R. 238), examined metals under magnification (R. 245), and that he “never made a study of it” and that it was really none of his business (R. 245).

He testified that on June 15, 1951, he was traveling in the vicinity of Sacramento Pass and he came upon a wrecked truck and that the front end was all “busted”. He noticed a broken piece and, over objection, stated that there was a “flaw” in it (R. 218). He described the piece as having been “cracked, and the crack had

been oxidized'' (R. 225). He described a stain mark the color of rust; that the part was fractured before it was machined (R. 226). He examined the part to see if he could see anything and stated that the parts have been cleaned up (R. 226). As to the time the oxidation existed, Mr. Snyder stated that it would be longer than three weeks but concluded by stating that he would not pass an opinion and if he did it would be a pure guess (R. 229).

On cross-examination Mr. Snyder admitted to his lack of knowledge of modern steel, its chemistry, composition or structure (R. 230, 231, 232 and 233). Mr. Snyder, for the first time, noticed that the splines or serrations were twisted and immediately concluded that there had been an excessive strain on the part, not only excessive but a "great" strain on the part (R. 236). Mr. Snyder, upon viewing the part at the scene of the accident, concluded that the rough surface of the fracture indicated crystallization but upon deposition failed to find any such evidence (R. 240). In explaining this situation, the witness stated that his first examination had been a year or more ago and, in fact, the District Attorney (Mr. Collins) had a "heck" of a time convincing him that he had seen the wreck (R. 240). Also, in regard to the rust the witness was asked to point out the areas where the rust was seen and, in response, replied: "I can't show it to you. 'Taint there." (R. 241). Mr. Snyder then further concluded that the "flaw" was in the metal when the part was new but that it did not show on the outside (R. 242). He then described the area of the

“flaw” as the entire surface of Exhibits G-1 and G-2 with the exception of the rising edge (R. 242). Mr. Snyder testified that an examination under magnification might change his opinion of the problem but he refused such opportunity, stating, “I can’t pass an opinion now, after this length of time. Why, hell, I wouldn’t give an opinion on it” (R. 244, 245).

The deposition of Mr. Jon Collins of Ely, Nevada, was read by the plaintiff into the evidence of the case. Mr. Collins was an attorney-at-law and District Attorney of White Pine County, Nevada (R. 263). Shortly after this accident Mr. Northern consulted Mr. Collins regarding his case and the facts and site of the occurrence were investigated by Mr. Collins (R. 263). In the course of such investigation, Mr. Collins made various observations and measurements and identified the various photographs in evidence of that place (R. 265). Testifying concerning the alternate marks shown on Exhibit C, Mr. Collins viewed nine such distinct marks averaging about four yards apart or a distance in excess of 108 feet (R. 266). On the left hand side fifteen such alternate marks were found by him also averaging in excess of four yards apart, or a total distance in excess of 135 feet (R. 267). The right side left the surfaced part of the road and was on the graveled shoulder before turning abruptly to the left for a distance of twelve to fifteen yards (R. 279). At that point the right hand wheel left the macadam about a foot or foot and a half and there was no object which was struck or hit (R. 269). Mr. Collins described his idea of what caused the solid

marks which abruptly crossed the highway to the left (R. 270, 271). Mr. Collins describes the course of the Northern vehicle as “the first swing was slightly to the left, at which time the wheels did not leave the macadam. Then there was a swing to the right, at which time the right wheels left the macadam. And they left the macadam, as I stated previously, about a foot or a foot and a half, then there was a violent swing to the left” (R. 272). By use of his automobile speedometer, the attorney then measured the distance from the point where the marks were first observed to the place where they left the highway on the left. This distance was .12 of a mile or 633.6 feet and in addition to this the truck went into a barrow pit, hit and uprooted a substantial tree (R. 273) which was a distance of twenty to thirty yards (R. 275).

At Ely, Nevada, Mr. Collins examined the truck and observed the broken part (R. 276) and later had possession of this part after its removal from the vehicle (R. 277). He further observed that the front end was “considerably scratched and banged up” (R. 281). Mr. Collins later sent the broken part to Mr. Earl R. Parker, Professor of Metallurgy, University of California, to be examined and received a report from that expert (R. 282, 283, 284).

The *plaintiff* caused the deposition of Earl R. Parker to be read into evidence. Mr. Parker related his qualifications which revealed eminent qualifications as a metallurgist and professor of metallurgy and he has specialized in the study of service failures (R. 286, 287).

Exhibits G1, G2, G3 and G4, were shown to Mr. Parker and he testified they had the same appearance as the parts previously sent to him by one Jon Collins of Ely, Nevada, and that he made a report to Mr. Collins by letter of August 24, 1951 (R. 219). It was stipulated that Exhibit No. 5 is a true and correct copy of that report (R. 289, 290). Concerning his examination and opinions, Professor Parker testified as follows:

“A. No. The magnification used for the examination was about twenty-five times the actual size so that we could scrutinize the surface of the fracture rather closely. The things that I looked for on such a fractured surface are characteristic surface markings which indicate, by comparison with other things that I have seen in the past with known histories, the nature of the surface failure; and in particular I always check for evidence of old cracks.

