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Harry J. Christiansen v. Utah Transit Authority And John G. Miller : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY J. CHRISTIANSEN,

Plaintiff-Appellant,

vs.

Case No. 17250

UTAH TRANSIT AUTHORITY and
JOHN G. MILLER,

Defendants-Respondents.

APPELLANT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY J. CHRISTIANSEN,

Plaintiff-Appellant,

vs.

UTAH TRANSIT AUTHORITY, and JOHN G. MILLER,

Defendant-Respondent.

APPELLANT'S BRIEF

Case No. 17250

This is an appeal from a judgment entered after jury trial held in the Third Judicial District Court, the Honorable G. Hal Taylor presiding, (judgment was rendered after a jury trial beginning on the 30th day of May, 1980, and continuing through the 5th day of June, 1980), and from the subsequent denial by the Court of Plaintiff's Motions for judgment notwithstanding the verdict and for a new trial. Appellant also appeals from the order denying Plaintiff's Motion to amend the complaint signed by the Honorable Bryant H. Croft on January 23, 1980.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and an order granting a new trial to the Plaintiff, and an order allowing the complaint to be amended to add new Defendants and seek punitive damages.

STATEMENT OF THE ISSUES

1. The Court's refusal to give Plaintiff's requested instructions and the giving of instructions objected to by the Plaintiff deny to Plaintiff the right to a fair trial.

2. The Plaintiff was denied a fair trial by the failure of the

Defendant John G. Miller to appear at trial and the Plaintiff should have granted judgment against the Defendant John G. Miller as prayed.

3. The failure and refusal of the Court to instruct the jury the consequences of their apportionment of negligence denied to Plaintiff right to a fair trial.

4. The jury's verdict was a result of sympathy, bias, prejudi and passion and was contrary to the clear weight of the evidence.

5. The Court's refusal to grant Plaintiff's Motion to amend Complaint to assert wilful and wanton negligence denied Plaintiff a fair

STATEMENT OF THE FACTS

This case arose out of a collision between a passenger automob and a Utah Transit Authority bus which occurred on 700 East at 2100 South Salt Lake City, Utah, on January 17, 1978, at approximately 6:30 p.m. The lowing facts are uncontroverted in the record and corroborated by the test of the witnesses. It should be noted that where the testimony of the Defe John G. Miller is cited, references are to the deposition of John G. Mille was read into the record at trial and which is an exhibit on appeal Refer to the testimony of John G. Miller given at trial will be to his depositio

The collision which is the subject of this lawsuit occurred o January 17, 1978, at approximately 6:30 p.m. See Record, pp. 354-56. The tiff was driving a 1971 Ford Mustang coupe. See Record, p. 53. The Defen John G. Miller was an employee of and driving a bus for the Utah Transit A ority. Utah Transit Authority conceded at trial that Mr. Miller was emplo by them and operating the bus as their employee. Defendant Utah Transit A ority stipulated at trial that any judgment against Mr. Miller could be en

against Utah Transit Authority because of the employer-employee relationship. Both vehicles were traveling Southbound on 700 East and approaching 2100 South in Salt Lake City. See Tr. pp. 354, 292. The Plaintiff Mr. Christiansen testified that as he approached 2100 South, he signalled and turned into the right-hand lane. As he approached 2100 South, another Utah Transit Authority bus was stopped in the righthand lane waiting for a red light and Mr. Christiansen stopped approximately 10 feet behind the first bus. Tr. p. 355.

Mr. Miller testified that as his bus approached 2100 South, the Mustang driven by the Plaintiff pulled into his lane, it may or may not have been signaling, he did not recall, and the Mustang then stopped behind the first bus. Mr. Miller applied the brakes on his bus, but was unable to stop the bus prior to its impact with the Plaintiff's vehicle. See Tr. pp. 291-293. The version of the accident most favorable to the Defendant is that given by Mr. Miller in his deposition. Mr. Miller's version of the accident is as follows: "The bus was in the lane traveling Southbound on 7th East in the righthand lane with another bus ahead of him." See Tr. pp. 291-2. As Defendant Miller's bus approached the light at 21st South, which light was red, a bus was stopped to wait for the light. As Mr. Miller approached the intersection, the Mustang pulled in front, drove for a few seconds and stopped. See Tr. p. 292, lines 4-7. Mr. Miller testified that the Mustang was stopped at the time his bus hit him and that the Mustang had been stopped one or two seconds prior to the impact. Tr. p. 292, lines 17-20. Mr. Miller further testified that the stop made by the Mustang was not a panic stop or a sliding stop, but just a quick stop. Tr. pp. 292-93. Mr. Miller testified that the Mustang did not skid his brakes, did not slide his wheels, but merely made what Mr. Miller characterized

as a quick stop. Tr. p. 293. Mr. MIller further testified that the Pla had come to a complete stop and released his brakes so that the brake lig were off at the time of the collision. See Tr. pp. 293-94. Mr. Miller t fied that the vehicle he was operating had "spongy" brakes and that the b were not operating efficiently. Tr. pp. 294-95. Mr. Miller testified th he struck the Mustang with enough impact to knock it forward 30-40 feet, Tr. p. 295, but that he did not knock him forward far enough to strike th behind which the Plaintiff was stopped for the red light. Mr. Miller tes that the accident could have been prevented if his brakes on the bus had 100% effective. See Tr. p. 302, lines 17-24.

