

1953

Thad L. Hatch et al v. Garrett Freight Lines, Inc. : Brief of Appellant

Utah Supreme Court

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V

IN THE SUPREME COURT of the STATE OF UTAH

THAD L. HATCH, Administrator with
the Will Annexed in the Matter of
the Estate of Herbert Sheldon
Neeshan, Deceased, and IVA M.
NEESHAN,

Plaintiff, and Appellant,
vs.

GARRETT FREIGHT LINES, INC.,
a corporation,
Defendant, and Respondent.

Case No. 7974

CONNIE LIETZ and
ELDON P. LIETZ,

Plaintiff, and Appellant,
vs.

GARRETT FREIGHT LINES, INC.
a corporation,
Defendant, and Respondent.

Case No. 7975

JAMES P. XENAKIS and
JENNIE XENAKIS,

Plaintiff, and Appellant,
vs.

GARRETT FREIGHT LINES, INC.
a corporation,
Defendant, and Respondent.

Case No. 7976

FILED APPELLANT'S BRIEF

JUL - 8 1953

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Clerk, Supreme Court, Utah

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I N D E X

	<i>Page</i>
Statement of Facts	2
Statement of Points	4
Argument	6
Points Argued:	
1. Error in refusing to submit to the jury an instruction with respect to faulty brakes causing the defendants unit to swerve to the wrong side of the highway.....	6
2. Error in submitting the issue on the Court's instruction No. 4 and on the single issue of whether defendant drove to the wrong side.....	10
3. Refusal to instruct the jury as requested under instructions number 1B, 2, 3, 4, 5, 8, 10, 11, 16, 17, 26, 27, submitted by plaintiff. Particularly 26, and 27, or giving an instruction that both units could be riding the center line and yet permitting guests Neeshan and Leitz to recover	11
4. Error in refusal to permit Grant Staples to testify.....	15
5. Error in requirement that all questions to the expert Harris be submitted as hypothetical questions.....	15
6. Error in the Court creating prejudice to the plaintiff in the following:	
Statement with respect to reading part of Noye's statement	23
Court raising objection to asking a leading question and cross examination of C. Robinson in absence of objection from counsel.....	25
7. Error in requiring the jury to carry on until about 10:00 o'clock p.m. with the case	27
8. Prejudicial statement of counsel for defendant in closing "Driver charged with death of the parties involved"	29
9. Court refusing to exclude Laren Somsen the driver after plaintiffs had invoked rule 43 F.....	30
10. Refusal of the court to grant a new trial and permit Dr. Freeman to testify on Friday to show Horace Clark was the first Mercury driver, and not the Mercury driver under discussion and to bring in Hal Noyes, Mr. Faile, and Mr. Talbot to show the same.....	30
11. Refusal to grant plaintiffs motion for judgment notwithstanding the verdict, and directed verdict.....	32
12. The error in the Court's refusal to permit plaintiff to cross examine the witness Culbert Robinson and Hal Noyes	35
Summary	39

CASES CITED

	<i>Page</i>
170 A.L.R. 660	12
Christman vs. Union Ry Co. of New York	
205 N.Y.S. 594	23
Kluge vs. Northern Pacific R. Co.	
9 P. 2nd 74 167 Wash 244	23
Martineau vs. Hanson	
155 Pac. 432 47 Utah 549	9
McKinny vs. Capson	
99 Pac. 660 35 Utah 180	9
Miller vs. Southern Pacific	
21 Pac 2nd 865 82 Utah 46.....	9
Momsen vs. Perry	
140 P. 2nd 772 104 Utah 151	8
Morgan vs. Bigler State	
238 Pac. 160 75 Utah 87	9
Pratt vs. Utah Light	
169 P. 686 57 Utah 7	9
Schafer vs. Thurston Mfg. Co.	
137 A 2nd 48 R.I. 244	24
Toone vs. O'Neil Construction	
121 Pac. 10 40 Utah 265	9
Webb vs. Snow	
132 P. 2nd 114 102 Utah 435	8

T E X T S

170 A.L.R. 660	12
5 Am. Jur. 437	33
58 Am. Jur. 340	38
58 Am. Jur. 342	33
64 C.J. 93	23
70 C.J. 611	38
70 C.J. 615 article 781	33-38
2 Jones on evidence 703	21

S T A T U T E S

57-7-205 (7) (c)	11
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APPELLANT'S BRIEF

*Reference to pages of the record is designated
R..... - line*

STATEMENT OF FACTS

This action arises out of a collision involving a Studebaker automobile with five passengers therein, and large tractor and semi-trailer. Defendant was operating the tractor and semi-trailer, which in the record is referred to as tractor for the part with the engine, and trailer for the semi-trailer for brevity. The tractor trailer was proceeding in a southerly direction on a curve, and the Studebaker was proceeding in a northerly direction on said curve at the point of collision. As a result of said collision, Captain Neeshan, a guest passenger, was killed. He was a service man survived by a widow and two children. Captain Xenakis was killed; he was the driver, and was survived by an aged mother and father who looked to him for their sole support. The minor child of the Neeshan's was killed as was the minor child of the Lietz's. Connie Lietz was injured in said collision. It was dark when the collision occurred.

All vehicles approaching the curve going south in the direction the tractor trailer was traveling were unable to determine by reason of the curve, which side of the road vehicles coming from the opposite direction were on. This statement was made by the driver of the vehicle of the defendant R553-7. The area involved had been newly paved, and there was no center strip painted in at the time of the collision. The tractor and trailer crossed completely over to the wrong side of the highway, exhibits A, B, C, D, E, and F. The Studebaker ended on its left hand side of the highway in the borrow pit, only however, after having made one complete gyration or turn-around.

The tire marks in the foreground of exhibit F were not made by the Studebaker. Defendant's own witness,

Faile so certified under oath as indicated on exhibit 00 and PP as indicated in the testimony of said defendant's witness R788-14, 793-14, defendant contends otherwise. The width of the said skid marks which crossed over to the wrong side from the undisputed evidence were wider than other marks approaching the scene R290-25, which other marks were identified as being the width of Studebaker tire marks and were on the Studebaker's right hand side two feet to the right of the center R296-19, while said marks going left as shown in exhibit F were wider and were made by a car the width of a Mercury (see exhibit 5 showing the width differential). The marks in exhibit F, claimed by defendant as Studebaker marks and going to the left or the wrong side did not come up and approach and stop near the skid marks made by the tractor trailer in the said area R313-2, so the vehicle making the same could not have been involved in the collision. Note exhibits themselves A, B, C, D, E, and F. The entire left-hand side of the Studebaker was damaged and the right-hand side of the Studebaker showed no damage insofar as any direct collision or contact with the tractor trailer is concerned. The damage sustained by the tractor was entirely on its right-hand side. The manufacturer furnished defendant operator with a tractor record regulating servicing of said tractor involved in this collision.

Said tractor record, exhibit EE, page 3, contains the following:

“When relining brakes always reline both sides of the axel at the same time.”

The same exhibit on the first blue page thereof shows that on September 24, 1951, a short time prior to the accident,

11. REFUSAL TO GRANT PLAINTIFFS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND DIRECTED VERDICT.

12. THE ERROR IN THE COURT'S REFUSAL TO PERMIT PLAINTIFF TO CROSS EXAMINE THE WITNESS CULBERT ROBINSON AND HAL NOYES.

ARGUMENT

1. ERROR IN REFUSING TO SUBMIT TO THE JURY AN INSTRUCTION WITH RESPECT TO FAULTY BRAKES CAUSING THE DEFENDANT'S UNIT TO SWERVE TO THE WRONG SIDE OF THE HIGHWAY.

