

1954

# Takataro Shiba, Miyoe Shiba v. John Weiss, Hendry D. Spencer and Helen Bethers : Brief of Appellants

Utah Supreme Court

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W. D. Beatie; Attorney for Plaintiffs and Appellants;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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*Plaintiffs,*

— vs. —

JOHN WEISS, HENDRY D. SPEN-  
CER and HELEN BETHERS,

*Defendants.*

Case  
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FILED  
JAN 20 1955

Supreme Court, Utah

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Appellants' Brief

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W. D. BEATIE

*Attorney for Plaintiffs and  
Appellants*

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SHIBA,

*Plaintiffs,*

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*Defendants.*

Case  
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## Appellants' Brief

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### PRELIMINARY STATEMENT

This is an appeal by the plaintiffs from a judgment of the Third Judicial District Court by the Honorable A. H. Ellett, dismissing the action upon its merits. This trial involved the consolidation of four law suits growing out of this particular accident, namely cases 98655, which is this case, 99868, 99687 and 99291.

### FACTS

The following facts out of which this case arises are established without serious dispute. This case grows out of an accident involving a truck and two cars, a few miles

west of the Strawberry Reservoir. The truck involved was owned by defendant Weiss, and was being driven easterly along Highway 40 toward the Strawberry Reservoir. The Shimoda car was traveling east in the same direction and following the truck. The Bether's car was traveling westerly. The Shimoda car struck the truck which was parked without lights and the Bether's car then ran into the Shimoda car. The plaintiffs are the father and mother of one Yoshiro George Shiba, who resided in Salt Lake City, and the defendant John Weiss, is the owner of a 1946 Dodge Pickup (Tr. 58), which he allowed the defendant to take on the early morning of October 19, 1953. (Tr. 166). The defendant Dellis Spencer resides at Neola, Utah, but worked at Todd Park (Tr. 81). Defendant Spencer left the Weiss home in Salt Lake City about 3:10 A. M. on October 19, 1953, (Tr. 82), and drove the truck on the way to his home, proceeding through Parleys Canyon to Heber and out through Daniels Canyon, toward the Strawberry. Defendant Spencer drove the truck about a half a mile past the last turn before coming to the west entrance of Bull Springs Road and Highway 40. (Tr. 86). At a point approximately 750 feet west of the entrance of the Bull Springs Road into Highway 40, the lights of the Weiss truck, being driven by Spencer, went out, while traveling on the right hand side of the road. (Tr. 89). The defendant then applied the brakes and clutch and brought the car to rest traveling about 12 or 15 feet (Tr. 90), stopping with two wheels off the hard surface of the road, about a foot and a half or two feet off of the road and with the wheels on the hard surface, not parallel

with the shoulder. (Tr. 91). After the Spencer truck came to rest it was struck in the rear by the Shimoda car, and while the Shimoda car was traveling from the initial impact, the Shimoda car then had a collision with the Bether's car, traveling in a westerly direction. (Tr. 98). The Weiss truck was being driven by Mr. Spencer himself. The Shimoda car, traveling in an easterly direction was occupied by the owner, Mr. Shimoda and Mr. Shiba, and the Bether's car, traveling westerly, was driven by Miss Bethers, and had as occupants, John Osborne and Mr. Iorg, the owner. The accident occurred at about 5:50 A. M., on the morning of October 19, 1953. The occupants of the Shimoda car were killed, and the owner of the Iorg car was killed.

Other undisputed facts are that the highway at the scene of the accident was 22 feet wide, a barrow pit on either side of the road, and that the point of impact was determined by Officer Mason Hill, at approximately 6:50 A. M., after the accident from the debris, oil marks and gouges in the road.

As to most of the other facts in the case, there is a sharp dispute in the evidence. Chiefly as to whether or not Shiba or Shimoda was the driver of the Shimoda automobile.

Officer Mason Hill, who investigated the accident, was called by Mr. Lowe, the attorney for the administrator of the Iorg Estate, Case No. 99686, which was one of the four cases consolidated for trial. Mr. Hill arrived

at the scene of the accident about 40 minutes after it happened, and upon cross-examination of the witness by Mr. Hanson, attorney for the respondent, testified as follows:

“Q. Now, with reference to the Japanese car, did you make any observation of the people in that car?