The deposition testimony of Mr. Miller appears to conflict wi written statement he gave to his company at the time of the accident. (R pp. 48-49) in that when he describes the accident in detail (Record, p. 4 states that a Mustang stopped abruptly, he applied brakes and was unable There is no mention of the Mustang pulling into his lane to create a haza

Mr. Miller testified that he had reported to the company on t day of the accident that the brakes were very spongy and that the bus had ceived a road call earlier in the day. See Record, p. 303, lines 1-8. T further indicates that Mr. Miller notified the sign out man at the time t the bus left the garage, that the brakes were spongy. See Record, p. 303 24-25; p. 304, lines 4-12. Mr. Miller testified by deposition that at th the Mustang pulled into his lane of traffic, it was 25-30 feet in front o bus. Record, p. 308, at lines 408. Mr. Miller testified that the bus an Mustang traveled in the same lane of traffic for approximately 400 feet p to the time the accident occurred. Tr. p. 308 at lines 22-25. Mr. Mille tified that he began gentle braking at the time the Mustang came into his

and that the Mustang traveled in his lane two or three seconds before it started to apply its brakes. See Tr. p. 309. Mr. Miller testified that during the two to three seconds that he traveled in the Southbound lane prior to the Mustang beginning its braking maneuver, he was braking gently but did nothing to increase the distance between the Mustang and the bus. See Record, p. 309 at lines 4-19. During the whole time that the Mustang was in his lane, Mr. Miller was apparently attempting to slow the bus through gentle braking. See Record, pp. 309-311. Mr. Miller testified that during the two or three seconds that he estimated the Mustang was in his lane before he started to brake, he had not done anything to increase the actual distance between his bus and the Mustang, See Record, p. 312, lines 14-22, yet in the accident report he gave the company, he blamed the bad brakes for the accident.

Mr. Miller testified that at the time of the collision, the road was wet. See Record, p. 313, lines 22-23. Mr. Miller watched the Mustang as it stopped and even though the road was wet, the Mustang did not slide or fishtail as it stopped, but just stopped in a stright line without skidding. See Tr. p. 314 at lines 2-11. Mr. Miller testified that in his opinion, if the brakes had been up to par, he would have been unable to stop without colliding with the Mustang. See Record, p. 302 at lines 17-24.

The testimony of Mr. Miller in his deposition differs significantly from his written statement made immediately after the accident. See Record, pp. 48-49, 283-320. In the accident report, Record pp. 48-49, Mr. Miller makes no mention of the Mustang pulling into his lane. Mr. Miller indicates in his statement that bad brakes on the bus caused the accident. Due to his failure to appear at trial, Plaintiff was precluded from cross examination on this

significant change in his description of the events of the collision.

The testimony of Mr. Christiansen was that he pulled into the hand lane of travel a good one-half block North of 21st South, came to a s behind a bus stopped for the red light at 21st South, and that he was park behind the first bus waiting for the light to change when he noticed a sec bus approaching from the rear in his rear view mirror. It was this second which subsequently collided with his vehicle. See Record, pp. 355-56.

The Plaintiff-Appellant received numerous injuries as a result the collision referred to above which injuries were corroborated by the te mony of Dr. Reams, Dr. Wright, Dr. Ruoff, Dr. Nelson and Dr. Horne. Mr. C tiansen himself testified regarding the pain and suffering he has experien as a result of the injuries received in the collision. Mr. Christiansen f testified that as a result of the injuries and disabilities sustained by h in the collision, he had lost income and was damaged by being unable to wo certain periods of time. The injuries of Mr. Christiansen were corroborat by testimony from his mother, Ruth Christiansen, as well as by the testimo of the doctors who appeared and testified on his behalf. Dr. Horne testif that as a result of the injuries sustained in the collision, Mr. Christian had certain permanent disabilities.

ARGUMENT

I. THE COURT'S REFUSAL TO GIVE PLAINTIFF'S REQUESTED INSTRUCTIONS AND THE GIVING OF INSTRUCTIONS OBJECTED TO BY THE PLAINTIFF DENY TO PLAINTIFF THE RIGHT TO A FAIR TRIAL.

The trial Court, over the objection of the Plaintiff, gave fou instructions requested by the Defendant numbered 21, 22, 23 and 25 of the instructions, Record at pp. 158-161, and refused to give Plaintiff's reque

instruction no. 8 (Record at p. 115). The Court also refused to give an instruction requested by the Plaintiff relating to the legal affect of the apportionment of negligence by the jury. The Court's refusal to give that particular instruction will be discussed at Point III in the brief. The Plaintiff properly took exception to the refusal to the Court to give its instruction no. 8 and to the giving of instructions no. 21, 22, 23 and 24 given by the Court and requested by Defendants. See Record, pp. 728-730. The Plaintiff further objected to the restriction on closing argument imposed by the Court wherein the Plaintiff was limited to 30 minutes for its closing argument. See Record, p. 730.

The Court refused to give Plaintiff's requested instruction no. 8 which would have instructed the jury as follows:

> If you should find that it was within the power of the parties to produce stronger and more satisfactory evidence than that which was offered on a material point, you may view with distrust any weaker and less satisfactory evidence actually offered by him on that point, unless such failure is satisfactorily explained.

The Defendants failed to produce at trial the Defendant John Miller, the supervisor who signed out the bus to John Miller on the date of the accident, and the mechanic who repaired the brakes on the bus after the collision occurred. The Defendants never at any time during the trial offered a satisfactory explanation as to why these three witnesses were not at the trial. In fact, as to the Defendant John Miller, the Plaintiff claims a particular prejudice in his not being available to testify at trial which is discussed herein as Point II. One of the critical contentions of the Plaintiff in the case was that at the time John Miller took the bus onto the road, he communicated to the sign-out man that the bus had bad brakes and was told by the sign-out man to take the

bus out anyway. The Defendant's defense was based partially on the fact they claimed the bus did not have bad brakes when it was taken onto the r yet they failed to produce the witness who could have given an opinion ba actual observation, the sign-out man, who Mr. Miller states drove the bus the block before he took it out. It was clearly within the power of the Transit Authority to produce stronger evidence for their claim that the b did not have bad brakes, in the person of the sign-out man, than was prod at trial.

