1981

Harry J. Christiansen v. Utah Transit Authority And John G. Miller : Brief of Respondents

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.

- -

BRIEF OF RESPONDENTS

- -

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable G. Hal Taylor

- -

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

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- -

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NATURE OF THE CASE

This is an action filed by the plaintiff against defendants Utah Transit Authority and John G. Miller for alleged damages arising from a minor accident between Plaintiff and a UTA bus.

DISPOSITION IN LOWER COURT

A jury trial was held with the Honorable G. Hal Taylor presiding. The jury returned a special verdict finding the plaintiff 70% negligent, the defendants 30% negligent, and awarded special damages of $7,700 and general damage of $5,000. The Court subsequently entered judgment in Defendants' favor of no cause of action.

RELIEF SOUGHT ON APPEAL

Defendants-respondents seek affirmance of the jury verdict and the lower court judgment.

STATEMENT OF FACTS

Because Respondents believe that the "Statement of the Facts" contained in Appellant's brief is both inaccurate in some respects and fails to include pertinent facts relied upon by the jury, Respondents offer their own factual statement. It should be noted, however, that any reference to the damage testimony and evidence during trial will be reserved for review in the Argument portion of this brief in that Plaintiff has failed to raise any substantial issue of damages requiring factual review.

The lawsuit in this matter involved an accident which occurred between a bus owned and operated by the Utah Transit Authority and driven by John G. Miller and a Mustang automobile owned and operated by the plaintiff Harry J. Christiansen. While it is undisputed that an accident did occur at 7th East and 21st South on January 17, 1978, the two versions of the accident are considerably different and it cannot, therefore, be said that the facts are "uncontroverted" as stated in Plaintiff's brief. (Appellant's brief, p. 2).

Plaintiff testified that on January 17, 1978, he had gone to a doctor's office to give him a bid on installing plumbing. After completion of this work the plaintiff proceeded south in his automobile on 7th east. (Tr. 253-254). It was about 6:00 o'clock p.m. when the plaintiff left the

doctor's office. There was a light rain falling. The plaintiff stated that at that time it was dark but the visibility was good. (Tr. 354).

The plaintiff characterized the traffic as fairly heavy on 7th East and estimated that he was traveling between 35 and 40 miles an hour as he left the intersection of 17th South and 7th East. He stated that he first observed the UTA bus shortly after leaving that intersection. (Tr. 354-355).

The plaintiff stated that he continued down the road and turned into the right-hand lane in preparation of a right turn down 21st South. He stated that he stopped behind another UTA bus which was near the intersection. (Tr. 355). He estimated that he had turned into the right-hand lane approximately one-half or one block before the intersection and that he stopped about 10 feet behind the bus. He stated he did this because he did not like the smell of emissions from buses. (Tr. 355).

The plaintiff recalled that as he was stopped he looked in his rear-view mirror to see where the bus was that he had passed and noticed that it was coming but quite a distance back. He believed that the bus was about one-half block back when he first looked in his mirror. (Tr. 356). The plaintiff claimed that he had been stopped in the right lane for more than a minute before the accident

occurred. (Tr. 387).

The plaintiff testitied that as he was looking at the parked bus in front of him he felt a surge and heard a bang. He stated that he felt himself going forward and could see the dash or the visor of the window as it kicked his head forward, thereby kinking it. He testified that after this impact he could not remember too much more. (Tr. 365).

He recalled, however, that he felt dazed and remembers the bus driver coming to his window and asking him if wanted a police officer to investigate. According to Plaintiff, the bus driver commented he would probably lose his job and then asked him again if he wanted to contact the police. The plaintiff replied he did and the bus driver said he would make the call. (Tr. 357).

Shortly thereafter a UTA supervisor arrived and told the plaintiff that it would be quite some time before the police would come and requested that the drivers exchange information rather than waiting for the police. (Tr. 358).

The plaintiff admitted that he did not tell the driver or the supervisor that he was injured and stated that he was too dazed and wobbly to make such a suggestion. (Tr. 389).

Plaintiff stated that when he arrived home he felt dazed and that his mother gave him some aspirin and told

him to lie down. (Tr. 359). He stated that he was anxious to see how much damage had been done to his car and therefore carefully examined it at home.

He decided to go to the UTA offices and report additional damage. He, his mother, and father, drove to the UTA main offices and talked to the same supervisor who was at the scene of the accident concerning additional damage to the car. (Tr. 360). Plaintiff again admitted that during this later conversation he did not say anything to the supervisor concerning his physical condition since he was still dazed and was not thinking clearly. (Tr. 397).

