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Ruth Neighbors Adams v. Floretta Lang : Brief of Respondent

Utah Supreme Court

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Case No. 8141

IN THE SUPREME COURT
of the
STATE OF UTAH

RUTH NEIGHBORS ADAMS,
Plaintiff and Appellant,

— vs. —

FLORETTA LANG,
Defendant and Respondent.

RESPONDENT'S BRIEF

RICH & STRONG,
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Respondent.*

INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINT	8
THE COURT DID NOT ERR IN EXCLUDING THE TESTI- MONY OF AN EXPERT WITNESS AS TO THE SPEED OF THE VEHICLE BASED ON A HYPOTHETICAL QUES- TION.	9
(A) THE TESTIMONY ON SPEED WAS NOT PROPER REBUTTAL.	9
(B) THE HYPOTHETICAL QUESTION WAS NOT PROP- ERLY FRAMED AND INCLUDED ELEMENTS WHICH WERE EITHER NOT IN THE EVIDENCE OR HAD BEEN TOLD TO THE EXPERT OUT OF COURT.	14
(C) THE PLAINTIFF'S ATTORNEY MADE NO OFFER OF WHAT HE EXPECTED TO PROVE BY THE AN- SWER OF THE WITNESS TO THE QUESTION OF SPEED AND WITHOUT SUCH OFFER, THERE IS NO BASIS FOR CLAIMING ANY PREJUDICE IN EXCLUDING THE TESTIMONY OF THE WITNESS....	27
CONCLUSION	29

AUTHORITIES CITED

53 Am. Jur., page 106, Sec. 120.....	12
53 Am. Jur., page 107, Sec. 121.....	13
3 Jones Commentaries on Evidence, Sec. 1326, page 2425.....	21
3 Jones Commentaries on Evidence, Sec. 1335, page 2442.....	23
3 Jones Commentaries on Evidence, Sec. 1330, page 2433.....	23
4 Nichols Applied Evidence, page 3926, Sec. 5.....	12
4 Nichols Applied Evidence, page 3927, Sec. 9.....	12
Utah Rules of Civil Procedure, Rule 43 (C).....	28
11 Wigmore on Evidence, Sec. 681.....	24
11 Wigmore on Evidence, Sec. 680.....	26
11 Wigmore on Evidence, Sec. 682.....	26

CASES

Christiansen v. Hollings, 112 Pac. (2d) 723.....	27
Samuel Smith, et al v. J. M. Richardson, et al, 2 Utah 424.....	11
State v. Lingman, 97 Utah 180, 91 Pac. (2d) 457.....	20
Travelers Insurance Company v. Drake, 89 Fed. (2d) 47.....	27
Xenakis v. Garrett Freight Lines, 265 Pac. (2d) 1007.....	25

IN THE SUPREME COURT of the STATE OF UTAH

RUTH NEIGHBORS ADAMS,

Plaintiff and Appellant,

— vs. —

FLORETTA LANG,

Defendant and Respondent.

Case No. 8141

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The plaintiff filed an action to recover for personal injuries which she sustained in an automobile accident on the 15th day of December, 1952, at about 6:50 A.M. on U. S. Highway 50 west of Magna and about one-fourth of a mile east of the Arthur Mill in Salt Lake County, (R. 1, 2, 87). There were four persons, including the driver, in the car. The defendant was operating the car. The plaintiff was riding in the right front seat. Marjorie Jacques was riding in the middle of the front seat, and Robert Adamson was riding in the back seat,

(R. 144). The four occupants in the car were employed at the Tooele Ordnance Depot, (R. 133). The vehicle was owned by Manuel Jacques, Marjorie's husband. Mr. Jacques generally drove the car to and from work, (R. 74, 75). However, on the morning of the accident he did not go to work and the defendant was requested by Mrs. Jacques to drive the vehicle, (R. 76, 119). Mrs. Jacques had first asked the plaintiff to drive the car, but she refused. Mrs. Jacques then drove the car to the defendant's home, (R. 140). There Mrs. Jacques told the defendant that she would have to drive. The defendant did not want to drive, saying she would prefer to take her own car, but Mrs. Jacques said that she wouldn't drive and that the plaintiff refused to drive; that if they were going to get to work, the defendant would have to drive; that her car was already warmed up and to take it. The defendant undertook to drive the car under these circumstances and in order that they could get to work, (R. 76, 141, 210). The plaintiff had agreed to pay Mr. Jacques \$1.00 a day for her transportation to and from the Depot, (R. 140).