Plaintiffs theory was based upon the premis that faulty brakes caused defendant's unit to swerve to the wrong side of the highway prior to impact. Plaintiff introduced into the evidence exhibit EE in which it was shown that the defendant relined the left-hand side of the tractor only. This was in direct violation and contrary to printed warnings and instructions in said tractor record, published for the care and operation of said defendant's tractor involved in the collision. See said warning, on page 3 of exhibit EE. The brake expert Littlepage, at R 363-15 indicated he had observed as many as 150 skid patterns where there had been unequal braking. He also testified that letting the linings go too long would result in a cam lock, locking the tires R367-15, and that when this occurs even when the brake is released, the tires will still be locked and skidding, R367-22. Whether the cam will or will not lock can be determined by removing the cover, and making an examination R367-27. The expert testified at R370-27 that if the brakes are not equal on both sides, it will throw the tractor to one side of the road, throwing it to the side where the

braking coefficient is the greater. Littlepage testified that he has examined many cam locking skid patterns and upon examining the skid patterns shown on exhibit A, he indicated that they appeared to be a cam locking skid pattern, R380-1, and that where one side is relined only, there is a differential in braking coefficient R381-21, and that where one side is relined only, the position of the cam on the roller will vary, causing greater braking coefficient on one side or the other because of the leverage principal R382-22. At R383-8, the expert testified that you could not have equal braking coefficient if you reline one side of the brakes on the tractor only. The expert Littlepage testified that he had experienced driving units where the brakes showed skid patterns like shown in the exhibits and that where brake marks are laid down as shown in exhibit A that it will throw the unit to the wrong side of the highway R385-12, and pull it to the side where the wheels are laying down heaviest skid patterns, see R371-1. The witness further testified at R391-16 that in his opinion the skid pattern definitely showed a locked cam on the unit, see also R407-4, and having in prior testimony indicated what is necessary to unlock the cam to stop the skid marking, the witness at R392-8 indicated that it was his opinion that the collision of the two units is what unlocked the cam. The jury was entitled to have submitted to them the question of whether or not the negligence as produced by plaintiff, or faulty brakes caused the unit to swerve to the wrong side of the highway. Plaintiffs's requested instructions at R169 to R175 inclusive should have been given by the court and was mandatory under the law. The undisputed evidence showed a complete locking of the tires on the left hand side of the tractor and the exhibits all show

the same. The Sheriff, on cross examination at R617-6 was asked whether or not he knew what the law was relative to equal adjustment of brakes on both sides of the vehicle whereupon the court cried out that the court would instruct the jury on the law. The jury could only infer that counsel was misrepresenting the law or was deceitful in this respect, since there was never any pronouncement from the court concerning equal adjustment of brakes or that consideration should be given the matter or that there was any law on the matter. Later also it will be noted that the court intimated that counsel might be deceitful or even a stinker.

The following cases require the court to give an instruction which permits the jury to consider the case on the theory of the parties presentation:

WEBB vs. SNOW

132 P. 2nd 114 102 Utah 435

“Trial Court erred in refusing instructions presenting defendant’s theory.”

MOMSEN vs. PERRY

140 P. 2nd 772 104 Utah 151

- (13) “Defendant entitled to have his case submitted to jury on any theory justified by proper evidence.

Toone case cited

The court failed to properly separate the theories of the parties, but instead gave general instructions as being mutual without regard to defendant’s theory.***”

MILLER vs. SOUTHERN PACIFIC

21 Pac. 2nd 865 82 Utah 46

290 U.S. 697

- (5) “That a party is entitled to have his case submitted to a jury on the theory of his evidence as well as on theory of whole evidence is recognized without argument. The jury must be instructed on the law as it is and applicable to the circumstances and theories as they are presented by the evidence.”

MARTINEAU vs. HANSON

155 Pac. 432 47 Utah 549

- (6) “The court must on request give a charge submitting to the jury defendant’s theory.”

TOONE vs. O’NEILL CONST.

121 P 10 40 Utah, 265

- (11) “Party is entitled to have his case submitted to the Jury upon his theory.”

McKINNEY vs. CAPSON

99 Pac. 660 35 Utah 180

- (15) “A party has the right to have the court instruct the jury upon the law on every material issue in the case in support of which there is some evidence.”

MORGAN vs. BIGLER STAGE

238 Pac. 160 75 Utah 87

PRATT vs. UTAH LIGHT

169 P 686 57 Utah 7

Plaintiff had established from plaintiff's witnesses that relining one side of the brakes on the tractor would give less friction on the new lining than on the old lining, and thus make brake coefficient unequal on both sides.

Defendant's witness was asked whether there would be less friction on the new lining than on the old, at R775-1 when the court cried, without objection, and you don't need to answer.

This was prejudiced error since he would have been required to say yes and thus require a directed verdict for plaintiff on admission of negligence.

Since the legislature required that motor vehicles have the brakes so adjusted that they will be equal on both sides of the axle it was mandatory that the court instruct on this matter, when counsel requests same or calls the court's attention to same and submits evidence thereon.

2. ERROR IN SUBMITTING THE ISSUE ON THE COURT'S INSTRUCTION NO. 4 AND ON THE SINGLE ISSUE OF WHETHER DEFENDANT DROVE TO THE WRONG SIDE.

Counsel for the plaintiff insisted that the court's instruction No. 4 (Lietz File Vol 2R88) be modified to include the movement of the tractor trailer to the wrong side which might be caused by faulty brakes R230, and the theory that defendant's driver must drive the vehicle to the wrong side to be negligent be deleted. This item, the court ignored. The jury could well find that the tractor trailer was never driven to the wrong side of the highway. In his deposition, the driver indicated that he did not turn it to the left hand side, and on evidence submitted by plaintiff it was indicated that the vehicle was pulled to the

wrong side of the highway by the excessive friction on the left hand side of the tires of the tractor rather than being driven there. Moreover, a finding that the Studebaker was on the wrong side, should not preclude guests from recovery if the tractor was also even partially pulled to the wrong side prior to impact, even if not driven there, particularly where defendant's negligence in brake care caused it to swerve to the wrong side, and if this was a contributing proximate cause of the collision.

3. REFUSAL TO INSTRUCT THE JURY AS REQUESTED UNDER INSTRUCTIONS NUMBER 1B, 2, 3, 4, 5, 6, 7, 8, 10, 11, 16, 17, 26, 27, SUBMITTED BY PLAINTIFF. PARTICULARLY 26, AND 27, OR GIVING AN INSTRUCTION THAT BOTH UNITS COULD BE RIDING THE CENTER LINE AND YET PERMITTING GUESTS NEESHAN AND LIETZ TO RECOVER.

The court erred in failure to give instruction 1b, R171, Exhibit EE. The manufacturer caused to be placed in the tractor record a warning that when relining brakes of said tractor, both sides of the axle must be relined at the same time. The evidence before stated indicates that the reason why the tractor record contains this warning is that it is impossible to have the brakes so adjusted that they will operate equally on the opposite sides of the vehicle without compliance with this important warning and instruction contained in said tractor record relative to the care and servicing of said vehicle in relining the brakes on both sides at the same time. Note also this is the only safety warning in the entire tractor record, since failure to reline both sides of the tractor, the court not only neglected to instruct the jury that the laws of Utah 1943 provided:

57-7-205 (7) (c)

“All brakes shall be maintained in good working order and shall be so adjusted as to operate as equally as practicable with respect to the wheels on the opposite sides of the vehicle.”

but also neglected to properly instruct the jury with respect to the legal effect of an absolute showing that the defendant had been negligent in this particular respect. One side of the brakes only was relined in careless disregard of the published warning and is in not contradicted and even admitted by defendant's shop foreman at R768-24 and is a direct violation of the statute above quoted. The authorities hold that failure to comply with a statute with respect to brakes is negligence per se, see:

170 ALR at 660

Plaintiff requested a negligence per se instruction, and got none. The skidmarks and the record is conclusive on the fact that the braking coefficient was unequal. See skid marks in all photographs submitted. The expert also testified such practice resulted in unequal adjustment on opposite sides of the vehicle.