A. I did.

Q. Just tell the court and jury what you saw and where those people were in the car.

A. Well, the youngest Japanese boy by the name of Shiba was laying in the front of the car under the steering wheel with his buttocks still on the seat and his head down on the floor (Tr. 24) boards, and—

Q. And where was—just go ahead, sir.

A. —and the older of the Japanese—I don’t recall his name right now—he was hanging out of the right front corner of the car, which had been torn away. He was hanging out there, and he had bled to death there. There was a pool of blood on the highway where he had bled to death hanging out of the car.” (Tr. 25)

On further cross examination by Mr. Beatie, the witness testified as follows:

“Q. And in response to a question of Mr. Hanson, you stated that the position of the bodies of the two Japanese, Shimoda and Shiba, in the car were the same as at the time the cars came to rest after the impact. You don’t know that to be a fact of your own knowledge, do you?

A. No.” (Tr. 46)

“Q. You didn’t check the back seat, did you, Mr. Hill, at the scene of the accident?

A. No, I don’t think I did.

Q. You don’t know whether there was blood in the back seat or not, do you?

A. No, I dont. (Tr. 65)

Donald A. Harris, a mail truck driver was the first person at the scene of the accident, and testified on direct examination for the appellant as follows:

Q. Which car?

A. The car sitting crossways of the road, the car with the Japanese fellows in it, and I shined my light on the face of the car, and I could see that the one fellow was hanging out of the car, and then it made me sick, and I turned away from it for just a few short seconds. I was sick to my stomach, and just then this other guy arrived on the scene. He was a deer hunter.

Q. With relation to this particular man, do you know which direction he came from Mr. Harris?

A. He came from Daniels Canyon. He was traveling in the same direction as I was.

\* \* \*

Q. What did you do, and what did you observe?

A. Well, I seen that this car crossed the road, and all I done is went around and shined my light on the guy hanging out the door, and that is as far as I observed the wreck at all.

Q. Did you observe anyone else in the front seat of the Shimoda car?

A. No, I didn’t. (Tr. 69-70)

Q. What did he do with the flashlight, and what was said?

A. Well, before he got the flashlight, he said, "Is anybody else hurt?" and I says, "I don't know. I haven't looked." That was when I was sick, pretty upset about it, so he got my light and walked around the other side of the car.

Q. Now, that is the Shimoda car?

A. Yes.

Q. Yes. What did he do, and what was said?

A. He shined his light in, and he said, "There is another guy in the back seat. In the back" is what he said. "There is another guy in the back." I took it for granted he meant more or less in the back seat. (Tr. 74)

This witness on redirect examination stated:

Q. Will you tell me then what this man did with relation to your flashlight?

A. He took my light and walked to the other side of the car.

Q. What car?

A. The Shimoda car." (R. 79)

"Q. Is that the time that he told you there was a Jap dead in the back?

A. Who told me?

Q. This deer hunter.

A. Yes.

Q. Are you sure that the deer hunter had not used his flashlight to look into the Bethers car at that time and seen Mr. Iorg in the back seat there?

A. I don't know whether he did or not.

Q. In other words, he could have been referring to someone in the Bethers car as well as the Japanese car when he came up to you, could he not?

A. He could have been."

On the question of the position of the cars, Officer Hill on cross examination testified as follows:

"Q. Do you know whether or not those men, either of them had been moved before you arrived on the scene?

A. No, they had not." (Tr. 25)

On further cross examination by Mr. Beatie the officer testified as follows:

"Q. You have no way of knowing how many people had been at the scene of the accident and had left or had arrived at the scene of the accident prior to your arrival at approximately six thirty?

A. No, I don't.

Q. And you do not know whether or not the automobiles were in the exact position as they finally came to rest after both the first and second impact or whether they had been moved, do you?

A. No, I dont." (Tr. 46)

\* \* \*

Q. You don't know whether the respective cars had been moved from one position to another and were in different position at the time you arrived at six thirty or not, do you?

A. No.” (R. 47)

The second point is the restriction of counsel for appellant by the Hon. A. H. Ellett in requiring him to consolidate with Counsel Mr. Watkiss and Mr. Yano, who represented Heade Shimoda, administratrix of the Estate of George Shimoda as a party defendant in case No. 99687.

“THE COURT: All counsel have passed the jury for cause, you may strike three challenges. I believe that is for each car, isn’t it. Counsel interested in the same side will have to join in the challenge. (Tr. 12)

THE COURT: The parties in the car proceeding easterly that ran into the truck would have three, and the parties in the car coming westerly would have three.