The accident occurred on a curve in the road. Photos were introduced showing the highway at the scene of the accident, (Exhibits 15, 16 and 17 (D)). However, the guard rails shown in the photos on the outside of the curve were not erected or in place at the time of the accident, (R. 83, 84, 111). A plat was also introduced in evidence showing the highway and curve at the scene of the accident, (Exhibit 28 (D)). It was undisputed that the

posted speed at the scene of the accident was 40 miles per hour and the sign so designating the speed limit is shown right at the curve in the photos and also on the road plat, (R. 92, Exhibits 15, 16, 17 (D) and 28 (D)).

It was dark at the time of the accident, (R. 77). The lights on the car were properly burning, (R. 78). The car was being operated at a speed of 35-40 miles per hour, (R. 79, 145). As it rounded the curve, it struck an icy spot on the road and started to slide to the left. The defendant let up on the gas feed and turned the car back to the right. She did not at this time apply the brake for fear that the car would go out of control, (R. 213). The car proceeded back to the right but continued toward the embankment on the outside of the curve. The defendant tried to turn the car back to the left, but it continued on the ice to the right. When the defendant saw that the car was not turning from the embankment she applied the brakes, but the car skidded on the ice to the right off the road and down the embankment, (R. 81, 82, 212, 213). From the time the car first started to slide until the time it left the road it was on ice, (R. 214).

Counsel in his statement of facts claims that there were icy spots here and there on the road that morning and that it was also foggy. This is not a correct statement of the facts as they existed at the scene. There was no material disagreement between the parties as to the status of the weather, the condition of the highway or the speed of the vehicle at the scene of the accident.

The plaintiff on cross examination testified that the road seemed to be dry from the time they left her home until the point of the accident; that she did not recall encountering any ice until the point of the accident, (R. 172); that they were traveling at a speed of "between 35 and 40 miles per hour," (R. 145, 171). She admitted that there was nothing unusual or out of the ordinary including the speed about which the vehicle was being operated, (R. 173, 174). She admitted that the defendant was driving carefully to her way of thinking, (R. 174), and that prior to the time that the car struck the icy spot where the accident occurred, there had been nothing about the operation that caused her any alarm or concern, (R. 175); that she had not complained or protested at any time about the manner in which the vehicle was being driven, (R. 171); that the first she noticed of anything unusual was when the car encountered the icy spot and started to slide, (R. 177); that it hadn't occurred to her as they were riding along that there might be any ice on the highway, (R. 180); that the roads were fairly dry when they left home, (R. 181); that no one prior to the time of the accident had made any mention about the possibility of any ice on the road, (R. 181). She also testified on cross-examination that she didn't know whether there was any material fog at the scene of the accident, (R. 182), or whether it was limited to the area down by the canal at the Magna Junction, (R. 182).

Mrs. Jacques testified for the plaintiff and said that they encountered fog at the Magna Junction by the canal, (R. 122). She didn't remember any fog at the scene of the accident to materially interfere with visibility, (R. 131). There was not enough fog at the scene to cause her any alarm or concern, (R. 132). She did not notice any snow or ice on the road surface, (R. 122, 123); she had not felt the car sliding prior to reaching the curve where the accident occurred, (R. 123); she had not noticed any icy patches, (R. 128), and the road prior to reaching the scene of the accident was generally dry that morning, (R. 135). She testified that as they went around the curve there was "probably a place where the sun never shined, was a patch of ice there, and we started to skid," (R. 124). On cross-examination she testified that they hadn't encountered any ice on the road, nor was she conscious of any ice or snow being on the road until the car started to slide at the point where the accident occurred. She was just as startled as the others when the car started to slide and had not expected it, (R. 133). With reference to the speed, she testified that they were traveling at a speed of "around 40 miles an hour," which was their customary speed, (R. 123, 133). There was nothing about the speed at which the car was being operated that caused her any concern, (R. 132).

The plaintiff called the defendant as a hostile witness. The defendant testified that there was slight fog at the Magna Junction, (R. 78); that they were travel-

ing at a speed of “between 35-40” or “not to exceed 40,” (R. 79, 80, 180). She also testified that there was no snow or ice on the road except at the point where the accident occurred, (R. 79, 82).

As a witness in her own behalf, the defendant testified that the only fog of any consequence was encountered at the Magna Junction. There wasn't any fog at the point of the accident. She was traveling at a speed of 35-40 miles per hour and did not see or encounter any ice or feel the car slip until they came around the curve where the accident occurred, (R. 211, 212). No one complained or protested as to the manner in which she was operating the vehicle, (R. 214). She had driven over the same road the day prior to the accident going to and from work and had encountered no snow or ice on the road, (R. 221, 222). She drove over the road on that day at the same rate of speed as she was driving on the morning of the accident, and to her knowledge there was nothing different in the conditions on the morning of the accident than there was on the previous morning. It had not stormed or rained in the interim, (R. 222).