The lower court not only ignored all of the above, but even refused instruction number 2 at R172 advising the jury that the law required equal adjustment and that they should consider from the facts whether there was such equal adjustment, and whether this neglect was a proximate cause of the collision.

Instruction numbers three and four R174 would have permitted counsel to have argued that the maintenance

was negligence in failure to comply with the regulations in the tractor records, and the law and to have done so under court sanction as to what the law was.

Under instruction 5 as requested, the matter of whether or not the defendant had discharged said defendant's duty relative to maintenance of equal adjustment on both sides of the axle and maintenance in good working order could have been considered and argued to the jury. This instruction the court ignored, particularly with respect to whether or not inspections were involved which would have revealed any of the neglect charged.

Instruction 8 R 178 should have been given as requested since the negligence charged by the plaintiff originated in relining one side of the brakes only, also R368-1 discloses that the mere removing of the plate would have shown that the cam on one side of the unit was turning over farther than the cam was on the other side where the brakes had been newly relined, and that the said inspection if it had been made would have revealed that greater pressure was being applied on one side than on the other side R383-11 causing unequal adjustment on opposite sides of the tractor.

Failure to give instruction number 10 R 180 constituted error since defendant's witness Noyes testified that the Studebaker flashed its spotlight several times while the driver paid no attention to the Studebaker until he observed that he was on a curve with no center mark and 150 feet from said Studebaker R at which time he applied his brakes and there would have been no need for sudden application of the brakes had the driver been paying attention and slowing down, and the sudden application of

the brakes, because they were not in equal adjustment is what caused the unit to swerve to the wrong side of the road. See also instruction 11 R 181 with respect to sudden application and resulting swerve.

Instruction 16 R 189 quotes the state law requiring that the braking efforts on the rear most wheels be applied at the fastest rate. Counsel for defendant stated that on defendant's unit they all were applied equally. The jury was entitled to an instruction on this matter since the legislature had spoken.

Instruction 17 R 191 requires that the vehicle be in a safe mechanical condition. Plaintiff under proper instruction could have shown that defendant's unit was not in a safe mechanical condition.

Instruction 26 R 202 should have been given since the jury could have found both vehicles to be in the center of the highway and yet permitted a guest not charged with negligence of the driver to recover and the jury was entitled to be instructed relative to what would constitute contributory negligence on the part of the guest. Likewise, instruction No. 27 R 203 should have been given to the jury so that counsel could have argued the matter of whether or not the tractor trailer was slightly over the center line and if it was, and if this caused the collision, that likewise, even if the Studebaker was slightly over the center portion of the highway that if the tractor trailer be partially over the center was a contributory proximate cause of the accident that the guest would be permitted to recover.

4. ERROR IN REFUSAL TO PERMIT GRANT STAPLES TO TESTIFY.

Grant Staples was an independent witness whose farm adjoined the area of the collision. Plaintiff had purposely saved this witness for the last to testify. This witness was the one in counsel's opinion the jury would most likely be convinced by. The witness was brought up from Kanosh, Utah, and while he was so ill that he was confined to his bed while in Salt Lake City except for the half day that he came into court. The remarks of the Court R528-12-20, R529-2-17 in refusing to permit Staples to testify was prejudicial error. Tendering proof would only further agitate the court, and prejudice counsel before the jury.

5. ERROR IN REQUIREMENT THAT ALL QUESTIONS TO THE EXPERT HARRIS BE SUMMITTED AS HYPOTHETICAL QUESTIONS.

Dr. Franklin S. Harris, Jr. qualified as a physicist, and was at R428-6 qualified in research with respect to movement of vehicles in collision. He was qualified in the field of mechanics. Dr. Harris also visited the scene of the collision in the case at bar and, examined the skid marks, and examined the units involved, and made detailed measurements and memoranda with respect to the damage demonstrated on both units. He also testified that he had the photographs, exhibits g, h, i, j, k, l, m, n, and others with him for comparison at the time he examined the scene of the accident, and when he was examining the details with respect to the damage done the respective units, and was personally present when the white strip was being painted in the center of the road R433-8. At R435-7, the doctor was also able to make measurements and de-

termine the precise angle at which the tractor skid marks intercepted the newly painted center line on the highway. The expert measured the skid marks and made observations of the jiggling marks of the dual wheels as demonstrated on the highway. The doctor had also made measurements of the small light scratch marks on the Studebaker door, which were uniform in distance between each other, to determine where the door had engaged the tractor to imprint such uniform marks thereon, and had determined that this was made by the right running board of the tractor which had uniform imprints of the same width thereon and pressed them on the left door of the Stuebaker. The doctor also determined where the center of gravity of the Studebaker was and where the Studebaker came to rest by the location of the peculiar Y post seen in the exhibit E and its location in relation to the crescent on the highway. At R437-4, and 440-16, the court without objection from defendant, declared the former questions as being leading. This was prejudicial error since it prejudiced counsel for plaintiff in the eyes of the jury, it appearing to the jury that counsel was improperly conducting the examination. Counsel did not lead the witness, or indicate what the answer should be, he was merely directing his attention to particular items he had measured particularly with respect to the pattern on the Studebaker door showing that the door had engaged the running board of the tractor. Again at R444-10, the court without justification interrupted counsel when he was merely inviting attention to the distance between certain areas which is certainly not a leading question. How can a witness tell what he found unless his attention is directed to a particular item.

In the administration of justice, courts should not interfere with orderly processes of interrogation of a witness, and the courts should by their conduct in the administration of justice give counsel and the jury a feeling that the court is impartial, and trying to be fair, and should not make it appear to the jury that counsel is either stupid or deceitful. At R447-6, the court instructed counsel for plaintiff that he would not be permitted to ask a question of the expert unless it was a hypothetical question, see also 829-30. Counsel indicated to the court that where the expert was familiar with facts, he should be entitled to indicate what facts he had under consideration, and give his opinion as based on the facts he found. Court would not permit anything other than hypothetical questions, and would not permit counsel to argue the law on the same at R455-13. The court pronounced that the expert would not be permitted to give facts he had observed and placed counsel in an embarrassing position to ask further factual questions. Moreover, at R459-25, the court again without objection refused to permit counsel to have the expert testify concerning the fact that the tractor had only one wheel on each side of the front of the vehicle, with two sets of duals on the rear of the tractor, and the skid marks examined by the expert were made by duals, and there were no brakes on the front of the tractor. Since the expert observed that the dual skid marks had a jiggle in the same, and was of the opinion that this jiggle was produced by an impact, having measured the angle, knowing the distance from the rear of the tractor to the front of the tractor, the doctor could have shown the precise position of the tractor at impact, which would have placed the front of the tractor completely over on the wrong side of the road.