“Q. Now, as a result of the examination you made and as you have described it, you arrived at certain opinions and conclusions in regard to the exhibit, did you not?

“A. That’s right. And those were stated in the letter referred to as Exhibit 1 (T.C.E. 5).

“Q. Now, did you find in your examination any reason to believe that the metal contained in the fractured parts was defective?

“A. No.

“Q. And did you arrive at any opinion that the part was sound before the fracture?

“A. Yes. There was no evidence of any defects in the cross-section of the part that had fractured.

“Q. And did you arrive at an opinion, Professor Parker, as to the cause of the fracture or failure of Exhibit P (T.C.E. G)?

“A. Yes. I would rather refer to the letter, which states as one of the conclusions of the examination ‘The fracture was caused by a sudden overload (rather than by fatigue—a type of failure that progresses slowly over a long period of time.)’

“Q. And is that your opinion now?

“A. Yes, it is.”

Exhibit 6 was then examined by the witness and from those photos of the micro-structures he testified that there was nothing to indicate either mechanical defects or metallurgical defects in the sense of improper heat treatment (R. 291). Professor Parker stated in his testimony that the structure and properties of the metal were suitable for the purpose for which it was used in the motor vehicle (R. 292). The hardness figures (the results of a chemical analysis and hardness test by Mr. Bradshaw, chemical analyst at the University of Utah were stipulated) as a result of test were normal for this type of metal and the chemical composition was suitable for use in parts of this type according to Professor Parker (R. 293). Upon examining the twisted splines of Exhibits G1, G2, G3, and G4, Professor Parker testified that the failure was due to a single overload rather than a series of small overloads and that a torsional force was applied to the part (R. 293). In regard to the problem of rust or oxidation, Professor Parker further testified (R. 295):

“A. I don’t recall seeing any oxidation on the surface of the fracture at the time that I examined it. If there had been any more than superficial oxidation on the surface, I would have noted it because of the fact that one of the things which is important in the study of such fractured surfaces is to look for evidence of old cracks which can be detected by local oxidation in the region of the old cracks, which produces a darkened area and consequently contrasts sharply with the remaining brighter portion of the fractured surface. There was no such evidence of an old crack insofar as I could determine at the time that I examined it.

“Q. And the time you are speaking about was some time toward the latter end of August of the year 1951?

“A. Yes.”

On cross-examination this same witness stated that the force on the pitman arm was from the rear forward to produce the clockwise twisting of the splines (R. 295). He also testified that such a fracture would require a very large force and a force higher than a driver could exert through the steering wheel (R. 296). Upon being examined as to the time factor of the fracture, Professor Parker testified (R. 298):

“A. That’s right. It is impossible to tell from the examination of the fractured part alone anything about the time factor except that this is the fracture which is characteristic of a single large overload which occurred at one time in contrast with the different kind of fracture which occurs over a long period of time by progressive growth of a crack due to repeated small overloads.

“Q. All right. Which are, as I understand, you have been referred to the fatigue type of fracture.

“A. That time-consuming type of fracture is called a fatigue fracture because of its gradual failure over a period of time.”

The defendant General Motors Corporation, after having made a motion for dismissal in its favor, called Mr. Millan (Mike) Drakulich, who testified that he owns a tavern on Sacramento Pass about forty-six miles east of Ely, Nevada and that he also operates a small stock ranch (R. 316). He was a friend and neighbor of Mr. Wertsderfer (R. 317). Mr. Drakulich described the road from the summit of Sacramento Pass to the place of the accident as having six curves. The witness first saw the truck pass his place of business and it “was traveling a little faster than trucks usually do, down that grade” (R. 319). Then about a half mile below his place of business he saw a cloud of dust and someone told him there was a wreck down there and he went down to the place of the accident (R. 317, 318). He found the truck on the left side about twenty-five or thirty feet up on the bank (R. 318). Mr. Drakulich went after Mr. and Mrs. Wertsderfer for aid and at the scene Mr. Wertderfer showed him the broken parts (Exhibits G1 and G4). He looked at the parts and saw no rust or discoloration, although Wertsderfer attempted to point out that it was “oxidized” (R. 320).

Mr. Wally Birch was produced by and testified for the defendant, General Motors Corporation. Mr. Birch

is a resident of Ely, Nevada, since 1936 and has been in the automotive repair and garage business since he was a young boy (R. 322). He runs a tow service and has seen and examined many wrecks and examined many broken parts, including those that have failed by reason of being defective (R. 323). Mr. Birch received a call and arrived at the scene of the accident on the morning following the occurrence (R. 323). He examined the scene, including the truck, tank, and the marks on and off the highway (R. 324). He formed the conclusion that the truck had rolled over four times and the tank was completely separated from it (R. 325). On that occasion Mr. Drakulich was present and he and Mr. Birch examined the broken steering part and he testified that there was no rust on the part or the faces of the fracture (R. 326, 327). He described how the truck was removed and taken to Ely, Nevada (R. 327). In describing the truck marks as shown by Exhibit "M", he testified that the marks alternated, first one mark on the right, then one mark on the left (R. 328). On cross examination, Mr. Birch testified that those marks could be made while the front wheels were controlled by the steering mechanism (R. 329). He further testified during the trial that he could see a bit of rust on the part when it was exhibited to him at the trial, but that he did not see such a condition when he first saw the part on June 16, 1951 (R. 331).