Robert Adamson, the sole other passenger in the vehicle, was called as a witness on behalf of the defendant. He testified that there was no snow or ice on the paved portion of the road. They did not encounter any snow or ice until they rounded the curve where the accident occurred, (R. 187). He did not notice any slipping or sliding of the car before it reached the point where

the accident occurred. There was no fog at the scene of the accident. He didn't notice any fog after the accident. He testified on direct examination that the defendant was traveling at a speed of 30-35 miles per hour "in that neighborhood" at the time she struck the icy spot, (R. 188). On cross examination he admitted that he may have told plaintiff's counsel that the vehicle was traveling at a speed of 35-40 miles per hour, stating: "It is pretty hard to tell when you are riding in the back seat of the car," and that it may have been 35-40 miles per hour, (R. 194).

Charles Paris, a Deputy Sheriff from Salt Lake County, was called as a witness on behalf of the plaintiff and testified that he investigated the accident, (R. 87). He admitted that after making his investigation and observing the condition of the highway, he made no arrests and found no improper driving on the part of the defendant, (R. 106, 107, 108, 114).

The case was submitted to the jury on the issues of the negligence of the defendant and the contributory negligence of the plaintiff, and the jury returned its verdict in favor of the defendant and against the plaintiff. It is from this judgment that the plaintiff takes her appeal.

The resume of the evidence which we have given indicates there was little dispute between the parties as to the condition of the weather, the condition of the high-

way, or the speed at which the vehicle was being operated. The facts simply showed, or at least the jury could so find, that the defendant was driving on a dry road at a speed of 35-40 miles per hour when she suddenly and unexpectedly encountered a patch of ice in the road on rounding a curve; that the car started to skid; that she acted reasonably to avoid the accident but without success. The skidding and accident came as a surprise to everyone.

The appellant in her brief has assigned only one error, namely, that the court improperly excluded certain testimony of an expert witness as to the speed of the defendant's vehicle based upon a hypothetical question. Accordingly, the only question involved on this appeal is whether the court erred in excluding this testimony and our argument will be directed to this point.

STATEMENT OF POINT

THE COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF AN EXPERT WITNESS AS TO THE SPEED OF THE VEHICLE BASED ON A HYPOTHETICAL QUESTION.

(A) THE TESTIMONY ON SPEED WAS NOT PROPER REBUTTAL.

(B) THE HYPOTHETICAL QUESTION WAS NOT PROPERLY FRAMED AND INCLUDED ELEMENTS WHICH WERE EITHER NOT IN THE EVIDENCE OR HAD BEEN TOLD TO THE EXPERT OUT OF COURT.

(C) THE PLAINTIFF'S ATTORNEY MADE NO OFFER OF WHAT HE EXPECTED TO PROVE BY THE ANSWER OF THE WITNESS TO THE QUESTION OF SPEED AND WITHOUT SUCH OFFER, THERE IS NO BASIS FOR CLAIMING ANY PREJUDICE IN EXCLUDING THE TESTIMONY OF THE WITNESS.

ARGUMENT

THE COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF AN EXPERT WITNESS AS TO THE SPEED OF THE VEHICLE BASED ON A HYPOTHETICAL QUESTION.

(A) THE TESTIMONY ON SPEED WAS NOT PROPER REBUTTAL.

Speed was one of the issues of negligence relied on by the plaintiff in support of her contention that the accident was caused by the defendant's negligence. The plaintiff, therefore, had the burden of proving as a part of her main case the speed at which she claimed the vehicle was being operated and showing that such speed was negligent under the circumstances. The plaintiff testified that the vehicle was going 35-40 miles per hour. Mrs. Jacques, a passenger in the car, and one of plaintiff's witnesses, testified that the vehicle was traveling around 40 miles per hour. The only other evidence on speed introduced by the plaintiff as a part of her main case was the testimony of the defendant which was brought out when the plaintiff's attorney questioned the defendant as a hostile witness. The defendant testified that her speed was between 35 and 40 miles per hour. The plaintiff, therefore, based her case on speed on the ground that the vehicle was being operated at a speed