Yet the court knew that plaintiff's witnesses were all killed, and having to rely on an expert, refused to allow the expert to testify or examination on the subject. It may, in the court's mind, have been sixth grade arithmetic as stated at R459-25, but the court overlooks the fact that many jurors who are not involved in daily processes of mathematical computations may not understand complicated matters, and may have forgotten geometry and should have the items explained to them in detail, and counsel should be entitled to fully present such matters, particularly the relation of the angle to the position of the tractor on impact.

Again at R469-3, the court without objection from counsel stopped the expert in the middle of a sentence and instructed him to confine himself to hypothetical facts, and how the machine moved according to the law of physics, and not what he observed relative to skid marks or other physical facts. At R482-14 counsel with the examination of the two units along with the expert knew that the left side of the Studebaker contacted the right side of the tractor and also knew that notwithstanding the terrific impact, the right front fender of the Studebaker did not engage the tractor and the entire front fender of the Studebaker escaped impact and that this must require the impact to be at an angle, also the license plate on the bumper of the tractor had been actually printed on the Studebaker at a definite angle. There was a definite scratch on the bumper of the Studebaker made by the pin in the bumper of the tractor showing angle of movement as the units engaged each other and it should also be borne in mind that the center of gravity of the Studebaker was known, and that the Studebaker rotated on an axis like scissors with the front bumper of the tractor in a clockwise motion.

At R483-22 the court would not even permit testimony on whether the unit would move clockwise. The driver of the tractor of defendant had claimed that the Studebaker at no time came from out of the field, and was at all times, even at point of impact with all four wheels on the pavement R568-1. It is obvious and apparent from the theory of the defendant that the tracks which were made by the Mercury could not have been made by the Studebaker since if the tracks, foreground exhibit F, had been made by the Studebaker with the impact occurring on the tractor's side of the highway, the Studebaker would of necessity had to have its rear part off on the unpaved part of the highway to have engaged the tractor at the angle it was known to have engaged the same. Exhibit F (or any other exhibit) does not show any skid marks off the highway. While on the other hand if the tractor had been on the wrong side, and the Studebaker hit it head on and at an angle, the angle, rotation, and all facts would have been consistent with the damage demonstrated. Yet the court at R483-2 said he didn't see any hypothetical question you can base that on and on the same page at line 22 another objection improperly sustained. Certainly the doctor should have been permitted to testify to the facts he observed, and give his opinion on this matter to show that the collision had to be on the Studebaker's right hand side of the highway.

Again at R484-14, counsel still attempting to pursue this matter is stopped by the court, this time, however, with objection made by counsel for defense. Again at R485-20, through the next several pages, it will be observed that the court even refuses to permit testimony when counsel attempts to phrase the same upon hypothetical ques-

tion basis, as to whether the matter would fly forward or not, the court had no right to stop counsel from giving expert opinion on the matter. It was important relative to deposit of debris seen in the exhibits to consider whether impact at a certain point would be consistent with where debris was deposited. As a matter of fact the debris seen in the foreground of the exhibits was entirely interior contents of the Studebaker. The highway patrolman had observed that had the impact occurred at the crescent these interior contents could not have come through the floor board of the car, and would of necessity had been deposited upon a subsequent gyration some time after impact, and the expert had made measurements and calculations as to the precise place these objects were deposited in such movement after impact. Yet he was not permitted to express an opinion on this matter, or even indicate what calculations he had made on the same. The skid marks and the damage to the units told a complete story, and plaintiff was entitled to have this story put before the jury. The fact that Dr. Harris happened to be an expert should not have precluded him from the right to tell the jury what facts he had observed and the court was in error at R518-24 indicating that counsel could argue to the jury and show the jury what had happened, and yet pronounce that it would not be proper for Dr. Harris to demonstrate his theory to the jury. At R158, counsel again pressing the importance of what slippage there was, if any, between the two units after impact, and what precise points of the units engaged each other, R518-28 in asking the expert to demonstrate how the crease on the side of the Studebaker was placed there, and was interrupted by the court without having completed his sentence, and without objection

from defendant and was not permitted to express an opinion or demonstrate how the damage was accomplished on the Studebaker. The court further at R519-8 and 20 merely permitted the expert to give his measurements disclose relative to damage and which parts of the units engaged each other. See also R519-18 where the court refused to permit the expert to show any part of his theory relative to the angle of engagement or the gyration or scissors actions of the cars with respect to their respective contacts. The Studebaker, as shown in exhibit T had tire marks on the rear of the same. Observe also that this mark is of a concave nature, or in the form of a crescent, and also observe on the large exhibit of the tractor that the rear dual has a noticeable scuff mark on the same. It certainly requires an expert to make a determination as to how, under the facts observed, these respective units engaged each other, to make such marks yet the court at R520-21 sustained an objection on this very matter. Again at line 17 R 521 the question was again put up, and objection sustained by the court. The court would not even permit counsel to cite the law counsel had available, relative to this matter, see:

2 JONES on Evidence 703

The position of the crescent on the highway where the defendant claimed the accident occurred, was found by the doctor to be exactly straight across from the Y post observed in exhibit M in the smaller ones, and E in the larger ones. It will be observed that the Y post intercepts the line of the Studebaker about at the hub on the rear

wheel. Had the Studebaker therefore advanced forward, even its length, it would have been impossible for the collision to have occurred by the crescent, since as observed from the photographs, the Studebaker had advanced only about three-fourths of a length opposite Y post. Should the angle of impact have been sufficient to have caused the Studebaker to strike and rotate rapidly, advancing forward and engaging the side of the tractor as it advanced, as one gear engages another gear, and then turning around again it would have been impossible for the collision to have occurred at the crescent or on the tractor's side of the highway, and the Studebaker to have stopped at a distance much shorter than 36 feet north of the crescent. It is known that the units did engage each other as gears engage each other from the marks on the respective units and the tires. The movement of the Studebaker from the point of impact on the Studebaker's side of the highway forward, depositing the seats at the point seen in the exhibits and swinging around over against the Y post was entirely consistent with the measurements and theories produced by Dr. Harris, yet the court at R483-23, when the doctor was asked if he had an opinion as to the relative movement of the respective vehicles, particularly the distance of the Studebaker would likely have traveled forward after initial impact, the court sustained an objection thereto without counsel for defendant having given a legal reason for said objection. Please observe in the testimony of the expert of the defendant that like prejudice was not demonstrated by the court. The court permitted the expert for defendant to testify to anything and everything, including the giving of testimony which had been objected to, and purporting to demonstrating his entire theory.

6. ERROR IN THE COURT CREATING PREJUDICE TO THE PLAINTIFF IN THE FOLLOWING:

A. STATEMENT WITH RESPECT TO READING PART OF NOYES' STATEMENT.

At R748-3 the court stated:

"Go ahead Mr. Schoenhals; I say this to you, (turning to the jury), if either of these lawyers read you half of a question, you might assume that they are trying to *deceive* you. That should be reason enough to you gentlemen that if you don't read out all of the question they are going to think you are a *stinker*."

R 493-3.

64 CJ 93

"Criticism of counsel's conduct of trial — It is error for the court to comment unfavorably, in the presence of the jury, on the conduct of the trial by counsel for one of the parties, especially in view of the fact that counsel in such situation is without opportunity to resent such criticism without risk to himself and injury to his client's cause with the jury."

Chistman vs. Union Ry, Co. of New York City

205 N.Y.S. 594, 210 App. Div. 104

(Rev. 200 N.Y.S. 800, 121 Misc. 247)

See *Kluge vs. Northern Pac. Ry Co.*

9 P. (2d) 74, 167 Wash. 294

(applying the rule)

Holding Counsel up to ridicule — The trial judge, when counsel makes contentions which are not deemed sound, should overrule them with dignity, and not use language holding counsel up to ridicule.”