With respect to the particular mechanic that worked on the br of the bus, on two separate occasions the Plaintiff attempted to take his sition, see Record at pp. 73, 77, and the Utah Transit Authority failed o occasions to produce the mechanic who worked on the brakes for deposition Again at trial the Defendant Utah Transit Authority defended the Plaintif claim that the brakes were faulty by bringing in a supervisor who had not on the particular brakes in question, who testified and gave opinions bas a report filed by the mechanic who did the work in lieu of producing the mechanic himself. Thus, there was certainly a situation in the case whic tified the instruction no. 8 requested by the Plaintiff. By refusing to said instruction, the Plaintiff was precluded in his closing argument fro ing to the jury the fact that the less trustworthy evidence produced by t Defendant should be viewed in a more critical light than it was because o failure to produce the actual witnesses who had the firsthand knowledge o situation. Thus, the Plaintiff respectfully urges that it was prejudicia for the Court to refuse to give requested instruction no. 8.

The Court, over the objection of Plaintiff, gave instruction

Record at p. 158. The Plaintiff specifically objected to the last paragraph of said instruction where it states that each driver was required to use due care in the following respect, to-wit:

> Not to suddenly stop or decrease his speed without first ascertaining that he can do so with reasonable safety and, if other vehicles are to be affected by such movement, not without first giving the appropriate signal to the driver to the rear that such movement is to be made.

The Plaintiff objected to this particular paragraph of the instruction on the grounds that it is misleading to the jury. The evidence in the case is that both the Plaintiff's vehicle and the bus which was following him were approaching a red light at 2100 South on 7th East. The evidence is uncontroverted that Mr. Christiansen in his vehicle stopped behind a bus which had stopped for a red light. Both drivers were aware of the fact that as they approached the intersection that a stop would have to be made because the light was red. Thus, to instruct the jury regarding a duty "not to stop or suddenly decrease his speed without first ascertaining that he can do so with reasonable safety," is inappropriate because the Plaintiff had a duty to stop for the red light and not signal other than his brake lights could arguably be required.

There is no evidence in the case that would necessitate the giving of the last paragraph of instruction no. 21. The appropriate signal is given by the brake lights of the vehicle at such time as the Plaintiff puts his foot onto the brake pedal. Because of the fact that the bus driver is charged with knowledge that the Mustang must stop at the red light, to give this instruction says to the jury that they could properly find the Plaintiff negligent for having stopped his vehicle behind a bus stopped for a red light when the stop that he made was required by law. Such instruction is misleading and prejudicial

to the Plaintiff.

The Court gave, over the objection of Plaintiff, instruction 22 (Record at p. 159) which states:

> You are instructed that a person operating an automobile upon a public highway has an obligation to keep a reasonable lookout to the rear, as well as in all other directions, from which traffic may be approaching in order to avoid danger to himself and others and to operate his vehicle in a safe and prudent manner in accordance with the conditions then and there existing including those conditions which might reasonably be anticipated. The duty of one operating an automobile to keep a reasonable lookout to the rear increases when the driver contemplates slowing or stopping his automobile upon the traveled portion of the highway.

It is the contention of the Plaintiff that this particular instruction is erfluous and unduly emphasizes whatever duty there may have been on behal the Plaintiff to exercise care in the operation of his vehicle. Assuming an instruction is proper, instruction 21 has already stated that the Plai has an obligation to use due care in operating his vehicle. The collisio question was caused by the faulty brakes of the bus and by the fact that bus driver did not keep a proper lookout and perhaps followed too close. Mr. Christiansen was obligated to stop at the red light to avoid collidin vehicles in front of him, instruction no. 22 unduly emphasizes a duty of Christiansen to safely operate his vehicle when there is no evidence in t record that would support a violation of Mr. Christiansen of any duties h have had to the following vehicle.

The Court, over the objection of the Plaintiff, gave instruct no. 23, which the Plaintiff contends under the facts in the case is a mis ment of the law under the circumstances of this case. In instruction 23,

Court instructs the jury that a person shall not stop or suddenly decrease the speed of the vehicle without giving an appropriate signal as provided by law, when he has an opportunity to give such a signal. It further states that the signal to be given may be either made by the hand extended downward or by the illumination of stop lights on the rear of the vehicle. The Defendant specifically objects to paragraph 3 of the said instruction on the grounds that it tells the jury that the illumination of brake lights does not meet the statutory requirement of giving an appropriate signal and that it directly conflicts with paragraph two which states that the giving of the mechanical signal by the brake lights is acceptable. The instruction is utterly confusing and would allow the jury to adopt the view that Mr. Christiansen violated his duty to the following vehicle by not giving an appropriate signal of his stop when, in fact, there is no evidence in the case upon which the jury could properly base a finding that Mr. Christiansen did not properly signal his stop. Even if we were to assume that Mr. Christiansen did not signal the stop, a fact for which there is no support in the evidence, the bus driver is charged with knowledge that Mr. Christiansen is going to stop because of the fact that they are approaching an intersection governed by a red and green traffic signal which is red for the Christiansen vehicle as well as the bus which is following him. The Plaintiff respectfully submits that paragraph three of instruction no. 23 is a complete misstatement of the law as it relates to the facts in this case. Plaintiff further contends that instruction 23 is repetitious and merely restates the principles set forth in instructions 21 and 22 and places undue emphasis on the duty to signal to following vehicles an intention to stop. The law does not require any further signal from a vehicle stopping at a red light than

illumination of brake lights and indeed the red signal light is a signal vehicles should stop. Instruction 23 is prejudicial to the rights of the tiff, and is clearly responsible for causing the jury to come to the verd it did. Clearly the instruction created a misunderstanding of a law rela to the duty of the lead vehicle in a rear end collision situation and cau the jury to assess more negligence to Plaintiff than would have been asse if property instructions had been given

The Court, over the objection of the Plaintiff, gave instruct no. 24 submitted by the Defendant (See Record, p. 161.) This instruction what is commonly known as the sudden peril instruction. However, there i evidence in the record from which the jury could properly find that the b driver was confronted with what in the contemplation of the law is referr a situation involving sudden peril. Taken in the light most favorable to Defendant, it is uncontroverted that the bus driver followed the Christia vehicle for some period of time prior to the time that the Christiansen v came to its stop. The bus driver, even though he was aware of the fact t the bus had bad brakes, and that the roads were slick from the rain, did ing during the period of time he followed the Christiansen vehicle, to in the distance between the Christiansen vehicle and the bus to a distance t he felt was a safe stopping distance. The bus was approaching a red ligh 21st South as was the Christiansen vehicle. The bus knew that the Christ vehicle would have to stop for the red light. The bus had failed to keep mum safe stopping distance between himself and the Christiansen vehicle, therefore, when the Christiansen vehicle stopped, the collision resulted to the negligence of the bus driver, not because of any sudden peril in t

the bus driver found himself. The giving by the Court of instruction no. 24 was prejudicial to the Plaintiff in that it presented a distorted situation to the jury and would allow them to find negligence on the Plaintiff or a lack of negligence on the Defendant which did not relate to the actual evidence and circumstances surrounding the collision as presented by the testimony.