of not to exceed 40 miles per hour. The defendant in her case did not refute this claim, and, as a matter of fact, the defendant admitted that she was traveling at a speed of 35-40 miles per hour not to exceed 40 miles per hour. Robert Adamson was the only other witness testifying in the defendant's case as to speed. He testified that the vehicle was going 30-35 miles per hour, but admitted that it may have been going 40 miles per hour. At any rate, the defendant personally admitted that the vehicle was traveling at a speed of 35-40 miles per hour and that is the material thing. This was the status of the evidence on speed when both parties rested their cases. It is therefore submitted that there was no material conflict between the parties on the question of speed. The defendant in her case had not introduced any new or affirmative material on the question of speed. There was nothing for the plaintiff to rebut on the question of speed. Nonetheless, the plaintiff in rebuttal called S. S. Taylor, an expert witness, and attempted to ask certain hypothetical questions to obtain from him an opinion as to the speed at which the vehicle was being operated. This was not and could not be rebuttal under the evidence as presented by both parties. If the expert was going to testify that the vehicle was being operated at a speed of 40 miles per hour, it was merely cumulative and would add nothing because all four occupants in the vehicle had already testified that the vehicle was being operated at a speed of 35-40 miles per hour. If, on the other hand, the expert was going to testify that the vehicle was being operated at some higher rate of speed than 40 miles per

hour, then it certainly was not proper rebuttal testimony. With the parties being in agreement as to the speed at which the vehicle was being operated, there was nothing left for plaintiff to rebut at that stage. Furthermore, if the testimony were admitted for this purpose, it would be an attempt not only to refute the defendant and her witness, Adamson, but also to impeach and refute the testimony of the plaintiff and her witness, Mrs. Jacques. Certainly, after all of the evidence is in, the plaintiff in rebuttal cannot be permitted to introduce new evidence based upon the testimony of an expert in answer to a hypothetical question, the sole purpose of which is to show that not only the defendant but the plaintiff and her witnesses were in error and that the speed was greater than that testified to by any of the parties. It was the plaintiff's burden to show excessive speed, and having based her claim on a speed of 35-40 miles per hour, she could not in rebuttal attempt to show a higher speed and refute her own testimony.

See *Samuel Smith, et al. v. J. M. Richardson et al.*, 2 Utah 424, wherein the Utah Supreme Court in speaking of rebuttal testimony said:

“Rebutting evidence is such as explains or repels, rebuts or counteracts evidence that comes out on the defense. It may incidentally support the case made in the complaint, but *that is not rebutting testimony which mainly supports the case stated in the complaint and only incidentally goes to explain or repel the evidence in behalf of the defense.*” (Italics ours)

See also 4 Nichols Applied Evidence, page 3926, Sec. 5:

“Evidence which mainly supports the case stated in the complaint and only incidentally goes to explain or repel the evidence in behalf of the defense is not rebuttal.”

See also 4 Nichols Applied Evidence, page 3927, Sec. 9:

“It is within the discretion of the court to permit in rebuttal evidence which should or might have been offered in chief, and statutes so expressly provide in many states. Admission in rebuttal of testimony constituting proof in chief is not reversible error, at least unless in case of abuse or discretion and prejudice. *But a party will not be allowed to offer evidence in rebuttal, which should properly have been offered in chief, except by leave of court. Evidence, part of defendant's case in chief, attempted to be introduced after they had rested and plaintiffs had introduced their evidence in rebuttal, was properly excluded.*” (Italics ours)

See also 53 Am. Jur., page 106, Sec. 120:

“After the parties have introduced their evidence in chief they are as a general rule confined to rebuttal evidence, that is, evidence which answers or disputes that given by the opposite party,—evidence in denial of some affirmative case or fact which the adverse party has attempted to prove,—except as the trial court may in its discretion permit a party to introduce evidence which could have been given as part of the testimony in chief. One cannot, *except in the discretion of the*

*trial court, introduce as a part of his rebuttal testimony relative to new and independent facts competent as a part of his testimony in chief. What is rebuttal evidence rests largely within the discretion of the trial court. * * ** (Italics ours)

See also 53 Am. Jur., page 107, Sec. 121 :

*“As a general rule, the party upon whom the affirmative of an issue devolves is bound to give all his evidence in support of the issue in the first instance, and will not be permitted to hold back part of his evidence confirmatory of his case and then offer it on rebuttal. Rebuttal testimony offered by the plaintiff should rebut the testimony brought out by the defendant and should consist of nothing which could have been offered in chief. And unless the court in its discretion dispenses with the requirement, the defendant, as well as the plaintiff, should introduce all his evidence in chief in support of his main case. But the trial court may, in its discretion, permit the introduction of such evidence on rebuttal, and an appellate court will not interfere except in cases of clear abuse of discretion. Nor, as a general rule, will the discretion of the trial court in refusing to permit evidence in chief to be introduced in rebuttal be interfered with, and in some jurisdictions the appellate courts will not review this discretion. * * **” (Italics ours)