Mr. Roy J. Griffin was sworn and testified as a witness for the defendant. Mr. Griffin identified himself as a man 58 years old and a resident of Saginaw, Michi-

gan, and that he was employed as Chief Metallurgist for the Saginaw Steering Gear Division of General Motors Corporation (R. 332, 333). Mr. Griffin is a graduate metallurgist and he has followed that profession with General Motors Corporation for his entire career (R. 333). The Saginaw Steering Gear builds steering gears for General Motors and for various other manufacturers, including Ford and Studebaker (R. 333).

Mr. Griffin detailed the manufacture of this Pitman sector shaft from the steel mill to the finished product. The shaft is made from a 6120 S.A.E. steel which is purchased in 1 $\frac{1}{4}$ " hot rolled bars from the steel mill. Billet samples from the steel mill are taken by Saginaw Steering for examination and analysis and they also receive the analysis reports of the steel mill as it is sampled throughout the heats (R. 335, 336). When the bars are delivered by the steel mill and the particular heat and ingot from which it came is identified by a metal tag and the material is not used until it is released as satisfactory by the Saginaw Laboratory, which gives the heat a code number which may be identified upon the finished part (R. 337).

Mr. Griffin then continued in his testimony to detail the production methods and procedures used in the Saginaw Steering Division, including the forming of the metal, the heat treatment, and the placing of the splines upon the shaft. He further described how the parts are assembled (R. 338, 339, 340).

The defendant, General Motors Corporation, then produced as a witness Dr. Hyrum E. Flanders. Dr. Flanders identified himself as a professor of metallurgy at the University of Utah and related extensive education and experience in this field (R. 391). In the month of June 1952 Exhibits G-1, G-2, G-3 and G-4 were brought to Mr. Flanders by one, Mr. Fouts, Mr. Griffin of the Saginaw Steering, and Mr. King, counsel for plaintiff (R. 391, 392). Mr. Flanders and these persons met with Mr. Bradford, Chemical Analyst of the University of Utah, to determine a procedure to follow in the examination of the part for the consideration of the existence of a defect (R. 392). As a result of the examinations made by Dr. Flanders, he arrived at the opinion that there was no defect whatsoever in the metal. He particularly noticed that the splines on Exhibit G-1 were twisted and he stated that this was caused by twisting that had taken place prior to the failure (R. 392, 393). A careful examination of the surface revealed no oxidation which might have been present before the fracture had taken place and at the trial he observed some superficial rust which was not present at the time of his examination (R. 393).

Mr. Arthur W. Harris was then presented and sworn on behalf of the defendant, General Motors Corporation. Mr. Harris was a resident of Detroit, Michigan, who had worked for General Motors Corporation for a period over thirty years and has been engaged by this company in designing and general engineering testing work, and at the time of the trial he was a field product engineer.

A good part of the experience of Mr. Harris has been to study vehicles under certain conditions to investigate difficulties and trouble—determine the cause and effect and to make recommendations to the Engineering Department (R. 401).

Exhibit “C” was examined by Mr. Harris and the marks made by a vehicle as shown on Exhibit “C” had received his consideration. It was the opinion of Mr. Harris that the marks as shown were typical of a “high speed tramp.” (R. 402). These marks could be made by a vehicle while there was a proper connection in the vehicle between the steering wheel and the front wheels. Mr. Harris then described the activity of a motor vehicle that makes this type of mark, and he testified that by reason of the spacing of the marks, as testified in plaintiff’s case by Mr. Collins, that the speed of a vehicle to make such marks would be approximately 70 miles an hour (R. 404). Mr. Harris then described to the jury how the marks were made on the highway as the vehicle turned abruptly to the left and left the highway on that side, and accounted for the appearance and disappearance of the various skid marks (R. 405).

STATEMENT OF POINTS

1. The trial court erred in denying motion of defendant General Motors Corporation for dismissal at the conclusion of plaintiff’s case.
2. The trial court erred in refusing to direct a verdict for defendant General Motors Corporation.

3. The trial court erred in denying motion of defendant General Motors Corporation to set aside verdict and enter judgment for said defendant.

4. The trial court erred in denying motion of defendant General Motors Corporation for a new trial.

5. The trial court erred in permitting the witness Gordon Wertsderfer, over objection of defendant General Motors Corporation, to testify concerning opinions and conclusions of said witness.

6. The trial court erred in permitting the witness Frank Snyder, over objection of defendant General Motors Corporation, to testify concerning opinions and conclusions of said witness.