MR. BEATIE: The only thing, there is involved this way—there are two different suits. Shimoda has one. I believe I would be entitled to at least in my suit, which is a death case, to three challenges in favor of the Shibas, would I not? You mentioned the—

THE COURT: You are going to win together or lose together, aren’t you?

MR. BEATIE: Not of necessity. I have the question of the guest arising which is a sole—with my case alone, Your Honor. The others are not involved in any guest question.

THE COURT: That is right, you would have the question of guest, but, after all, you have got to show the negligence on the other part.

MR. BEATIE: That's true. I was just wondering if I have to associate my challenges with Mr. Watkiss and Mr. Yano, though, how we are going to split it. I might want two and they want two, and we wouldn't come out right. (Tr. 13)

MR. BEATIE: To that ruling, Your Honor, just as a matter of record, may I have an exception?" (Tr. 14)

## POINTS TO BE ARGUED

1. THAT YOSHIRA GEORGE SHIBA, WHILE DRIVING AN AUTOMOBILE OWNED BY GEORGE SHIMODA, NEGLIGENTLY DROVE SAID AUTOMOBILE INTO THE DEFENDANT'S TRUCK, AS A MATTER OF LAW.

2. ERROR IN REQUIRING APPELLANTS TO CONSOLIDATE THEIR PREEMPTORY CHALLENGES WITH THE DEFENDANT SHIMODA IN ANOTHER ACTION WHICH WAS CONSOLIDATED AT TRIAL.

This point is moot unless the first point is found in favor of appellants.

## ARGUMENT

POINT I. THAT YOSHIRA GEORGE SHIBA, WHILE DRIVING AN AUTOMOBILE OWNED BY GEORGE SHIMODA, NEGLIGENTLY DROVE SAID AUTOMOBILE INTO THE DEFENDANT'S TRUCK AS A MATTER OF LAW.

It is apparent from the holding of the court that the court must have concluded that Shiba was the driver of the Shimoda automobile and was therefore guilty of negligence as a matter of law under the rule of *Dalley vs. Mid West Dairy Products Company*. It is our position that the evidence is not conclusive on this question.

The testimony of Mason W. Hill, the investigating officer who arrived on the scene at least 40 minutes after the accident happened, is contrary to the evidence of Donald Harris, who was the first known person to arrive at the scene of the accident, and testified as to the statement which he heard the deer hunter make after he had borrowed his flashlight, "That there was a dead man in the back of the car." The court seems to have taken the position that the testimony of Officer Hill was conclusive of the position of the bodies at the time of the accident, and upon this point counsel disagrees with the trial court.

It is the contention of appellants that the conflict in testimony as to the driver of the Shimoda automobile is a jury question there being a conflict in the testimony as aforesated.

It is said in Sec. 325, 53 Am. Jur., page 263:

*"Uncertain Proof: Conflict of Evidence.*

"A motion for nonsuit should be granted only where there is no contriety of evidence as to the facts, and not where the evidence raises a question for the jury."

Sec. 1126-53 Am. Jur. 782:

“Decision at Close of Plaintiff’s Testimony; Nonsuit.

“A motion to take a case from the jury on the ground of the insufficiency of the plaintiff’s evidence should be denied, where there is evidence which justifies an inference of facts upon which his right to recover depends.”

In the fairly recent case of *Winegar v. Slim Olson, Inc.*, 252 Pac. (2d), page 205, Justice McDonough stated as follows at page 206:

“In ruling on a motion for nonsuit it is well established that where a jury sits the court must accept as true the evidence in behalf of the plaintiff, and must give the plaintiff the benefit of every fair and legitimate inference that could be drawn therefrom by the jury. *McGarry v. Tanner & Bakes Co.*, 21 Utah 16, 59 P. 93; *Smith v. Columbus Buggy Co.*, 40 Utah 580, 123 P. 580; *Dunn v. Salt Lake & O. R. Co.*, 47 Utah 137, 151 P. 979; *Kitchen v. Kitchen*, 83 Utah 370, 28 P. 2d 180. If at the conclusion of the plaintiff’s evidence the court decides that the plaintiff has not established a prima facie case or cause of action against the defendant a judgment of nonsuit may be properly entered. *Ibid.* In order to establish a prima facie case the plaintiff must present some competent evidence on every element needed to make out the cause of action. The test is whether or not there is some substantial evidence in support of every essential fact which a plaintiff is required to prove in order to entitle him to recover. *Robinson v. Salt Lake City*, 37 Utah 520, 109 P. 817. If the evidence and the inferences are of such character as would authorize reasonable men to arrive at different conclusions as to whether all the essential facts were or were not proved then the ques-

tion is one for the jury and a non-suit should be denied. Robinson v. Salt Lake City, supra.”