It is clear from all of the authorities cited that the testimony which the plaintiff sought to develop from the expert witness in rebuttal was not proper rebuttal. If it had any place at all in the case, it should have been introduced as a part of the plaintiff's main case. Further-

more, the effect of the testimony sought to be introduced was to tell the jury that the defendant was wrong, that the plaintiff was wrong, that the two passengers in the vehicle were wrong, and to urge them to disbelieve the driver and occupants in the vehicle including the plaintiff and to find some other or different speed based upon the testimony of a person who wasn't even there and who, it would be argued, knew more about the case than either the plaintiff or the defendant or the other two passengers in the vehicle. The evidence was not proper rebuttal. The plaintiff in rebuttal should not be permitted to impeach her own witnesses under the guise of rebutting testimony offered by the defendant.

(B) THE HYPOTHETICAL QUESTION WAS NOT PROPERLY FRAMED AND INCLUDED ELEMENTS WHICH WERE EITHER NOT IN THE EVIDENCE OR HAD BEEN TOLD TO THE EXPERT OUT OF COURT.

In rebuttal the plaintiff called S. S. Taylor and had him identify a map which he had drawn which was marked as Exhibit 24 (P), (R. 239). This map, among other things, contained a dotted red line purporting to show the arc or route of the vehicle from the time it struck the ice until it left the highway and overturned. Mr. Taylor admitted that he knew nothing about the mark shown on the dotted red line and that the path was pointed out to him by someone else; that the course with respect to the dotted line was not based upon his own knowledge, but on what someone else had shown him.

The map was admitted in evidence except for the dotted line which was excluded, (R. 240, 241). The first hypothetical question which counsel framed was as follows:

“Q. Assuming that we had a standard 1941 Pontiac sedan coupe with three ladies in the front seat and one man in the back seat, with the accelerator off, that left the paved concrete portion of the Magna-Garfield highway on the south side, just west of the culvert, *as indicated on the plats and on the photographs that I have shown you—*

MR. STRONG: I will object to that; there are no things illustrated on the plat or on the photograph as to where the car left the road.

MR. MOSS: I submit, your Honor, *it has been testified to by witnesses;*

Q. And I am showing you photographs 11, 12, and 13 (P), which have been admitted in evidence; do you recognize the area in the photograph? I have asked you that before?

A. Yes.

Q. Were you present when they were taken?

A. Yes.

MR. STRONG: Going to make further objection to all this testimony, your Honor, on the ground that it is testimony that should have been given on his first case. It isn't proper rebuttal testimony, and I object to any further testimony. It is just an attempt to reopen the whole thing, and should have been testimony given in the main case. (R. 243)

MR. MOSS: I submit, your Honor, this is the proper place for admitting it. Mr. Strong has come forward with testimony now of his witnesses that the car was travelling at a slower rate of speed—that is, thirty to thirty-five—and one witness, thirty-five to forty. (Argument.)

THE COURT: Well, there is nothing now before the court. Counsel started to ask a hypothetical question, then he injected some photographs and stuff, which, as the record stands, would have to be included within the hypothetical question.

MR. STRONG: Go ahead and ask the question.

THE COURT: If you want to ask the hypothetical question, Mr. Moss, you better start it over now.

MR. MOSS: Well, we will start over again.

Q. Mr. Taylor, I ask you a hypothetical question: Assuming that a standard 1941 Pontiac coupe, with three ladies in the front seat and one man in the back seat, with the accelerator off, left the paved concrete portion of the Magna-Garfield highway on the south side, just west of the culvert, as is indicated on Exhibits 11, 12 and 13 (P), which are admitted in evidence and as shown on *Exhibit 24 (P)* and *Exhibit 28 (P)*, both of which show the culvert area; and, assuming that that car, leaving the highway at that point, *described an arc on the shoulder or embankment of the road shown on sketch 24 (P)* over frozen ground and frozen snow, without apparent side slippage diagonally across the dirt and paved portion—

THE COURT: Mr. Moss, in the interest of time, that involves some matters that are not in evidence, and therefore the question, as it is formed up to this time, would be objectionable.

MR. MOSS: What part, your Honor, do you think

—

THE COURT: The arc you refer to on the last exhibit. (R. 244)

MR. MOSS: Well, that—Officer Paris has testified to that arc, your Honor.

THE COURT: Officer Paris, as far as it appears, hasn't even seen that map.

MR. MOSS: Yes, but he has testified to it as Mr. Taylor testified he took it—

THE COURT: Yes, but, Mr. Moss, this man can't make a drawing from what somebody else told him they testified to and then use it as part of the evidence.