ARGUMENT

POINTS 1, 2, 3 and 4

THE TRIAL COURT ERRED IN DENYING MOTION OF DEFENDANT GENERAL MOTORS CORPORATION FOR DISMISSAL AT THE CONCLUSION OF PLAINTIFF'S CASE; THE TRIAL COURT ERRED IN REFUSING TO DIRECT A VERDICT FOR DEFENDANT GENERAL MOTORS CORPORATION; THE TRIAL COURT ERRED IN DENYING MOTION OF DEFENDANT GENERAL MOTORS CORPORATION TO SET ASIDE VERDICT AND ENTER JUDGMENT FOR SAID DEFENDANT; THE TRIAL COURT ERRED IN DENY-

ING MOTION OF DEFENDANT GENERAL MOTORS CORPORATION FOR A NEW TRIAL.

So that this Honorable Court may properly appraise the evidence in support of plaintiff's theory in the case and the lack of evidence to support it, we have set out the evidence at some length in support of our position that the verdict is not supported by the evidence and contrary to the law, and the trial court should have granted defendant's motion for a judgment in its favor.

As stated in Hooper vs. General Motors, Utah, to impose liability on a manufacturer or assembler of an automobile certain necessary elements must be made out, and plaintiff is required to show:

1. A defective wheel at the time of automobile assembly.
2. Such defect being discovered by reasonable inspection.
3. Injury caused by failure of the wheel due to its defective condition.

1. *There was no substantial evidence that the pitman sector shaft was defective at the time of manufacture or assembly by the defendant General Motors Corporation.*

It is true that the elleged expert witnesses for the plaintiff, Mr. Wertderfer and Mr. Snyder, testified that they discovered rust and oxidation on the part, and that

such a condition constituted a "flaw", in their opinion. (At this point it is interesting to note that a careful examination of the testimony of these witnesses placed the alleged rust or oxidation on entirely different places on the face of the fractured part.) Mr. Wertsderfer stated that it had taken six weeks to discolor the metal (R. 174) and Mr. Snyder stated that any opinion on his part as to the period of time could only be a guess (R. 229). Further, the witness Snyder stated that the metal from which the part was made was, in his opinion, defective at the time of its manufacture by the steel mill (R. 229). This opinion, which was allowed over defendant's objection, was utterly destroyed by the witness himself. His only experience in the manufacture of steel was some fifty years ago while employed in a steel mill, and the nature, type and duration of his employment and experience at that time was not shown (R. 217, 218). Also this same witness testified:

"A. It's been so long since I've been around an open hearth. I haven't been around an open-hearth furnace since, let's see, 1901. Yes, say, 19— well, since 1905, anyway.

"Q. And it's probably a lot different today, is it not?

"A. Oh, sure. That's the reason I ain't going to say what this steel's made of or what.

"Q. So the answer is you really have no knowledge of the mill processes of manufacturing?

"A. I know they make steel now that we didn't have in the early days. (R. 238).

* * * * *

“Q. Now, you mentioned that you have not looked at these parts under a glass.

“A. No, I haven’t. That might change my opinion on it.

“Q. Would you care to look at these parts under a glass, Mr. Snyder?

“A. I can’t pass an opinion now, after this length of time. Why, hell, I wouldn’t give an opinion on it.

“Q. You wouldn’t give one at all now?

“A. No.” (R. 244, 245.)

* * * * *

“Q. I see. You have never paid any attention to examining them?

“A. No, I’ve never made a study of it. It’s really none of my business.” (R. 245.)

Thus the testimony of Mr. Snyder offered no real probative value to the plaintiff’s case and no judgment can be predicated upon such incompetent, unreliable and inconclusive testimony.

No evidence was offered by plaintiff as to when the truck was manufactured and assembled by General Motors Corporation, or when it left their possession. It is perfectly possible that the truck left the possession of this defendant a long time before the six weeks mentioned by the witness Wertsderfer. Plaintiff cannot complain of its failure to produce this evidence as this information was easily available and accessible to plaintiff.

If any question remains as to the plaintiff's proof, the court's attention is directed to the testimony of Dr. Parker that the part was good and sound in all respects, and that its fracture was due to a sudden and great overload. This witness, an eminent and qualified metallurgist from the University of California, was presented by the plaintiff.

No substantial evidence in the entire record supports the necessary proof of the first element set forth.

2. There was no evidence that such defect, if it existed at all, was discoverable by reasonable inspection.

A search of the record for any evidence to support this proposition is in vain, and, on the contrary, the defendant General Motors Corporation revealed at the trial its inspections and precautionary method of manufacture. The metal bars were purchased from the steel mill, with a constant check on its quality, from the pouring of the ingots at the mill to its receipt by General Motors Corporation (R. 335, 336, 337). Visual, manual and scientific tests and controls were carefully used in the fabrication of the part by this defendant (R. 337 to 342, incl). *No challenge was made by plaintiff concerning the propriety as to these methods by General Motors, nor did the plaintiff claim any failure on the part of General Motors Corporation to properly perform its obligations in this respect. No evidence was introduced by plaintiff, or anyone else, even suggesting that the procedures as outlined by Mr. Griffith of the Saginaw*

Steering Gear Company were inadequate or improper. Both of plaintiff's alleged experts, Wertsderfer and Snyder, properly ignored this subject, as they both admittedly had no knowledge of the automotive industry or its methods, processes or problems. Again, Professor Parker, produced by this plaintiff, stated that the type and character of the metal used was perfectly proper for the use to which it was applied.