This Honorable Court in the case of Solt v. Godfrey, 25 Utah 2d 210, 479 P.2d 474 (1972), reversed a case wherein a jury had found for the Defendant in a personal injury situation and the trial court had refused to give an instruction relating to "to look is to see." In reversing the case and holding that the refusal to give such an instruction was prejudicial error, this Honorable Court stated

> This instruction properly presented the Plaintiff's theory of the case and should have been given, although it was refused. . . It appears to us that the failure to give the requested instruction and the giving of the one excepted to, amounted to errors which undoubtedly caused the jury to decide as it did. We therefore, reverse and remand for a new trial

In so holding, the Utah Supreme Court followed the practice which appears to be universal, that when the trial court refuses to give a proper instruction relating to one of the major theories of the Plaintiff's case, or gives an instruction which is prejudicial to the Plaintiff's case, such is prejudicial error entitling the Plaintiff to a new trial.[1]

[1]See e.g., Stephens v. Dulaney, 78 N.M. 53, 528 P.2d 27 (1967); Drury v. Palmer, 84 Idaho 558, 375 P.2d 125 (1962); Kemp v. Pinal County, 13 Ariz. App. 121, 474 P.2d 840 (1970); Bradley Chevrolet, Inc. v. Goodson, 455 P.2d 500 (Okla., 1969); Smith v. Holst, 275 Ore. 29, 549 P.2d 671 (1976); Izett v. Walker, 67 Wash. 2d 903, 410 P.2d 802 (1966); Davis v. Cline, 493 P.2d 363 (Colo., 1972); Hasson v. Ford Motor Co., 138 Cal. Rep. 705, 564 P.2d 857 (1977); Hayes v. Moscow Alfalfa Products, Inc., 217 Kan. 184, 535 P.2d 461 (1975); Chevez v. Robberson Steel Company, 584 P.2d 159 (Nev., 1978); Wollan v. Lord, 142 Mont. 498, 385 P.2d 102 (1976.)

In Stephens v. Dulaney, supra, the New Mexico Supreme Court st

> A party is entitled to have the jury instructed upon all correct legal theories of this case which are pleaded and supported by the evidence, and a failure by the trial court to so instruct constitutes reversable error.

It would thus appear as set forth in Solt v. Godfrey, supra, that the fail of the Court to give requested instructions, or the giving by the Court of jectionable instructions, is prejudicial and should allow the party advers affected by the prejudicial error to have a new trial. In this case, the structions given by the Court over the objection of the Plaintiff clearly judiced the Plaintiff in that the net affect of said instructions was to t the jury that they might properly find the Plaintiff to be negligent becau of his failure to give some sort of signal of his stop other than the illu ation of the brake lights prior to his stopping for the red light at 21st These instructions are clearly misleading to the jury. The affect of thes instructions is that a person approaching a red light who puts on his brak thereby illuminating the brake lights, and stops for the red light, has so how violated his duty to signal his stop to following vehicles. This inte tation of the statute which requires a party to signal his intention to st a red light is clearly wrong when applied to the facts in this case. The pose of a statute requiring a signal for a stop is that a driver should no following vehicles that the vehicle intends to stop. This is useful when vehicle is stopping in a situation where the following vehicles could not expected to know of the impending stop of the signalling vehicle. However to require more than the illumination of the brake lights when one stops f red light at a controlled intersection, is clearly not in the contemplatio of the protections afforded by the statute. When the Court gave these ins

requested by the Defendant, the jury obviously became confused, especially with the arguments of defense counsel in closing that Mr. Christiansen had violated his duty to signal to the following vehicle that he intended to stop and that this was a basis for the jury finding him negligent in this collision. The Plaintiff respectfully urges the Court to find that the giving of these instructions was prejudicial error in that the driver of the bus was charged with knowledge that the Plaintiff's vehicle intended to stop behind the traffic that had already stopped for the red light. When one looks at the verdict of the jury, to-wit, that the Plaintiff was 70% negligent and the Defendant 30% negligent, the only conclusion that can be reached is that the instructions unduly emphasized the signal for stopping a vehicle and misdirected the jury. Under a proper set of instructions, reasonable minds could not differ on the fact that in the circumstances of this case, the Plaintiff fulfilled his duty to signal a stop and the Defendant was clearly more negligent than the Plaintiff.

II. THE DEFENDANT WAS DENIED A FAIR TRIAL BY THE FAILURE OF DEFENDANT JOHN G. MILLER TO APPEAR AT TRIAL AND THE PLAINTIFF SHOULD HAVE BEEN GRANTED JUDGMENT AGAINST THE DEFENDANT JOHN G. MILLER AS PRAYED.