MR. MOSS: I will relate it to the drawing, your Honor;

Q. —described an arc as is shown on the chalk—

MR. STRONG: Starting another—

MR. MOSS: No, this is continuing the same question, back to the arc part.

MR. STRONG: I am going to object; I mean, he has got to reframe the question because he has got something in there now that I did not stipulate to—the arc he referred to on that exhibit. It is improper unless it is taken out. So, at this stage, the question has got to be reframed.

MR. MOSS: We will ignore the last plat. We will use the chalk drawing.

MR. STRONG: You have got it in your question.

MR. MOSS: Well, I will ask that part be stricken.

MR. STRONG: No, I want you to start so I will know what the question is.

MR. MOSS: I thought you were interested in time.

THE COURT: You better start over on your question. (R. 245)

Q. Mr. Taylor, let's assume the following facts—not related to any drawing on the board, just assume the following facts: That a 1941 standard Pontiac sedan coupe with three women in the front seat and one man in the back seat, travelling westward on Highway 50, at a point that is—approximately a point a quarter of a mile east of Arthur Mill and proceeding upgrade on that road of *approximately four per cent*; assume that that car, with the accelerator off, left the paved portion of the cement highway, and travelled to the left of the highway up onto a bank—a 25 per cent gravelled bank—that had some snow on it, and described an arc across that bank that was 90 feet in length from the point where the car left the highway to the point where it returned to the highway, and the highest point of the arc was nine feet from the edge of the concrete to the right wheel or inside wheel of the car; and, then, assume that no brakes were applied during that time and there is no indicated side slippage during that time; assume that that car returned to

the concrete portion of the highway and proceeded from the point where it went onto the concrete portion a distance of 47 feet in a northwesterly direction across the highway; and assume that there are no marks on the highway showing any application of brakes; and *assume the highway is clear at that point—that is, the surface not covered with ice or snow*; and assume that car, after travelling 47 feet across the highway and the shoulder, went off of an embankment at approximately 15 miles an hour; and assume that that car landed at the bottom of the cliff on its nose and did not drag down the face of the shoulder, and, having landed on its nose, turned over onto the top of the car onto a railroad track, which is approximately — a railroad track which lay twelve feet beyond the face of the cliff—you get those? Assuming those to be facts, can you, by calculation, tell me the speed at which that car would be travelling in order to traverse that area as described. (R. 246)

MR. STRONG: I object to this question on the ground, incompetent, irrelevant, and immaterial. It is not proper rebuttal testimony. It is testimony that counsel could have gone into in the main case. I will object to it on the further ground that it is not assuming all of the facts in the evidence, that there is no competent evidence in the record to assume it was a four per cent grade. The only testimony on that is based upon a map from the State Capitol, without any investigation or measurements made at the scene, and, further,

it is based on the assumption that no brakes had been applied, and there is testimony in the case that brakes had been applied.

MR. MOSS: This is a hypothetical question.

MR. STRONG: I know, but you have got to conform to the evidence.

MR. MOSS: Assume certain facts, and the jury is permitted to determine whether or not those facts are in evidence.

THE COURT: Objection will be sustained."

(Italics ours) (R. 247)

The first attempt of the plaintiff to ask the hypothetical question was never finished and the plaintiff's attorney voluntarily reframed it. There is no basis for complaint at this stage. The second attempt at the hypothetical question referred to an arc or curve as shown on Exhibit 24 (P). This arc or curve in Exhibit 24 (P) had been previously excluded since it was admittedly based upon hearsay evidence. Furthermore, the hypothetical question at this stage was never finished.

All of the authorities are in agreement that a hypothetical question cannot be based upon matters which are not in evidence. See *State v. Lingman*, 97 Utah 180, 91 Pac. (2d) 457, wherein this Court said:

"We do not consider it necessary to further discuss this question, save to advance the admonition that the court and counsel should be careful to see that a hypothetical question presents or assumes no fact that is not in evidence; that it

does present all facts or elements necessary to the determination to be made by the witness, or to enable him properly to form an expert opinion; and that no material element or fact is used by the witness in his determinations that is not presented in the question as asked."

See also 3 Jones Commentaries on Evidence, Sec. 1326, page 2425:

"If there is no testimony in the case tending to prove the facts assumed in the hypothetical question, such question is improper. * * *"

The third attempt at the hypothetical question, among other things, referred to a 4% grade concerning which there was no testimony in the case and, therefore, no basis for that portion of the hypothetical question. The court properly sustained the objection not only because it was not proper rebuttal testimony, but because the hypothetical question was not properly framed and contained information which was not in the record.