Schafer vs. Thurston Mfg. Co.

137 A. 2, 48 R.I. 244.

An examination of the record well discloses that Noyes, a hostile and adverse witness was under cross examination. He had given Mr. Summerhays a statement. The witness was not only under cross examination, but the statements he had given in writing to Summerhays prior to the trial were being used to impeach the witness. Mr. Hanson over objection of counsel for plaintiff was practically leaning on shoulders of counsel in connection with statements being read. The trial judge in accordance with the cases above should have given a ruling with dignity without using language which might hold counsel up for ridicule before the jury. It is the contention of counsel that litigants and the parties interested in proceedings in which the negligence causing the death of loved ones is being adjudicated, should entitle said parties to a ruling of this appellate court showing them that judicial system does not sanction unjudicious remarks and that such discussion has no place in our courts in the administration of justice, particularly, when the jury might even infer that counsel is intentionally trying to deceive them, and that he might even be a “stinker.” Such remarks frustrate counsel and justice, and do not lend dignity to judicial proceedings, and cause counsel to feel that counsel is being intimidated by the court against doing his best to make a proper pres-

entation and is being deterred in preservation of a record. Such comments on the part of the court can well account for lack of scientific preservation of the record under objection and continued comments of the like from the court. The remark speaks for itself as to whether or not it is prejudicial, and the faith of litigants in unbiased and unprejudiced judges and in our judicial system, should be restored by this appellate court pronouncing that there is no place in our courts of justice for such remarks, in the administration of justice.

B. COURT RAISING OBJECTION TO ASKING A LEADING QUESTION AND CROSS EXAMINATION OF C. ROBINSON IN ABSENCE OF OBJECTION FROM COUNSEL.

R362-6 Counsel for plaintiff was asking the Sheriff a question on cross examination as to whether or not the Sheriff knew that the state law required brakes to be in equal adjustment on both sides of the vehicle. The court did not even permit counsel to complete his question when the court cried out:

“Well now let me tell the jury what the law is and let’s not be telling them by inference here. If we need any law told to the jury, I will explain that to them so you don’t have to bother the Sheriff about it.”

Counsel carries much responsibility in determining the future financial support of minors of a deceased service man with several deaths being involved and when the court without objection and in an angry voice interrupts counsel, and will not permit counsel to cross examine, particularly

when counsel could have taken exhibit EE and shown the Sheriff that the tractor record EE was on the tractor at the time of the collision and had he opened and read the same, that a violation of the would have been apparent, counsel appeals to the higher court in the interest of the justice to hold such action by the court as being prejudicial error. This should particularly be held as being prejudicial error in view of the fact that the jury was informed by the court that certain conduct would entitle them to infer that counsel was trying to deceive them and that they might think counsel was a "stinker," and the court then tells the jury that the Sheriff will not be permitted to be examined on this, and that if there is any law that needs to be told the jury that the court will explain, and tell them. The jury could well infer from this statement that counsel actually was trying to deceive them, since the court neglected to instruct the jury that there was any law in the State of Utah requiring the brakes to be in equal adjustment and being silent on this item the jury would of necessity have to infer that counsel was deceitful in this respect and was attempting to misrepresent to them what the law was.

When counsel is on tension in a strenuous law suit involving the entire financial future of many people and bears the responsibility of presenting to the best of his ability the facts to the jury, the tedious strain is such in the interest of justice and proper consideration to the nervous excitement of counsel, and the opinion of litigants and jurors of our judicial system that the courts should be most cautious and considerate of litigants and counsel and avoid any statements from which prejudice, anger, or frustration of the Administration of justice might be caused.

7. ERROR IN REQUIRING THE JURY TO CARRY ON UNTIL ABOUT 10:00 O'CLOCK P.M. WITH THE CASE.

At about 4:00 p.m. on Thursday, the court announced that he would not grant an additional day for the trial of the case R228. No pronouncement had been given prior to that time that the time of trial would be shortened and that plaintiff would not be permitted the right to put on rebuttal and particularly that plaintiff would not be permitted to have Dr. Freeman from Fillmore, Utah, appear and testify on Friday. Counsel for plaintiff had called the doctor long distance the day before, and the doctor had agreed to fly up Friday morning in his own private aircraft to appear as witness. The court was familiar with this fact R228. From a careful survey of the witnesses to testify, the material necessary to be placed before the jury, counsel for plaintiff had determined that this was the earliest time he could have the doctor present to testify. It was apparent to counsel that the evidence to be submitted would consume the entire day Thursday and that rebuttal would go forward Friday, which would have been the fact had the court not insisted on an evening session. Counsel therefore was acting in good faith in requesting the doctor to fly up Friday morning, and recognizing the fact that the doctor was the only doctor in the city of Fillmore in connection with the hospital, and in the public interest felt that it would be unwise to have him come up and sit all day Thursday to appear on Friday. The entire theory of the case of the defendant and the entire defense of the defendant's was that the marks in the foreground of exhibit F were made by the Studebaker, going over to the wrong side. This was not only denied by Faile, who signed affidavits on photographs to the contrary, but also by Dr.

Freeman who was standing near the bodies and in a position where he actually observed these marks being laid down by a Mercury. It was not proper for plaintiff to place Dr. Freeman on in the evidence in plaintiff's case in main. It would have been properly objectionable as anticipating the theory and defense of defendant's case. Yet the court refused to grant one day's time or to give plaintiff time necessary in which plaintiff could present an eye witness to the laying down of tracks in exhibit F as being made by the Mercury, rather than the Studebaker. This was most important and constituted prejudicial error.

It is also very objectionable to make it appear to the jury that they were required to take supper and return and stay until 10:00 p.m. in the evening listening to the trial when it appears as though it was the plaintiff's fault for their being retained, and particularly when one of the lady juror's had announced that she had a friend in Utah from out of the state and she was most anxious to spend the evening visiting with said friend. In a case so involved as this, plaintiff should have been granted at least an hour to sum up the evidence and present the case, and in the fixing of time, such a request at such a late hour would have infuriated the jury and would have been prejudicial to the case of the plaintiff, particularly where the jury was required to stay late into the evening. The grandfather of one of the children killed in the accident knew a court was in session where the litigants were given over thirty days time in the trial over issues as to which was going to prevail, where millions of dollars were concerned and all parties wealthy. It is most difficult for counsel to explain to the widow and orphans of a service man why the court would not grant just one more additional day

for trial of their case and yet would extend to other people a full thirty days of the court's time.

8. PREJUDICIAL STATEMENT OF COUNSEL FOR DEFENDANT IN CLOSING "DRIVER CHARGED WITH THE DEATHS OF PARTIES INVOLVED."

Counsel for the defendant insisted that the driver, Laren Somsen, sit through the entire trial notwithstanding the fact that plaintiff had invoked Rule 43 F, which should have excluded said driver. There was not only error in this respect, but when counsel for the defendant was summing up his case to the jury he extended his hand to the driver sitting in the presence of the jury with a long sad forlorn looking face and told the jury that plaintiff had charged the driver with the responsibility of the death of the people involved. This was highly prejudicial and should have been grounds for a mistrial. It was also a mis-statement of the theory of plaintiff's case, since plaintiff had contended that the relining of one side of the brakes was to be considered in negligence which caused the vehicle to swerve over to the wrong side. Under the instructions given by the court, the jury could not help but be sympathetic to this sad looking driver when the judge had instructed the defendant, not the driver, could only be found negligent if the driver drove to the wrong side. The court having refused to instruct the jury on the negligence with respect to the relining of the brakes required the jury to come in with a verdict in favor of the defendant in absence of proof that said driver negligently drove to the wrong side. The jury could not even consider negligence of the driver in sudden application of brakes as being a factor. Moreover, plaintiff had tried this case

in the absence of the sympathetic widow and orphans without any of them appearing to generate sympathy and then counsel for the defendant notwithstanding the fact that counsel for plaintiff had confined the trial strictly to the facts without the introduction of the sympathy angle or prejudice, struck a deliberate blow below the belt by making it appear to the jury that the driver was charged with something. The jury could anticipate jail or other difficulties when as a matter of fact the driver was not even made a party defendant. Fair play on the part of the court should have at least granted plaintiff a new trial under such unfair statements made by counsel for defendant.