3. No substantial evidence was produced by the plaintiff that the injury to plaintiff was caused by the failure of the pitman sector shaft due to its defective condition.

In discussing the proposition of whether the injury to plaintiff was caused by the failure of the pitman sector shaft due to its defective condition, we can begin with the basic proposition that the causal connection between the alleged negligent act of the defendant and the injury to plaintiff is never presumed, and that this is a subject that plaintiff is required to prove affirmatively.

Jackson vs. Colston, 116 Utah 295, 209 Pac. 2d 566.

The plaintiff testified that in proceeding down Sacramento Pass he had rounded a curve to the right and had gotten himself over to the left of the center line of the highway, and as he noticed himself over on the left-hand side of the road he pulled himself back on the righthand side (R. 127). It is apparent that at this time he had control of his steering. The plaintiff then testified

that he again caught himself in the middle of the road and turned it back to the right side of the road (R. 127). At this time he had control of his steering. The vehicle being driven by plaintiff then gradually went over to the right side of the road until the right wheel was off the surfaced portion of the highway. See Exhibit C. The plaintiff has no idea back of this point where he lost control of the steering, but on cross-examination he stated that he made this statement upon a prior deposition:

“Q. I will ask you, Mr. Northern, whether or not, on that occasion, you made this statement: ‘No sir. When I tried to turn it back to the right again, after pulling it from the right side, pull it to the left, and after trying to straighten it back to the right again, I could not straighten it. That’s when I hit the brakes.’”

“A. Yes sir. I did.

“Q. And right after that do you recall this question: ‘And what was the sensation on the steering wheel as you tried to pull it back from the right side of the road?’”

“A. Well just wasn’t nothing to turn it back with.’”

“Q. You made that statement, did you not?”

“A. Yes sir, I did.

“Q. And will you listen to the following questions and answers, Mr. Northern, on the same occasion on the deposition: ‘Q. You didn’t try to spin it at all back?’”

“‘A. Well it done happened, sir. Didn’t have enough time to do all that. Just steering it, I

imaging around eight, ten inches; something like that.'

" 'Q. Then you started tipping over?

" 'A. *It was going over then.*

" 'Q. *You were going over then?*

" 'A. *Yes sir.*'

"Q. Did you testify to that effect upon the taking of this deposition?

"A. I don't recollect that, sir.

"Q. Do you deny now, Mr. Northern, that you made such a statement on that occasion?

"A. No sir. I do not deny it. I just don't recollect it.

"Q. And you could have made such a statement, is that right?

"A. Possible." (R. 130, 131.)

If, as plaintiff testified, that when the truck was on the right side of the road with the right wheel on the shoulder, he was able to "snatch" the truck from this position, again he had control of his steering, and an examination of Exhibit 3 will show that at the time he claims to have lost control of his steering that he was already tipping over as testified above. Exhibit 3 shows this vividly by the appearance and disappearance of the skid marks of the Northern vehicle crossing the highway immediately before leaving the highway on the left side. Thus the plaintiff in his own testimony gives a description of being able to control the vehicle right up to the time it skidded across the highway out of control.

Neither a review of the testimony of the alleged experts, Mr. Wertsderfer or Mr. Snyder, shows any evidence from which it is shown or can be inferred that the part failed prior to the truck being upset. Quite the contrary, Mr. Wertsderfer testified on cross-examination that there appeared to be a twist on the splines of the fractured sector shaft, and that it would take great force to twist the splines on that part (R. 186). Mr. Snyder testified that the twist on the splines of the fractured exhibit meant that there had been an excessive strain on the part (R. 236). In addition to the foregoing Dr. Parker stated that the examination of the fractured part and the twisting of the splines was due to a single overload, caused by a torsional force (R. 293).

The testimony of Professor Parker is the only evidence produced by plaintiff as to the cause of the accident. Neither Wertsderfer, Snyder or Jensen testified as to the cause of the accident. There was, therefore, not only a failure to prove causation but positive proof by plaintiff to the contrary.

The foregoing is the extent to which the plaintiff attempted to prove the necessary element of proximate causation, and the defendant contends that such element was not proved by either direct evidence or by a reasonable inference. On the other hand, the defendant together with plaintiff in its case clearly proved that the failure of the pitman sector shaft was caused by a great and sudden overload, by a torsional force and, according to Dr. Parker, a force of such a character that

it could not have been exerted by the driver of the vehicle (R. 296).