The Plaintiff's case at trial was severely prejudiced by the failure of the Defendant Miller to appear as a witness at the trial. A discovery deposition was taken from the Defendant John G. Miller on Tuesday, January 8, 1980, in preparation for the litigation. At the time of the deposition, the Plaintiff was assured by counsel for Defendant that the Defendant John G. Miller would be available to testify at the trial on the merits. Because of these assurances, the deposition taken by the Plaintiff's counsel was taken for discovery purposes only and not with any intention of being used as a testimonial

deposition at trial. In fact, there are several glaring discrepancies bet the testimony given in the deposition and the statement made in writing by Defendant John G. Miller to Utah Transit Authority regarding the circumsta of the accident which was prepared within a day or two after the accident pened. It was the intention of Plaintiff to use these discrepancies to im the Defendant John G. Miller should he at trial give testimony similar to given in his deposition about the circumstances surrounding the accident. accident which is the basis of this lawsuit occurred on January 17, 1977 a 6:35 p.m. On January 18, 1977, John G. Miller filed with the Utah Transit ority a two-page document entitled "Transportation Loss Report." See Reco pp. 48-49. In the Transportation Loss Report, John G. Miller states that weather was rainy, that the roadway was wet and then he gives a brief summa of the accident as follows: "Bumped into rear of car just as I was leavin stop." The next section of the Report asks him to describe the accident i tail. In so doing, Mr. Miller states:

> I had just stopped to pick up a passenger and was pulling back into traffic when a yellow 1971 Ford Mustang, License No. JED 320 stopped abruptly. I immediately applied brakes but was unable to stop before running into the car at from 5-10 mph. If brakes had been 100%, I would have been able to stop. My foot was clear to the floor for a full 25 feet. Signed John G. Miller.

On page two of the Report, under the section entitled "Condition of Equipm Mr. Miller states "brakes very spongy and bus had received a road call ear in the day." He also states that he notified the sign-out man of the defe at 4:45 p.m. Under the section entitled "Did you notice any equipment def he had marked "yes." See Record at p. 49. In his deposition, Mr. Miller

the accident somewhat similar to the statement given in his report. However, he states in answer to the question "Tell us how the accident occurred",

> I had just pulled the bus over and dropped off a passenger or picked one up. I was in the right lane and was remain-in the right lane. There was another bus ahead of me. As I was nearing the light at 2100 South, which was red, the other bus was stopped there waiting for it. I started to stop, when this guy in the Mustang pulled in between us and stopped, just stopped. I put the brakes to the floor. It brought it down, but just didn't bring it down to a stop before I hit him." Record at pp. 291-92.

In the version of the accident given in the deposition, Mr. Miller states that the yellow Mustang pulled into his lane and stopped suddenly, while he was stopping for the red light at 2100 South. Yet in the original report filed with the Transit Authority, Mr. Miller makes no mention of the Mustang pulling into his lane in such a manner that it contributed to the accident. In fact, he merely observes that the yellow Mustang is there and that he could not stop his bus in time to avoid running into the rear. At trial, counsel for Defendant based their defense to a great degree on the idea that Mr. Miller had pulled his car into the lane where the bus was traveling in such a manner that the bus could not avoid striking the Mustang. This was a critical part of their defense. They argued to the jury that Mr. Christiansen had pulled into the West lane of traffic in front of the bus driven by Mr. Miller and stopped his vehicle in such a manner that it was impossible for the bus to stop and that the accident resulted from Mr. Christiansen pulling into the lane when there was not sufficient room to do so. This is completely contrary to the version of the accident originally given by Mr. Miller, and was an item that counsel for Plaintiff purposely did not elaborate on in the discovery deposition because counsel wanted to use the two different versions of the accident to impeach Mr. Miller

III. THE FAILURE AND REFUSAL OF THE COURT TO INSTRUCT THE JURY ON THE CONSEQUENCES OF THEIR APPORTIONMENT OF NEGLIGENCE DENIED TO PLAINTIFF HIS RIGHT TO A FAIR TRIAL

At the time that the Court held the hearing in chambers on the structions to be given the jury in the case, counsel for Plaintiff asked t Honorable Judge Taylor what his feelings were with regard to instructing t jury about the legal consequences of its apportionment of negligence in li of the cases of McGinn v. Utah Power & Light, 529 P.2d 423; and the dissen opinion of Justice Maughan in Lampkin v. Lynch, 600 P.2d 530 (1979). Judg Taylor indicated at that time that until such time as the Supreme Court in overruled McGinn v. Utah Power & Light, supra, he was going to follow its ing and would not consider an instruction to the jury relating to the lega consequences of its apportionment of negligence. Plaintiff asked the Cour consider giving such an instruction but because of the adamant position of Court on this issue, Plaintiff did not pursue that point. The Plaintiff d assert, however, that the failure of the Court to instruct the jury about legal consequences of its negligence led to a harsh and unfair result in t trial and thwarted the interests of justice in the present case. The Plai specifically contends that in this situation where the accident arose out a rear end collision between a bus and an automobile driven by the Plainti the equity is clearly in favor of the Plaintiff recovering for his injurie However, where the jury is kept in the dark as to the affects of its appor ment of the negligence, the final affect in the present case was to deny t Plaintiff any recovery at all. The Plaintiff concedes the fact that in th case of McGinn v. Utah Power & Light, supra, this Honorable Court stated t it was error for the trial court to inform the jury as to the legal affect

its apportionment of the negligence in a comparative negligence situation. However, in recent years, the majority of states appear to have swung to the opposite point of view and it now appears that the weight of opinion is moving in favor of allowing the jury to know the legal effect of its apportionment. See e.g., Seppi v. Betty, 99 Idaho 186, 579 P.2d 683 (1978); Roman v. Mitchell, 82 N.J. 336, 413 Atl.2d 332 (1980); Krengel v. Midwest Automatic Photo, Inc., 295 Minn. 200, 203 N.W.2d 841 (1973); Porsche v. Gulf Mississippi Marine Corp., 390 F.Supp. 624 (E.D. La. 1975). This is clearly pointed out in the concurring and dissenting opinions in the case of Lampkin v. Lynch, supra. In the concurring opinion of Justices Wilkins and Steart, they clearly indicate that in their opinion the Court should reconsider its position announced in McGinn v. Utah Power & Light, supra, that it is prejudicial error if in a comparative negligence case the Court instructs the jury as to the effect or impact of its fact finding answers in a special verdict will have on the outcome of the case. Supra at 533.