9. COURT REFUSING TO EXCLUDE LAREN SOMSEN, THE DRIVER, AFTER PLAINTIFF HAD INVOKED RULE 43 F.

The court erred in refusing to exclude the driver Laren Somsen under Rule 43F particularly when the court ruled that the Rule 43F having been invoked required all of plaintiff's witnesses to remain outside of the court room. Somsen was not a party to the suit, he was the driver of the car, and was kept in the court room for the sole purpose of generating sympathy on the part of the jury. The defendant likewise had their officers in court, said officers sitting with the counsel for defendant. Plaintiff had no one sitting with counsel and all of plaintiff's witnesses were excluded.

10. REFUSAL OF THE COURT TO GRANT A NEW TRIAL AND PERMIT DR. FREEMAN TO TESTIFY ON FRIDAY TO SHOW HORACE CLARK WAS THE FIRST MERCURY DRIVER, AND NOT THE MERCURY DRIVER UNDER DISCUSSION AND TO BRING IN HAL NOYES, MR. FAILE, AND MR. TALBOT TO SHOW THE SAME.

The court erred in refusing to give one additional day trial which would have permitted plaintiff to proceed on rebuttal and show that the skid marks upon which defendant had relied as being made by the Studebaker foreground exhibit F, were not made by the Studebaker and were actually made by a Mercury coming to the scene skidding and up close to it leaving tire marks in an attempt to stop. There was definite evidence that the Mercury came close, and made skid marks, and the marks in exhibit F shows only 1 set of skid marks where are the Studebaker tire marks, except on the right side of the road. The trial judge could have and should have granted a new trial. This is particularly important since the affidavit in the motion for new trial R228 et seq which was not denied, appropriately called this to the court's attention. Moreover, counsel for defendant intentionally pulled a surprise witness by requesting that Hal Noyes, Talbot, be excused before the witness Clark was called to testify. Clark drove a Mercury car up to the scene and counsel for defendant as well as the witnesses who were at the scene of the accident all knew that Clark was not the Mercury driver who laid down the tracks shown in exhibit F as being under consideration in this cause. Counsel for plaintiff should have been granted leave to have a new trial or at least have the opportunity to have had the matter heard on Friday permitting Dr. Freeman, Faile, Noyes, and Talbot to appear before the court and give testimony to the fact that the Mercury driver Clark was driving a different colored Mercury and was not the Mercury driver that slapped on his brakes and laid down tracks shown in exhibit F.

11. REFUSAL TO GRANT PLAINTIFFS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND DIRECTED VERDICT.

Appellant established by the evidence the fact that defendant was negligent in relining only one side of the brakes of the tractor. The appellant likewise established the fact that this negligence caused the tractor to swerve to the wrong side of the highway. These facts were never refuted, since the tractor did go to the wrong side of the highway, and the driver claims that he did not turn it that way. The appellant likewise showed that the tracks of the Studebaker where they approached and stopped abruptly at the point of contact with the tractor skid marks, placed the Studebaker on the right hand side of the highway at point of impact R. Counsel recognizes the fact defendant claims there is some evidence submitted by the defendant which would tend to indicate that the marks in the foreground of exhibit F were made by the Studebaker, however, under the maxim of the laws which states that "the case of a party is not stronger than it is left at its weakest point on cross examination." And since the defendant is required to admit as testified to by Mr. Faile their own witness that the marks on which defendant had relied were not made by the Studebaker, but were actually made by a Mercury car; the court should have instructed the jury that under the evidence submitted, the negligence of the defendant was the proximate cause of the collision and for them to assess damage, since there could be no contributory negligence on the part of a guest under the evidence submitted, and would have left only the question as to whether or not the driver Zenakis was guilty of contributory negligence for the jury to consider.

The authorities uniformly hold that a party to an action may not cross examine said parties own witness.

70 CJ 615 article 781
58 AM JUR 342 article 618

Mr. Faile testified that the marks in the foreground of exhibit F were not made by the Studebaker and were made by the Mercury, see exhibits 00 and PP. The testimony must stand as submitted, and the court erred in permitting counsel for defendant to cross examine their own witness over objections of counsel for appellant. Moreover, the authorities likewise hold that a party may not impeach said witness, and Mr. Faile having given evidence which exploded the entire theory of defendant's case, an attempt on the part of the defendant to impeach his own witness as given was error and the court should have sustained the objection thereto. See:

5 AM JUR 437 Article 792 et seq

Faile testified he saw the Mercury right where the skid marks in question were made R788-28. Faile, after using his best judgment and stating that the marks defendant claims were made by the Studebaker were actually made by the Mercury, was under redirect examination. See R793-19 where Faile stated that E. L. Schoenhals did not tell said Faile that certain marks were Mercury marks, but asked him to use his judgment in selecting same. The fact is established that Faile voluntarily and with his best judgment declared the tire marks to be Mercury marks in exhibits 00 and PP. Moreover, it will be observed that this witness was not related to the plaintiffs and cannot be

placed in the category of the exceptions with respect to impeachment of one's own witness. The record discloses that the defendant's witness Faile had made the selection of the marks being made by the Mercury at his own leisure R788-14 and had identified the same in his sworn written statement. By producing him, plaintiff had vouched for his credibility and should not be permitted to attack or to attempt to change his testimony in order to make it consistent with defendant's theory, and defendant was bound by his testimony. The authorities likewise hold that the law should not permit counsel to use this as a means of coercing his witness in order to change his mind on a subject where he has made voluntary disclosures. It was apparent from the record that the witness Faile belonged to the brotherhood of truck drivers, that he was friendly to the truck driver, and that he was adverse to the plaintiffs in the case. After said Faile had of his own election and using his best judgment described the tracks upon which defendant had relied as not being actually made by the Studebaker as being made by the Mercury while he was present and saw them laid down R788-28, the lower court erred in permitting counsel for defendant to cross examine and impeach this witness over objection and asking him leading questions and tricking him to line his testimony up again in a consistent manner, friendly to the truck driver of the defendant.

At least the lower court should have recognized the requested instruction submitted as 1B and have permitted the jury to determine only whether or not the negligence in failure to reline brakes on both sides and sudden application was the proximate cause of the collision.