The appellant subscribes to the nature of a cause of action in the case of a manufacturer's liability as originally determined by the leading case of MacPherson vs. Buick Motor Company, 217 N. Y. 382, 111 N. E. 1050, and as later adopted in the Restatement of the Law of Torts in Section 388, and as set forth by Justice Wolfe in the case of Hooper vs. General Motors Corporation, *supra*. The defendant seriously contends that all of the elements of such a cause of action must be affirmatively proved by plaintiff.

A basic problem of this type of case is the consideration by the Court of two possibilities and the plaintiff presents the proposition (1) that the broken part caused the accident and the contention of the defendant (2) that the part was broken by reason of the accident.

To argue the first possibility one is required to indulge in a degree of speculation and conjecture not justified by but contrary to the law and the evidence in this case as shown by plaintiff's own evidence. Even though the evidence clearly lends its weight and preponderance in favor of the defendant, if we admit that the two possibilities are on a parity, the trial court nevertheless erred in its ruling. This court has held that when a wrong or injury has been brought about from one or the other of two occurrences either one of which may have been the sole ~~approximate~~ cause, and the defendant could be responsible for one only, the ~~defendant~~ must *plaintiff*

prove by a preponderance of the evidence that the defendant's wrong was the sole ~~approximate~~ cause.

This was the holding in Tremelling vs. Southern Pacific (51 Utah 189, 170 Pac. 80) and consistently followed and later announced in Sumsion vs. Streater, Smith, Inc., 103 Utah 44, (132 Pac. (2d) 680).

In the Sumsion case this court stated:

“While deductions may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities the other way equally or more potent the deductions are mere guesses and the jury should not be permitted to speculate. The rule is well established in this jurisdiction that where ‘the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law.’ Tremelling v. Southern Pacific Co., 51 Utah 189, 170 P. 80, 84; Tremelling v. Southern Pacific Co., 70 Utah 72, 257 P. 1066. Many cases are cited in support of this proposition and the court quoted with approval from 29 Cyc. 625 where it is stated: ‘The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury, and no recovery can be had if the evidence leaves it to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them.’ ”

This court has repeatedly held that the doctrine of the Tremelling case applies where plaintiff's evidence shows the two possibilities as to cause.

D. & R G. vs. Ind. Com., 66 Ut. 494, 243 Pac. 800.

Peterson vs. Richards, 73 Ut. 59, 272 Pac. 229.

In this connection the court's attention is invited to the case of Fisher vs. Sheppard, 366 Pa. 347, 77 A (2d) 417, where a tractor trailer crashed into the rear of a building and plaintiff alleged that the accident was caused by a defective sleeve in the differential. That court said:

“We are of the opinion that the evidence is not sufficient to establish this basic fact. Certainly, proof of a broken sleeve itself, in the circumstances here presented, will not support a finding that it was defective prior to the collision of the tractor with the Fisher building. A finding that the break resulted from the terrific impact is equally probable. Where two conclusions can be had from given circumstances, one of which would create liability and the other negative liability, a jury may not be permitted to indulge in conjecture and negligence cannot be predicated thereon.”

We are aware that the respondents will point to the fact that the witnesses Snyder and Wertsderfer testified that there was a “flaw” in the Pitman sector shaft by reason of the rust they purported to see. This was true in the case of Livesley vs. Continental Motors Corp., 331 Mich. 434, 49 N.W. (2d) 365. In this case plaintiffs asserted that a defective connecting rod in an airplane engine broke causing the engine to freeze and the subsequent crash. A witness for plaintiff testified in that case: “It is a flaw in the forging . . . definitely it was not checked. It would have shown up.” The plaintiff

made further proof in that case than did Mr. Northern. The Michigan Court stated, as follows:

“We do not overlook the testimony of plaintiff’s witness Stevens referring to the break of the piston end of the connecting rod in question,

“It is a flaw in the forging. * * * definitely it was not checked. It would have shown up.”

But the witness further testified:

“Q. What test do they make? * * *

“A. Well, I don’t understand what they make, but I understood they run parts as critical as this through an x-ray machine on an assembly line to show up flawed parts. Whether they do on anything as small as this I am not sure, but they should.

“Q. Do you know anything about the magna-flux process?

“A. No, I don’t.”

“It is apparent that his statement, “It would have shown up,” is the expression of an opinion which has no basis of any knowledge of the witness and is without evidentiary force.

“The case of MacPherson v. Buick Motor Co., 217 N. Y. 382 (111 N.E. 1050), was brought to recover damages because of personal injuries caused by reason of a defective wheel of an automobile sold by defendant to a dealer by whom the automobile was sold to plaintiff. The wheel was the product of another manufacturer. The wheel was defective and the defect was the cause of the injury to plaintiff. The defect of the wheel could have been discovered by reasonable inspection, which inspection was omitted.

“The opinion in the MacPherson case among other things stated as follows (111 N.E. 1055):

“It (defendant) was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests. Richmond & Danville R. R. Co. v. Elliott, 149 U. S. 266, 272, 13 Sup. Ct. 837, 37 L. Ed. 728. Under the charge of the trial judge nothing more was required of it. The obligation to inspect must vary with the nature of the thing to be inspected. The more probable the danger the greater the need of caution.”