In his dissenting opinion, Justice Maughan clearly stated that in his opinion the McGinn case, supra, should be reconsidered. The position the Judge took at trial in this case is that although the Justice appeared to state in Lampkin v. Lynch that when the matter is properly raised on appeal, McGinn will be reconsidered, until such time as the Court actually reverses McGinn, it is binding on the lower Courts. Plaintiff urges, in fact, McGinn v. Utah Power & Light should be reversed and that it is proper for the trial court to inform the jury of the affects of its apportionment of negligence in a comparative negligence situation.

In the case of Seppi v. Betty, supra, the Idaho Court gives a very well reasoned opinion on the question of informing the jury of the effect of

its apportionment. The Idaho Court points out that without such knowledge jury is easily confused and injustice is likely to result. For example, i points to instructions given in the case which tell the jury to determine damages proved by the evidence to have proximately resulted from the negli of the defendants" and then asks them in the special verdict form to deter "the total amount of damages sustained by both plaintiffs." 579 P.2d at 6 This is precisely how the jury was instructed in this case. In his instru 26, Judge Taylor stated that the jury was to assess only damages proven to been caused by Defendant's negligence and then in question 4 of the special dict asks for total damages sustained by the Plaintiff. Record, pp. 163, This is precisely the situation the Idaho Court in Seppi, supra, claims is fusing to the jury if a consequences instruction is not given. The Seppi soning is compelling for the proposition that McGinn should be reversed.

In the Roman case, supra, the New Jersey Supreme Court states:

> Plaintiffs argue that unless the jury is made aware of the legal effect of its findings as to percentages of negligence, such findings may be premised on an erroneous concept of the law and can result in a molded judgment far different from that intended by the jury. In this very case it has been suggested that the jury may well have concluded that its findings of the infant plaintiff's negligence quota of 75% and defendant Mitchell's 25% would result in a monetary verdict for plaintiff for 25% of the damages found.
>
> We believe the contention has merit and that a jury in a comparative negligence situation should be given an ultimate outcome charge so that its deliberations on percentages of negligence will not be had in a vacuum, or possibly based on a mistaken notion of how the statute operates. Prior to the adoption of the comparative negligence statute when the contributory negligence of a plaintiff was an absolute bar to recover in this State, a jury was instructed as to the

> outcome of its findings, by a charge that if it found contributory negligence to any substantial degree, its verdict must be for the defendant. 413 Atl.2d at 327.

They then went on to hold that reason dictates that a jury be informed of the consequences of the apportionment of negligence to prevent injustice to the parties.

The position that McGinn should be reassessed and reversed to the extent that it precludes informing the jury of the affect of its apportionment, is supported in an article in the Utah Bar Journal entitled "Utah Comparative Negligence Practice Does Blindfolded Justice Demand Blindfolded Juries?", Utah Bar Journal, Vol. 7, Nos. 10-12; Vol. 8, Nos. 1-6, Winter, 1979-Summer, 1980. The author points out the fact that there are legal arguments on both sides of the question and that while in the early days of comparative negligence, the weight of scholarly though appeared to be on the side of keeping the juries ignorant of the affect of their apportionment, the more recent trend and the more reasoned argument seems to be more in favor of allowing the juries to know what affect their apportionment will have on the damages recovered by the Plaintiff.

Ms. Barton's article cites the findings of the University of Chicago Jury Project, Broder, The University of Chicago Jury Project, 38 Neb.L.Rev. 744 (1959), and sets forth that the findings of the jury study indicate that when a jury is not informed of the affect of their apportionment of the damages in a case, notwithstanding the fact that the Court instructs them to award the total damages, they often, if not in a majority of the cases, reduce the amount of damages they award as a total to reflect their apportionment of the negligence. If one looks at the answers to the special interrogatories in this case,

it is a lot easier to reconcile the meager damage award given by the jury being a reflection of this principle, i.e., that the jury set forth what figured to be 30% of the Plaintiff's damages at the figure given rather th that the sum they awarded was the total amount of damages suffered by the tiff. This is especially true since instruction no. 26 tells the jury to award damages caused by Defendant's negligence. See Record, p. 163.

Leon Green, an eminent authority in the field of tort law, poi out in an article Negligence Law, No Fault and Jury Trial, 50 Tex. L.Rev. (1972) that there is a disparity in the results which are probably reached a comparative negligence case depending on who is the fact finder. In the the fact finder is the Judge, the Judge, of course, knows the affect of th portionment and, therefore, one is sure that a proper apportionment of the gence and damages is made. However, when we blindfold the jury so that th do not know the affect of the apportionment of their negligence, Green sta that denying instructions to guide the jury in the performance of its func because of fear that it may reach a judgment based on a layman's sense of can hardly be called jury trial. 50 Tex. L.Rev. at 1114. While early cas supported the idea that the jury should be kept in ignorance as to the eff of its apportionment, the Courts and legislatures of the country appear to swinging now in the opposite direction. For example, the legislatures in State of Minnesota, Colorado, North Dakota, Wyoming and Kansas have, by la decreed that juries reach their special verdict answers with knowledge of applicable law. See Barton, supra, at page 28.

Other states have reached the conclusion that the jury should told of the affect of its apportionment by Decree of Courts. See e.g.,

Smith v. Gizzi, 564 P.2d 1009 (Okla., 1977); Seppi v. Betty, supra; Porsche v. Gulf Mississippi Marine Corp., supra; Roman v. Mitchell, supra; Krengal v. Midwest Automatic Photo, Inc., supra; as stated by Ms. Syd Barton in the conclusion of her article:

> Adherence to McGinn by the Utah Courts results merely in the blind leading the blind. Especially in the face of opposing authority, a single decision resting on cases from other states which no longer stand in their own jurisdictions is no reason to keep our comparative negligence jurors blindfolded. Barton, Utah Comparative Negligence Practice, supra at 35.

Therefore, the Plaintiff respectfully urges that this Court overrule the holding in McGinn v. Utah Power & Light, supra, and based on the failure of the trial court in this case to instruct the jury on the affect of its apportionment of negligence as requested by the Plaintiff-Appellant, that this case be reversed and remanded to the District Court for a new trial.