12. THE ERROR IN THE COURT'S REFUSAL TO PERMIT PLAINTIFF TO CROSS EXAMINE THE WITNESS CULBERT ROBINSON AND HAL NOYES.

When counsel for appellant was proceeding in trial from the items indicated above, it was quite apparent that the court making it most difficult for counsel for appellant, in raising objection on the court's own motion, without objection from opposing counsel and interfering with the normal procedure relative to normal cross examination and ruling against counsel for appellant on items upon which counsel for appellant now urges to be prejudicial error, and without even giving counsel an opportunity to argue the law or complete his question or inform counsel concerning the basis of a ruling. At 611-18 the sheriff was asked whether the law required brakes to be in equal adjustment, and objections thereto in error sustained. Counsel for appellant should have been permitted to ask the Sheriff what he observed with respect to the skid marks all being made by one side of the tractor R611-18, and what he observed with respect to the skuffing marks on the tires. Counsel again asked the Sheriff, Mr. Robinson, if he was familiar with the law requiring brakes to be in equal adjustment both sides of the vehicle R617-6, counsel asks the indulgence and patience of this court and requests that some recognition be given to a situation where the court cries out an interruption before a sentence is even completed and further frustrates counsel, so that counsel is in no mental condition to make a scientific perfect record when no legal reason is given for the objection counsel is unable to frame another question that will not be objectionable. The situation should not require counsel to keep pressing the court and making it appear to the

jury that counsel is quarreling with the court. Moreover, where the court appears already prejudiced and angry, counsel could well assume that the continued pressing of items might result in further reprisals and vindictive action on the part of the court to the prejudice of counsels clients, counsel respectfully requests that this court take notice of these factors in declaring as error the unrequested objection volunteered by the court with respect to the evidence of the Sheriff Culbert Robinson.

With respect to the evidence of Hal Noyes, this witness testified that he saw the Studebaker on the wrong side of the highway. He also testified that the Studebaker approached the scene striking the tractor with the right front fender of the Studebaker and bounced to the Studebaker's left hand side without becoming involved in any further collision with the tractor or the trailer, and without turn-in around and made such statements under oath prior to the time said Noyes appeared in court. Counsel for appellant took this witness down to the wrecking yard where the Studebaker was taken, immediately after the accident, and had there the pictures of the scene and Studebaker and tractor which are now displayed to this appellate court as exhibits. The witness Noyes examined the pictures, examined the wrecked Studebaker and also examined a tractor which was near the Studebaker, which tractor was the same type as was involved in this collision. Counsel for appellant asked Noyes to examine the pictures and determine whether or not the pictures reflected with fidelity the damage and scene as he remembered it, to which he replied "yes." Noyes then examined a crease in the door of the Studebaker and measured the distance of the said crease in the door from the ground with his leg against

the door of the Studebaker holding his hand on his leg where the crease in the Studebaker door was made. He then walked over to the tractor again measuring the height of the running board on the tractor on his leg from the ground. Noyes admitted to counsel for appellant that it appeared as though the Studebaker under closer scrutiny struck with the left fender rather than the right fender, and that it was apparent that after striking the tractor that the Studebaker made a complete turn around engaging the tractor's right hand running board against the left hand door on the Studebaker and then swerving around again and that it also appeared as though the Studebaker could have been facing forward again striking the rear duals of the trailer only, after having made a complete turn around or one complete revolution. The witness Noyes indicated that he did not observe any of this gyration and could not believe that it happened until he had convinced himself by making the observations which he made at the wrecking yard, and that he knew for certain he was now mistaken on what he thought he had observed. The witness Noyes also could have made his observations of the Studebaker being on the wrong side after it had impacted on the right side of the road, and made a complete revolution, and had advanced 36 feet, which is double its length, and on its last impact with the trailer appeared at the point to said Noyes, to have been on the wrong side of the highway, and this would be the only time that Noyes could have seen the Studebaker since he was only 50 feet behind the trailer. The court should bear in mind it was dark. It was most important to appellant's case that these items be permitted to be admitted into the evidence on the cross examination of Noyes, yet the trial judge erroneously at

R756-15 stopped counsel from cross examining Noyes on this very vital detail, and again at R756 refused to permit counsel on cross examination to bring out the fact that things happened at the scene of the accident which Noyes did not observe and which upon closer scrutiny he was convinced did actually occur. The right of cross examination has never been so curtailed or refused to counsel's knowledge.

The following authorities support counsel in holding that the rights of cross examination should not be interfered with by the court and that great latitude should be extended counsel.

70 CJ 611

"A party has a right to cross examine witnesses who have testified for the adverse party, and his right is *absolute*, and not a mere privilege.

* * * It is not within the discretion of the court to say whether or not the right will be accorded."

70 CJ 615

"The right to cross-examine witnesses of the adverse party being absolute 76 it should not be abridged 77."

Citing Utah case.

58 AM. JUR. 340

These cases should require a complete reversal of the abuse of the lower court in refusing counsel the time honored, privilege of cross examining adverse witnesses.

SUMMARY

In this action two service men were killed. While their dependents were burying their dead with no person interested in protecting their rights, not even the Sheriff, and with all the witnesses in plaintiff's car killed with the exception of one who was asleep and seriously injured, it must be apparent to this appellate court that it was only under laborious petition that counsel was able by court order to go into the records and bring before the court disclosure of the negligence of the defendant in failure to maintain brakes in such condition that the said brakes could be applied equally on both sides, and when suddenly applied would cause the unit to swerve to the wrong side of the highway. Had it not been for the pictures taken, and the work of counsel looking into these issues, and in reviewing records that had been produced under court order, none of these details would have been available. It is very discouraging to counsel after having worked for months examining records, interviewing experts, and going through evidence which discloses conclusive evidence of negligence on the part of the defendant as well as conclusive evidence that such negligence in relining brakes on one side only would cause the vehicle to be on the wrong side of the highway at impact, to have the court completely ignore this most important theory as well as the many requests prepared and submitted thereon in the thirty instructions submitted. Our juries always give considerable weight to pronouncement from the bench concerning what the law is. Since the jury was instructed, "You are not to consider as evidence any statement of counsel made during trial," the failure on the part of the court to give judicial sanction

to the law or any legal recognition to the theory of the Plaintiff, or any instructions upon which plaintiff might have argued under judicial sanction with respect to plaintiff's theory was prejudicial error. Moreover, with the increasing number of deaths on the highways, practices indulged in by large trucking companies which are contrary to the published manual of instructions of the manufacturer of said tractors particularly when the brake expert testified that such negligence on the part of the trucking company is the very cause of the unit going over the center line, such flagrant violations of safety warnings should be discouraged by our courts. If trucking companies can indulge in such practices resulting in property damage and death, particularly where they are running units on our highways the maximum width permitted under our law, where even an inch or two on the wrong side of the highway might mean death, and then receive judicial approval, of such conduct without even a mention by our court that such conduct might constitute negligence, it is apparent that such action by our courts is prejudicial to maintenance of safety standards as well as the rights of parties and orphans deprived of future support through such flagrant disregard of rights of life and property. The law should be quick to recognize established negligence particularly where the death of a service man forced to be away from their families and who are forced to use the road more than normally, are concerned. The Civil Aeronautics Board always makes an investigation to determine the cause of aircraft accidents, yet we have the death of four people involved, and a case where the Sheriff or highway patrol did not even measure the length of the skid marks, or make any note of the fact that the skid

marks were all on one side, or check the tractor record to find out whether or not the defendant had discharged his duty with respect to keeping the brakes in equal adjustment on both sides of the tractor when it was obvious and apparent the brakes were not in equal adjustment from the skid marks or whether the skid marks crossing over were the width of the Studebaker guage. Then we have the court, after counsel has been diligent in presenting such fact, not only disregarding the law and the facts involved, but also scolding counsel for attempting to find out why the Sheriff was so negligent in this respect.

May it please this court to entertain a ruling that from the showing made that it was negligence per se for the defendant to be so grossly negligent in disregarding the published warning given in the tractor record, and that since the collision involved vehicles approaching each other from opposite directions, that the question of which unit was on the wrong side of the highway would be most important, and that this would constitute the proximate cause of the damage sustained. Counsel sincerely believes that the showing of failure to reline both sides, together with the statement of the expert, that this would cause the unit to swerve to one side or the other, supports the contention that such neglect and failure was negligence per se.