Thereafter, the plaintiff had the expert Taylor testify that he measured the grade at the scene of the accident at 4%, (R. 247, 248). He then attempted to add on to his previous hypothetical question as follows:

"Q. Four per cent. *And, having had those factors pointed out to you and an area of the hillside described by — what person was that?*

A. Sheriff Paris.

Q. Sheriff Paris; did you make a computation as to the speed that the Pontiac automobile had to be travelling *in order to go over the cliff and land in the position it did, as described by Officer Paris?*

MR. STRONG: Just a minute, I will object to the question on the ground, incompetent, irrelevant, and immaterial; it isn't proper rebuttal testimony; furthermore, it is based upon hypothetical questions that were given on information pointed out by officers at the scene when Seymour Taylor was out there. It isn't based upon any testimony—

THE COURT: The objection is sustained. (R. 248)

MR. MOSS: Well, I don't know how a hypothetical question can be based on anything else.

(Argument.)

THE COURT: Mr. Ross, the witness can not be asked a hypothetical question—

MR. MOSS: The name is "Moss".

THE COURT: —of matters he hears out of court and which he doesn't—or which isn't in this record, in the first place; second place, it isn't rebuttal.

MR. MOSS: He can be asked a hypothetical question based on facts which are in evidence, your Honor.

THE COURT: The objection is sustained."

(Italics ours)

At this stage the plaintiff's hypothetical question called the expert's attention to certain things pointed out to him at the scene of the accident some time later by Officer Paris and as described by Officer Paris to the expert witness. These descriptions were not part of the record. There was no evidence as to what Officer Paris had ever pointed out to the expert. It was wholly impossible to know what condition or things the expert had in mind as having been pointed out or described to him by Officer Paris. The objection to this hypothetical question was properly sustained.

See 3 Jones Commentaries on Evidence, Sec. 1335, page 2442:

"The general rule against the consideration of hearsay by a judicial tribunal finds no exception in the case of expert witnesses. While, as stated in preceding sections, expert opinions may in some cases be based upon personal knowledge gained from observation or examination, the rule is well established that hearsay in the form of information gained from the statements of others outside the courtroom is not such personal knowledge, nor may it be the basis of an expert opinion. * * *"

See also 3 Jones Commentaries on Evidence, Sec. 1330, page 2433:

"Opinions sought merely upon testimony heard or read by the expert, and without re-statement and limitation of the facts, are undoubtedly open in the great majority of cases to

the objection that the witness, however conscientious, will not found his opinion upon all the facts but only upon those which his personal belief induces him to assume as true. When he is called upon to form an opinion upon testimony which he has heard or read, the witness unconsciously passes upon the weight of the evidence or credibility of other witnesses, and, in determining the facts, in effect usurps the province of the jury.
* * *

See also II Wigmore on Evidence, Sec. 681 :

“The same objections apply to the question, ‘*On what you have heard of the testimony in this case, what is your opinion?*’; with the additional objection that it is here still more difficult to understand the premises actually in the witness’ mind, since no one else knows exactly how much he has heard.” (Italics ours)

The plaintiff’s attorney then merely stated :

“Q. Mr. Taylor, do you have an opinion in this matter?

MR. STRONG: As to what?

MR. MOSS: Opinion as to speed. (R. 248)

MR. STRONG: Just a minute, I will object to that on the grounds incompetent, irrelevant, and immaterial; not proper—

THE COURT: Sustained, on the ground it is wholly irrelevant.

MR. MOSS: All right, that will be all; thank you.” (R. 249)

No further questions were asked. No further witnesses were called. The plaintiff never made any request to re-open the case. If the expert had an opinion, it was wholly immaterial. The four occupants in the car, including the plaintiff, who should know more about the speed than anyone else, had testified without disagreement that the car was being operated at a speed of 35-40 miles per hour—not to exceed 40 miles per hour. If the expert was going to testify to the same speed, it could add nothing. If the expert was going to testify to a higher speed, it was not proper rebuttal.