IV. THE JURY'S VERDICT WAS A RESULT OF SYMPATHY, BIAS, PASSION AND PREJUDICE AND WAS CONTRARY TO THE CLEAR WEIGHT OF THE EVIDENCE

The jury answered the special interrogatories and stated

1. Harry Christiansen was negligent.

2. His negligence was the proximate cause of the accident.

3. Defendants Utah Transit Authority and John G. Miller were negligent.

4. Their negligence was a proximate cause of the accident.

and then apportioned the negligence as follows:

Christiansen 70%.

Defendants Utah Transit Authority and Miller 30%.

Record at 176. They further assessed special damages at $7,700.00 and general

damages of $5,000.00. Record at 177.

The apportionment of negligence given by the jury and the amo of damages clearly show that the jury was acting contrary to the weight of evidence in the case and had been confused considering the apportionment o negligence, the affect on damages and was clearly a result of sympathy, bi passion and prejudice.

The factual evidence as to the collision is clear. The Plaint automobile stopped behind another vehicle for a red light at the intersect of 2100 South and 7th East. After the Plaintiff had been stopped for a co of seconds, the car he was driving was then struck in the rear by a Utah Tr Authority bus driven by Defendant Miller. For the jury to assess 70% of t responsibility for the collision to the Plaintiff the driver of the vehicl which was struck from behind by the bus, is clearly contrary to the evidet in the case.

That the jury's general damage award for pain and suffering wa substantially less than the special damages for medical bills and lost wag indicates that there is a good probability that the jury acted in precisel the manner set out in the Chicago Jury Study set forth in the article on U comparative negligence practice heretofore cited. Utah Bar Journal, supra at pp. 27-35. See also Broder, The University of Chicago Jury Project, su It appears that the jury determined that the negligence was 70%-30% and th decreased the damages awarded based on those proportions and then filled i the answers to the questions notwithstanding the Court's instructions that should not do that. Thus, as stated in the article "when, despite instruc to set the amount of the Plaintiff's total damages, the jury reduces the a

because of the Plaintiff's negligence, and the Judge, pursuant to the prescribed procedure reduces it again, a double deduction results." See Barton, Utah Comparative Negligence Practice, supra at p. 31. The Chicago Jury Project shows that this confusing result is a common occurrence.

For the jury to assess negligence to the Plaintiff of 70%, and the bus driver and bus company 30% is simply contrary to good sense and reason. In Heft and Heft, Comparative Negligence Manual (1971), the authors, who are authorities in the field of comprative negligence, set forth figures that their research has shown to be typical apportionments in typical cases. They state that in the situation involving a rear end collision, the negligence should be apportioned 100% to the rear vehicle and 0% to the front vehicle in the normal situation. See Heft and Heft, supra, at §4.50. In discussing this apportionment of 100%-0%, they state

> This is the ordinary case of the rear end collision. The Defendant driver hits the Plaintiff's car, which has been stopped at an arterial intersection for several seconds; and the oncoming Defendant is guilty of negligent look out or unlawful speed or both. It was heretofore indicated that not all rear end collisions are settled or litigated on a percentage of 100%. Obviously, in cases where the Plaintiff stops without signal, or stops in the country or at a place where stops are not ordinarily made, or stops abruptly, this percentage must be modified. Ordinarily, brake lights of the stopping car are sufficient warning. However, there are instances when the driver of the stopping car is aware, or should in the exercise of ordinary care be aware, of traffic conditions to the rear which makes stopping at that point and time negligent. Heft and Heft, supra, at §4.50. (Emphasis added.)

In the present case, taken in the light most favorable to the Defendant, the evidence is clear that the bus had sufficient time to stop without colliding with the Plaintiff had the bus driver been exercising reasonable care. This

fact, coupled with the bus driver's statement that the brakes on the bus s spongy or defective, leads to the inescapable conclusion that the bulk of blame for this particular collision must lie with the Defendant Miller an bus company. According to Heft and Heft, supra, the 100%-0% apportionmen negligence in a rear end case could be modified as a result of an unexpec stop, or a stop in a situation where one would not ordinarily expect a ve to be stopping. Heft and Heft notes that the brake lights of the Plainti care are adequate warning of an impending stop. With brake lights admitte on and both the bus and the Mustang approaching a red traffic signal to ve approaching Southbound at 21st South, makes it impossible for the Defenda to argue that the stop made by the Mustang was unexpected. The bus drive deposition testimony does indicate that the stop was sudden. However, the er's deposition testimony was that it was not a panic stop or a skidding such that it should have surprised the following bus driver. The bus dr was approaching a red light, there were vehicles in front of him. A comm sense interpretation is that the bus driver should have been slowing his and expecting the vehicles ahead of him to stop. Clearly, for the jury i present case to have assessed 70% of the fault for this particular collis to the Plaintiff's vehicle, which had stopped behind another vehicle at a light and was then struck from the rear by the bus following, is a manifes carriage of justice.

The cumulative effect of the other errors set forth in the ins ing of the jury and the failure of the Court to allow the issue of gross, and wanton negligence to be prevented, through Plaintiff's amended Compla coupled with other errors set forth as grounds for reversal in this case

the Plaintiff, is that the jury reached a verdict which was clearly contrary to the evidence in the case, which resulted from passion, sympathy and prejudice. This Court should reverse the trial Court's order to prevent a manifest miscarriage of justice.

As stated in Korleski v. Lane, 10 Wis.2d 163, 168; 102 N.W.2d 34 (1960), the appellate court has the right to grant a new trial in the situation where there has been an obvious miscarriage of justice and the apportionment of negligence is contrary to the weight of the evidence. Here, even taken in the light most favorable to the Defendant, the facts do not warrant the apportionment of 70% of the negligence and causation for the collision to the Plaintiff. Clearly, the jury has created an injustice which should be corrected by this Court through the granting to the Plaintiff of a new trial.

V. THE COURT'S REFUSAL TO GRANT PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO ASSERT WILFUL AND WANTON NEGLIGENCE DENIED PLAINTIFF A FAIR TRIAL.