The court should have at least given the requested instructions that this would constitute negligence, and that the jury had only one problem to determine, and that was whether or not this negligence was the proximate cause of the accident. Moreover, both the tractor and the Studebaker could have both been traveling in the center of the highway, and Neeshan and Lietz recover as guests, and

they must necessarily so recover as guests since the defendant showed no evidence of contributory negligence on the part of said guests. True, no recover could be had in behalf of Xenakis should the jury find that Xenakis was driving down the center of the highway at the time of the collision, however, no instruction was given permitting the guest to recover under such circumstances, which was error on the part of the lower court.

Counsel should be permitted to try his case without undue interference from the court with respect to whether or not a witness should be permitted to testify. The judge in the administration of justice should not determine the quantum of evidence to be submitted. The court should not place counsel in a position where counsel appears to the jury to be improperly proceeding, or making it apparent to the jury that counsel is unnecessarily detaining them for a period longer than the court thinks necessary by having the witness Staples from Kanosh questioned on details on which some testimony had been theretofore given. This is particularly true where counsel feels that a particular witness might impress the jury with his sincerity, his candor, and his firm appraisal of the items he observed.

Plaintiff established the case in main on the pictures and testimony of experts, together with the records of the defendant. This being the case, counsel for plaintiff should not be punished for having exercised diligence in having the expert review the scene, make measurements, and acquire facts, as a matter of fact, more facts than the Sheriff and highway patrolman had to exhibit to the jury with respect to the facts of the area involved and all other facts including the very angle at which the skid marks of the

tractor intercepted the center line on the highway as it was being painted in, together with the angle of the units as they collided from the facts observed. When counsel is cautioned that all questions under circumstances of this type must be made as hypothetical questions, and when it has been demonstrated in the presence of the jury that the court questions the propriety of such evidence counsel should not be required to continue to tender answers and have the court sustain objection thereto, or the court on its own motion object thereto without counsel knowing the basis of the objection, and thus making it appear to the jury that counsel is attempting to proceed improperly. When counsel is faced with the burden, under such strain, of carrying the burden of proof, the court in refusing to permit argument on the questions of whether or not the expert could give an opinion based upon the facts he observed after having related the facts is certainly prejudicial error. Moreover, the conduct of the trial judge in suggesting objection and objecting himself, and sustaining objections in error was prejudicial error. It is certainly prejudicial error to have the court preclude the expert from showing the movement of vehicles after collision, and whether or not the Studebaker could have struck at the crescent and still come to a stop at the point it was known to have come to rest. This is most important since it is obvious that had the collision occurred at the crescent where claimed by the defendant, that the Studebaker advanced the length of said Studebaker in engaging the left hand door of the Studebaker against the right running board of the tractor, which would have placed it down the road 18 feet, and that it would have advanced another 18 feet in turning around to strike the rear dual of the

trailer. Also, knowing the center of gravity of the Studebaker, the axis on which the Studebaker was gyrating on and the respective jiggles in the tire marks, the expert, from the fact he had observed was in a position to show the relative movements of these vehicles after collision and to show that it was impossible for the collision to have occurred at the crescent on the tractor's side of the highway and yet have the Studebaker come to rest at the position shown as Y post where the pictures showed it came to rest since this was at a point directly across from the crescent which would mean that the Studebaker did not advance more than half its length forward after impact. Moreover, the court erred in refusing to permit the expert to indicate what, in his opinion, made the crescent, notwithstanding the fact that he had observed the units as well as the skid marks and the damaged parts on the respective units and compared them all with the pictures. It was admitted at R100-14 that the trailer tire went flat. The expert and Noyes both knew from the examination of exhibit C that the rear duals on the tractor were scuffed, and knew from exhibit T as well as examination of the Studebaker that the concave tire marks on the back of the Studebaker were made by engaging the rear duals of the tractor, yet the expert was not permitted to testify on such matters, give an opinion, or even answer inquiries on hypothetical questions with respect thereto.

The record does not disclose any conduct on the part of counsel for plaintiff of antagonism towards the court, or any justification for the court to tell the jury that they might assume counsel was trying to deceive them, or that they could think that counsel was a "stinker." Where hostile witness who are mistaken, and have admitted to

counsel that they are mistaken, and yet attempt to maintain a false position, that they have taken to satisfy their own ego in maintenance of consistency, counsel should be granted great latitude in cross examining them on their statements without having the court make pronouncements calculated to frighten counsel from pursuing such cross examination, and making it appear to the jury that counsel might be deceitful in attempting any such procedure. Such remarks are not only highly prejudicial, but can frustrate justice and frustrate professional skill, wisdom, and judgment, and can frustrate not only counsel, but the administration of justice. Such pronouncements should be declared by the appellate court to be most unjudicious and inappropriate, and not in the interest of the administration of justice.

Thad Hatch, a party in this litigation was familiar with the facts that Judge Larsen's court was involved in a trial lasting more than thirty days. Counsel for plaintiff is unable to explain why one more day could not be granted for this case to have Dr. Freeman testify, and to have put on rebuttal, and why the court should insist on the matter being carried through to completion into the late evening, without giving warning of the same until after 4:00 o'clock in the afternoon of the last day that counsel would be permitted sufficient time to submit the evidence, particularly where counsel had accommodated the court in the consolidation, and had accommodated the court on stipulations almost to the point of prejudice all in the interest of time. It was most certainly prejudicial error to continue proceeding with the trial without leave of having one more day, and was an abuse of discretion on the part of the

court to insist that counsel proceed without leave of producing Dr. Freeman.

Plaintiffs did not parade the sympathy angle before the jury of the orphans and the widow, and the aged parents, and were they excluded from the court and not permitted to testify. Counsel assumed counsel for defendant would be fair and that counsel for defendant should at least under the usual professional practices expected, not indulge in petty prejudices and parade the sympathy angle of the driver before the jury, and then in the final summation to the jury, point to the driver as being charged with the responsibility of the deaths, causing the jury to cringe with sympathy for the driver. Fair play would dictate the granting of a new trial for such conduct.

The court actually excluded the witnesses for plaintiff, and all the parties for plaintiff, yet they permitted this driver, Laren Somsen, to remain for the entire trial.

The trucking company, with its vast enterprises was able to correspond and locate a second Mercury driver who appeared at the scene, who was not the one to skid and run tracks up to and near the scene of the wreck. While under our standards of procedure, counsel might get by withholding of this witness until they had intentionally requested all other witnesses who were present when this Mercury approached, to be excused, and all the time knowing that Mr. Clark was not the Mercury driver who made the tire marks in question. Most certainly the court was in error in not permitting a new trial and recalling Talbot, Noyes, and Faile to show that Clark's Mercury did not make the tracks shown in exhibit F and that

there was actually another Mercury at the scene. Moreover, Dr. Freeman would have shown conclusively that the Mercury did make the marks in question. The jury could well assume that the entire theory of plaintiff's case was void since Clark's Mercury did not make any tracks, and that under the law of averages, it was most unlikely that two Mercury cars would appear at the scene of the accident immediately after the accident, and one lay down tire marks, and another appear and make no marks. This actually did occur and these witnesses as well as Dr. Freeman would have so indicated, had the plaintiff been given an opportunity to try the case on Friday. In the interest of administration of justice a new trial should be granted with instructions that from the proof submitted all plaintiff's requested instructions should have been given, together with a reversal on all points submitted.

Respectfully submitted,

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