From the foregoing, it is contended by the appellants that there being a conflict in the evidence as to the driver of the Shimoda automobile, that it was error for the court to nonsuit the plaintiff at the conclusion of the evidence adduced in the four consolidated cases on the part of plaintiffs.

The appellant contends that reasonable men could have arrived at different conclusions as to whether or not Shiba was the driver of the Shimoda car and therefore it was a jury question.

**POINT II. ERROR IN REQUIRING APPELLANTS TO CONSOLIDATE THEIR PRE-EMPTORY CHALLENGES WITH THE DEFENDANT SHIMODA IN ANOTHER ACTION WHICH WAS CONSOLIDATED AT TRIAL.**

This point is moot unless the first point is found in favor of appellants.

On the question of pre-emptory challenges to the jury, the Utah Statute is as follows:

Rule 47, Subsection (c), U.C.A. 1953: Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

The above statute is a combination of the former statutes 104-24-2 and 104-24-3, U.C.A. 1943.

In the case of *Sutton v. Otis Elevator Co.*, 68 Ut. 85, 249 Pac. 437, the same statutes were involved as are herein set forth. In this case the two parties defendant were required to combine their challenges and while in the present case appellant was required to combine his challenges with a party defendant in another action, the basis of adjudication being that they were involved in the same automobile.

The court in that case said at page 458:

“Such cases as the one at bar are not of frequent occurrence. When, however, such cases do occur, it is not a satisfactory reason to say a substantial right should be denied because it may possibly lead to subsequent abuses. I am irresistibly impressed with the conviction that the rule announced by the courts of Texas, Michigan, and Wisconsin, which I have briefly reviewed in this opinion, is more consonant with reason and justice, and therefore more likely to have been within the intent of our Legislature, than is the rule invoked in behalf of respondent. The statute which requires the “parties on either side to join” should only be regarded as a precaution to the trial court to see that the right of severance in challenges shall not be permitted except in cases where it is manifest from the very nature of the case, that even-handed justice requires it.

I am of opinion the challenge should have been allowed, and that the denial thereof was prejudicial error.”

In the case of *Maddox vs. Pattison*, 186 So. 894, the court said:

“This action arose out of a collision between two trucks. Mrs. Maddox and Buckline instituted separate suits against defendant on separate causes of action. It is true the proceedings grew out of the same vehicular collision, and the issues in both causes respecting the defendant’s liability are identical, yet on the other hand, it is to be noted that the issues pertaining to the extent of the injuries sustained are not the same, the parties litigant are different and separate judgments were and are required to be rendered.

“The U. S. Supreme Court offered the following pertinent remark in the case of Mutual Life Ins. Co. vs. Hillman, 145 U.S. 283, 12 S. Ct. 909, 912, 36 L. Ed. 706-707. “But although the defendants might lawfully be compelled at the discretion of the court to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments, and no defendant could be deprived, without its consent, of any right, material to its defense, whether by way of challenge to jurors or of objection to evidence, to which it would have been entitled if the cases had been tried separately. Sec. 819 of the revised statutes provides that in all civil cases each party shall be entitled to three pre-emptory challenges, and in all cases where there are several defendants, or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges and under this section, under this provision, defendants sued together upon one cause of action, would be entitled to three pre-emptory challenges in all. But defendants in different actions cannot be deprived of their several challenges, by the order of the court, made for the prompt and convenient administration of justice, that the three cases shall be tried together.”

## CONCLUSION

It is respectfully submitted that the trial court erred in the matter of directing a nonsuit against the plaintiff and invading the province of the jury in so ruling, and that if this point is sustained, that the court erred in requiring appellant to consolidate his challenges with a defendant in another action.

Respectfully submitted,

W. D. BEATIE

*Attorney for Plaintiffs and  
Appellants.*