“In the instant case the testimony shows that the defect could not have been discovered by reasonable inspection, thus the instant case is differentiated from the MacPherson case.

“The New York court further ruled in Smith v. Peerless Glass Co., 181 N.E. 576, at page 578, ‘There was, therefore a duty to use reasonable care. Reasonable care consists among other things in making such inspections and tests during the course of manufacture and after the article is completed as the manufacturer should recognize as reasonably necessary to secure the production of a safe article,’ with which rule the defendant in the instant case is shown to have complied.

“It is unnecessary in this case to review exhaustively the authorities as to liability of manufacturer when negligence is shown because the negligence counted on in the instant case was not shown.

“For failure to prove the negligence which plaintiff counted on, plaintiff was without a sufficient case to go to the jury.”

In the instant case there is no evidence that the defect, if it existed, could have been discovered by a reasonable inspection by General Motors Corporation, or that it caused the accident. The Court is reminded that the witness Wertsderfer testified that a crack in the part could have been seen *if* it had been one-thousandth of an inch (R. 200) and the witness Snyder testified that it was inside the part (R. 247). It is interesting to note, and assuming the partial oxidation, that no one for the plaintiff testified that the remaining part where the metal was joined and not cracked was not capable of performing properly and that it would have broken in that condition under normal and reasonable use.

The case of Harward vs. General Motors Corporation, 235 N. C. 88, 68 S. E. (2) 455, was a case where the plaintiff alleged a defective steering mechanism. The court in that case stated:

“Whether the failure of the steering gear to fit as indicated by the plaintiff and his witness was due to the natural wear or hard and fast driving or lack of lubrication is left in doubt. There is a complete absence of testimony that any cotter key or other essential part of the mechanism was left out, or that any improper parts were used. There is no substantial evidence that there was anything wrong with the steering equipment of the automobile at the time it was sold to the plaintiff, nor is there substantial evidence in the record which tends to prove that the condition in which the steering mechanism was found after the accident was due to any fault or negligence either of omission or of commission on the part of either of the defendants. *Shroder v. Barron*.”

Dady Mot. Co., App. 111 S. W. 2d 66; O'Hara v. Gen. Motors Corp., 35 F. Supp. 319; Bird v. Ford Motor Co., 15 F. Supp. 590; Supera v. Moreland Sales Corp., 56 P. 2d 595; MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050; Davlin v. Henry Ford & Son, Inc., 20 Fed. 2d 317.

“Negligence is never presumed from the mere fact of an accident or injury. The plaintiff has the burden of establishing by appropriate proof not only negligence but that such negligence was the proximate cause of the injury complained of. The plaintiff must also establish by his evidence a casual relation between the alleged negligence and the injury upon which a recovery is sought. Evidence that merely takes the matter into the realm of conjecture is insufficient. Rountree v. Fountain, 203, N. C. 381, 166 S. E. 329; Lynch v. Telephone Co., 204 N. C. 252, 167 S. E. 847. Plaintiff's evidence at most raises a suspicion or a conjecture, but fails to establish actionable negligence or any casual relation between the condition of the automobile when it was purchased and the accident resulting in plaintiff's injury more than nine months later.”

It is anticipated that the respondent will argue that there was sufficient evidence on which the jury could deduce the necessary ultimate inferences. Thirty years ago this Court held that while juries are given great latitude in deducing inferences from established facts, they nevertheless are not permitted to base an inference upon an inference and a finding based upon such would be mere speculation and conjecture. Karren vs. Bair, 63 Utah 344, 225 Pac. 1094. Although such rule has been the subject of much confusion, this Court has not departed from it.

We believe that one of the best statements regarding the question of an inference upon an inference is contained in the case of *New York Life Insurance Company vs. McNeely*, 52 Ariz. 181, 79 Pac. (2d) 948, wherein it was stated: “. . . the Courts do not mean that under no circumstances may an inference be drawn from an inference, but rather the prior inferences must be established to the exclusion of any other reasonable theory rather than merely by a probability, in order that the last inference of the probability of the ultimate fact may be based thereon.”

In applying the facts of the instant case, the plaintiff must rely upon an inference that the alleged “flaw”, if it existed at all, existed at the time the truck was in the possession of the General Motors Corporation. Upon this inference we must then further draw the inference that it was a “flaw” that was discoverable by reasonable inspection. Again, based upon these two successive inferences, it is necessary to infer that by reason of the “flaw” the part was so weak that it was unable to withstand normal and reasonable use.

To further carry on this weird sequence and again based upon the prior deductions, we are asked to infer that the alleged defective part caused the accident and that it was not broken during the violence of the accident itself.

It can readily be seen that in order to reach the ultimate conclusion necessary to sustain the verdict in

this case that all of the inferences are at the best but possibilities and that they are not probabilities nor established to the exclusion of any other theory.