On the 9th day of January, 1980, the Plaintiff-Appellant made a motion to the Court to amend the Complaint to add claims against Utah Transit Authority for wilful and wanton negligence and for punitive damages and to add additional Defendants who were employees of the Utah Transit Authority. This motion was based upon admissions made by John G. Miller in his deposition to the effect that the brakes on the bus were faulty and that he had been ordered to take the bus onto the road with faulty brakes. Subsequent to these declarations in the deposition of John G. Miller, Plaintiff-Appellant hired a private investigator to take statements from other driver-employees of the Utah Transit Authority and Plaintiff-Appellant obtained statements from numerous drivers indicating that it was the management policy of the Utah Transit Authority

and Plaintiff-Appellant obtained statements from numerous drivers indicat that it was the management policy of the Utah Transit Authority to send bu onto the road when it was known that the brakes on said buses were defect Based upon these statements and the statement of Mr. Miller that in the pa cular situation involving the Plaintiff the bus which collided with Plain vehicle had been put onto the road with defective brakes, the Plaintiff m a motion to the Court to add a count in the complaint seeking punitive da for wilful and wanton negligence against Utah Transit Authority and their agement executives.

The motion of the Plaintiff to amend the complaint was argued fore the Honorable Bryant H. Croft on the 18th day of January, 1980. Cou for Defendant argued that the motion should not be granted because the tri was set and the Defendant would be prejudiced if the Plaintiff were allow to amend its complaint at such a late date. The Plaintiff contended that not feel the Defendant was prejudiced; that if, in fact, the Defendant was udiced, the trial date could be stricken and reset at a later date granti the Defendant the time it needed to prepare for the claims in the new cou and further, that the Plaintiff had a right to have all his claims presen to the Court and the jury in the above-entitled case. The Plaintiff clai he had a right to have a determination by the jury on the merits as to the tion of the gross, wilful and wanton negligence of Utah Transit Authority its employees and agents and the question of punitive damages could only claimed against the Defendant Utah Transit Authority upon a showing by the tiff that the Utah Transit Authority acted with malice. The Plaintiff co that point of view and further asserted that the question of wilful and wa

negligence related to the apportionment of negligence and that the negligence of the Plaintiff would be no defense in a situation involving gross, wilful and wanton negligence of the Utah Transit Authority in sending the buses onto the roads when it knew they had bad brakes. The Court, after hearing arguments of counsel, denied the Plaintiff's motion to amend the Complaint and signed an order denying said motion on the 23rd day of January, 1980.

The Plaintiff contends that the District Court erred in failing to allow to Plaintiff the opportunity to amend his Complaint to set forth claims of gross, wilful and wanton negligence and to make claims for punitive damages based on the facts discovered by the Plaintiff's relating to the sending of buses onto the road by Utah Transit Authority with bad brakes. It cannot be argued by the Defendants that they would have in any way been prejudiced by allowing the amendment or that such prejudice should have been the basis for denying the motion. The Supreme Court of the State of Alaska treated this problem in the case of Wright v. Vickaryous, 598 P.2d 490 (Alaska, 1979). In the Wright case, supra, the Alaska Supreme Court properly concluded that if an amendment to the pleading is sought by the Plaintiff and this amendment presents a new theory, the proper remedy for a claimed lack of time to prepare for trial is a continuance to be granted to the Defendant and not to prevent trial on the merits on the new theory. See also, Booth v. Red Eagle Oil Co., 393 P.2d 871 (Okla., 1964).

The failure of the Court to allow the Plaintiff to amend the Complaint precluded the Plaintiff at trial from bringing in testimony of other bus drivers to show that in fact the bus company had a policy of sending buses with faulty brakes onto the roads and that the primary cause of the collision

was the fact that the bus company had sent a bus onto the road with fault

As stated by Mr. Miller in the statement given to the bus company on the

of the collision (Record at pp. 48-49), at the time he gave the initial s

ment, his sole claim for the cause of the accident was the faulty brakes

bus because as he stated

> If brakes had been 100%, I would have been able to stop. My foot was clear to the floor for a full 25 feet. Record at p. 48.

Mr. Miller further stated

> Brakes very spongy and bus had received a road call earlier in the day. Record at p. 49.

The fact that Mr. Miller stated that the bus company sent the bus into se

knowing that there were bad brakes, and the evidence of the statements o

employees obtained by Plaintiff's private investigator that this was a co

practice of the Utah Transit Authority, was sufficient evidence to go bef

the jury on the question of wilful and wanton negligence. In the event

the jury had believed that there was wilful and wanton negligence on beha

of the Utah Transit Authority, then the negligence of the Plaintiff here

have been no defense to Plaintiff's claims for injuries. It is the conte

of the Plaintiff herein that the approach taken by the Alaska Supreme Cou

Wright v. Vickaryous, supra, is proper and that instead of denying the m

of the Plaintiff to amend, the Court should have allowed the Plaintiff t

the Complaint and granted a continuance to allow the Defendant whatever a

tional time it needed to prepare to defend the new allegations set forth

the Plaintiff in an amended Complaint. The failure of the District Court

allow Plaintiff to amend his Complaint was prejudicial, and this Court s

remand the case for a new trial and allow the Plaintiff to amend his Complaint to set forth claims for wilful and wanton negligence and punitive damages against Utah Transit Authority and its supervisory employees.

CONCLUSION

WHEREFORE, premises considered, Plaintiff-Appellant respectfully submits that the errors of the Court below in refusing to allow amendment of the Complaint and the errors at trial in misinstructing the jury and refusing to inform the jury of the legal consequences of their apportionment of negligence resulted in a manifest injustice to Plaintiff and this Honorable Court should reverse the verdict of the jury and remand the case for a new trial and allow Plaintiff to amend the Complaint.

Respectfully submitted this 13 day of February, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that I handed to TRS Runner Service the ori

of the foregoing Appellant's Brief to be delivered to the Court, State C

Building, Salt Lake City, Utah, and two copies of the same to be deliver

the Attorney for Respondents, Timothy R. Hanson, 175 South West Temple, S

Lake City, Utah, on the 13 day of February, 1981.