Counsel at page 3 of appellant's brief states that an expert witness may be asked a hypothetical question based partly on his personal observation and partly on the premise provided by the hypothesis. With reference to the expert's personal knowledge, this Court has made the following comment in the case of *Xenakis v. Garrett Freight Lines*, 265 Pac. (2d) 1007, at 1010:

“* * * We are in accord with the generally recognized rule that when the material facts are within the expert's own knowledge and are related by him in his testimony, his opinion may be based upon such personal observations and knowledge, without necessarily having the facts hypothetically stated. *Yet it is obvious that the court and jury must be made aware of the facts upon which the expert bases his conclusion, otherwise the testimony would be of little assistance, and there would be no way of testing the validity of his opinions.* * * *” (Italics ours)

We submit that there was no error in refusing to permit the expert to testify in answer to the hypothetical question for the reasons aforementioned, and in addition thereto, because the facts on which the hypothetical questions were based were in any event found against the plaintiff by the jury's decision. There was a dispute as to the course the vehicle took, and particularly whether the vehicle merely went onto the gravel shoulder to the left or up onto the bank as contended by plaintiff's counsel, and whether the highway was covered with ice during the entire point of the skidding. These points must be deemed as having been decided in the defendant's favor by the jury's decision. Therefore, at least three of the material points on which the plaintiff's counsel based his hypothetical question were found against him. By the jury's decision the premises for the hypothetical question were not established and there could be no prejudice in the court refusing to permit the expert to testify. See II Wigmore on Evidence, Sec. 680:

“* * * It follows as a necessary part of the theory, that if the premises are ultimately *rejected by the jury as untrue*, the testimonial conclusion based on them must also be disregarded.”

(Italics ours)

The propriety and soundness of the hypothetical question should in any event be left in the sound discretion of the trial judge who is, of course, more familiar with the situation. See II Wigmore on Evidence, Sec. 682, page 810:

“* * * The trial judge should be given discretion to determine how far the counsel can and must properly limit his questions, and how far the jury may be trusted, with the aid of argument, to discover the conditional nature of the question.”

See also *Travelers Insurance Company v. Drake*, 89 Fed. (2d) 47:

“The scope of the hypothetical question is left to the sound discretion of the trial judge. * * *”

See also *Christiansen v. Hollings*, 112 Pac. (2d) 723:

“* * * Moreover, the appellate court is justified in placing considerable reliance upon the determination of the trial judge in passing on the sufficiency of the facts narrated in the question. *Weaver v. Shell Company*, 34 Cal. App. 2d 713, 94 Pac. 2d 364; *Graves v. Union Oil Co.*, 36 Cal. App. 766, 173 Pac. 618. * * *”

The record conclusively shows that the hypothetical questions were not properly framed, included hearsay evidence, and were based upon facts not in the record, and the trial court properly excluded the same.

(C) THE PLAINTIFF'S ATTORNEY MADE NO OFFER OF WHAT HE EXPECTED TO PROVE BY THE ANSWER OF THE WITNESS TO THE QUESTION OF SPEED AND WITHOUT SUCH OFFER, THERE IS NO BASIS FOR CLAIMING ANY PREJUDICE IN EXCLUDING THE TESTIMONY OF THE WITNESS.

As we have heretofore indicated, the plaintiff's attorney made no offer of what he expected to prove by

the answer of the witness to the hypothetical question. It is impossible to tell from the record in this case whether the expert witness was going to testify to the speed already given by the other parties, to-wit: 35-40 miles per hour, or whether he was going to testify to a higher or a lower speed.

Rule 43 (C) of the Utah Rules of Civil Procedure provides as follows:

“In an action tried by jury, if an objection to a question propounded to a witness is sustained by the court, *the examining attorney may make a specific offer of what he expects to prove by the answer of the witness.* The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.”
(Italics ours)

The purpose of the rule is to permit an attorney to make a record on what he expects to prove in order that he may use the same as a basis for appeal. Under this rule it was the duty of the plaintiff's attorney, if he desired to pursue the matter further or use it as a basis for appeal, to explain to the court what he expected to prove by the witness and either give the court an oppor-

tunity to permit the evidence to come in, or to further state the court's basis for its objection to the testimony. Having failed to do so, it would be mere speculation for this court to determine what the plaintiff expected to prove by the witness, and without knowing the speed to which the expert was going to testify, there certainly could be no basis for claiming prejudicial error in the court's refusal to permit the expert to testify. Therefore there is nothing in the record on appeal to show that the plaintiff could have been prejudiced in any event by the court's refusal to permit the expert witness to testify.

CONCLUSION

We submit that it was not error on the part of the court to exclude the testimony of the expert witness as to speed because—(A) The testimony on speed was not proper rebuttal; (B) The hypothetical questions were never properly framed and included elements which were either not in the evidence or had been told to the expert out of court, and (C) Because no offer of proof was made, the record fails to disclose any possible prejudice on the part of the plaintiff to the exclusion of the testimony. The exclusion of the testimony was within the sound discretion of the court, and on the record in this case the lower court could take no other action. The judgment should be affirmed.

Respectfully submitted,

RICH & STRONG,

*Attorneys for Defendant and
Respondent.*