In discussing the foregoing, the Appellant is aware of the statement made by Chief Justice Wolfe in the case of Hooper vs. General Motors Corporation, supra, as follows: "Certainly, reasonable men from the cumulative factual total could infer, and with the consideration of rim-spider separation may have inferred, that the wheel was defective at the time of assembly." The Court is reminded that that case was an appeal by the plaintiff after a verdict of no cause of action and was reversed on the basis that a certain instruction was improper and prejudicial.

The records and briefs in that case will show that there was no issue concerning the elements of a cause of action of a manufacturer's liability and the necessary evidence to support such a cause of action. The statement quoted was unnecessary dicta in that case and we seriously urge this Court to reconsider its effect and clarify the same. The case does not support the conclusion of Justice Wolfe "that the wheel was defective *at the time of assembly.*"

POINT NO. 5

THE TRIAL COURT ERRED IN PERMITTING THE WITNESS, GORDON WERTSDERFER, OVER OBJECTION OF DEFENDANT GENERAL MOTORS CORPORATION, TO TESTIFY CONCERNING OPINIONS AND CONCLUSIONS OF WITNESS.

It is apparent to any tyro that consideration of problems involving the cause and effect of metal failures is a highly technical and scientific subject and one which requires specialized training. Over the defendant's objection the Trial Court allowed the plaintiff to present the witness Gordon Wertsderfer as an expert and to testify before the jury concerning his opinions and conclusions. The witness Wertsderfer qualified himself as a welder, machinist, and construction worker. In addition he related that he had read articles on metallurgy as published by the American Welding Society and a concern referred to as the Oxweld Welding Equipment (R. 170, 171). On the other hand he stated that he had no knowledge of steering mechanisms for vehicles and that he had never followed the automobile line (R. 163).

A reading of Mr. Wertsderfer's testimony on Voir Dire examination will show that he did not possess the specialized knowledge necessary. It is submitted that the witness was not qualified and that the ruling of the Court was in error.

POINT NO. 6

THE TRIAL COURT ERRED IN PERMITTING THE WITNESS, FRANK SNYDER, OVER OBJECTION OF DEFENDANT GENERAL MOTORS CORPORATION, TO TESTIFY CONCERNING OPINIONS AND CONCLUSIONS OF SAID WITNESS.

Over the objection of the defendant, the plaintiff presented the witness, Frank Snyder, as an expert and the Court allowed his testimony, which included opinions and conclusions on a metallurgical subject. The objection to this witness was even more pointed than the objection to the witness Wertsderfer. The Court is reminded that the parties stipulated that the record may be considered as showing objections to all opinions and conclusions. This was done to expedite the trial. Mr. Snyder qualified himself as a machinist for over a long period of years.

On Voir Dire examination the witness admittedly had done no testing in regard to stress or strain of metals and had made no special study for the cause of breaks (R. 220). The same witness testified as follows:

“A. It’s been so long since I’ve been around an open hearth. I haven’t been around an open-hearth furnace since, let’s see, 1901. Yes, say, 19— well, since 1905, anyway.

“Q. And it’s probably a lot different today, is it not?

“A. Oh, sure. That’s the reason I ain’t going to say what this steel’s made of or what.

“Q. So the answer is you really have no knowledge of the mill processes of manufacturing?

“A. I know they make steel now that we didn’t have in the early days. (R. 238).

* * * * *

“Q. Now, you mentioned that you have not looked at these parts under a glass.

“A. No, I haven’t. That might change my opinion on it.

“Q. Would you care to look at these parts under a glass, Mr. Snyder?

“A. I can’t pass an opinion now, after this length of time. Why, hell, I wouldn’t give an opinion on it.

“Q. You wouldn’t give one at all now?

“A. No. (R. 244, 245.)

* * * * *

“Q. I see. You have never paid any attention to examining them?

“A. No, I’ve never made a study of it. It’s really none of my business.” (R. 245).

It is apparent and obvious that the witness was not only unqualified but the lack of qualifications and necessary knowledge and experience were admitted by him. The Appellant seriously contends that the subject of metallurgy and the cause and effect of metal failures is a subject requiring special and peculiar knowledge and experience, and that the witness must affirmatively show these qualifications. *Seward vs. Natural Gas Co. of New Jersey*, 1 N. J. Super. 124, 78 A. 2d 129; Canonico

vs. Cellanese Corporation, 11 N. J. Super. 455, 78 A. (2d) 411; Mary Jane Stevens Co. vs. First National Bank Building Co., 89 Utah 456, 57 Pac. (2d) 1099. Of particular interest is the case of Duntley vs. Inman, Poulsen & Co., 42 Ore. 334, 70 Pac. 529. In that case the witness was a mill hand whose duty it was to repair and look after the pullies. He examined a broken pulley after the accident and upon trial ^{was} asked what caused the pulley to break. He was not allowed to answer on the basis that it was not shown that he possessed any special knowledge on the subject and showed no experience in the manufacture or testing of machinery of that kind.

The Appellant recognizes the wide discretion of the Trial Court in determining whether or not a witness is qualified but submits to this honorable Court that there was an abuse of such discretion.

Respectfully submitted,

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September, 1953.