Since the defendant John Grant Miller was not present at the trial his deposition was read and introduced into evidence by the plaintiff. Mr. Miller stated that on January 17, 1978, he was driving the Cottonwood Heights route which included a southbound run on 7th East. He stated that the traffic was moderate to heavy and that it was raining a little but the streets were not wet. (Deposition of John Grant Miller, taken January 8, 1980 and renumbered as part of this record as pages 289-290).

Defendant Miller recalled that he was driving in the right-hand lane of 7th East and had just stopped to let out a passenger. This stop was located around 1950 South and 7th East. (R. 299). There was no other bus stop between that one and the one located near the corner of

21st South and 7th East. (R. 299).

Miller related that he pulled the bus back into the right lane and reached a speed of about 30 to 35 miles an hour which required about four or five seconds of travel time. (R. 298-299). Miller observed that the 21st South light was red and that another bus was sitting adjac to the bus stop near the intersection. (R. 292). As he came nearer to the intersection he began to slow down in preparation of stopping.

At this point the plaintiff's Mustang pulled into the right lane at a speed of about 30 to 35 miles an hour. (R. 293). Miller recalled that the Mustang was some 25 to 30 feet in front of the bus when it pulled in front of the bus. (R. 308). He stated that he put his brakes on as soon as Plaintiff came into the lane in order to increase the distance between the bus and the Mustang and that he was attempting to slow down. (R. 309). During the two or three seconds that both vehicles were moving together the defendant Miller stated he did not apply the brakes very hard because this would have thrown the passengers down the aisle. (R. 310). He stated he was attempting to increase the distance between the car and the bus since it was the company's policy to always maintain approximate three seconds of distance between a bus and a vehicle in front. (Tr. 287). However, Miller stated he did not

believe the distance between the vehicles increased appreciably during this two or three second period. (R. 312).

After the two or three seconds had elapsed the Mustang's brake lights suddenly came on and the Mustang made what Miller characterized as a quick stop. (R. 293). The Mustang stopped approximately 50 feet behind the other bus that was located at the bus stop. (R. 300-301). Miller stated that the Mustang could not have been stopped for longer than one or two seconds before he bumped it. (R. 292).

At the time he saw the brake lights go on Miller stated that he immediately attempted to panic-stop the bus. (R. 313). He recalled that the buses were equipped with computerized air brake systems which stopped the wheels from sliding even if a panic stop was being applied. (R. 288).

Miller estimated that he hit the Mustang at between five and ten miles an hour. The Mustang rolled forward about 40 feet upon being hit since its brakes were not on but it did not hit the bus in front since there was over 50 feet of space in between the two vehicles. (R. 295).

A diagram prepared by Miller during his deposition was introduced as Plaintiff's Exhibit 32 and was received as evidence. In addition, a report, used at the deposition also, which was filled out by Miller after the accident

Defendants called Douglas Woodbury who is a fleet engineer for the UTA and who had conducted tests of UTA buses as to the effect that out-of-adjustment slack adjusters would have upon the stopping ability of the bus. Woodbury stated that until all four slack adjusters were out one and one-half turns the bus was still in compliance with state stopping standards. (Tr. 698). The 12 click adjustment referred to in the mechanic's report indicated that the nuts were backed up only three-quarters of a turn.

Had all four wheels been backed off this amount the brakes still would have met state guidelines and if only one of the four wheels had been off this amount any deficiency would have been further reduced to only 25 percent. (Tr. 706). Stating it another way, Woodbury explained that if one wheel were completely off as to its slack adjuster and the other three wheels were functioning properly the state standard of stopping would still be met. (Tr. 699). This occurred because each wheel produces 25 percent of the braking force. (Tr. 449).

As noted earlier, a number of witnesses testified on behalf of Plaintiff as to the alleged injury and damages incurred as a result of this accident. Likewise, Defendant called several medical witnesses to refute these charges. At the conclusion of the evidence the matter was submitted to the jury by way of special interrogatories.

The jury answered the special verdict form by finding that plaintiff Harry J. Christiansen was negligent, that his negligence was a proximate cause of the accident, that defendants UTA and John Miller were also negligent, that their negligence was also a proximate cause of the accident, and then alloted 70% of the negligence to plaintiff Christiansen and 30% to defendants UTA and Miller. In addition, the jury found special damages of medical expense and lost wages of $7,700 and general damages of pain and suffering of $5,000. (R. 176-177).

Subsequently, a judgment on the verdict was entered finding no cause of action in favor of the defendants. (R. 187-189). Plaintiff then made a motion for judgment notwithstanding the verdict or in the alternative for a new trial. (R. 190-191. At the time of hearing Plaintiff's attorney was not present but the court denied the motions based upon the merits and not upon the failure of Plaintiff's counsel to appear. (R. 192-194).

This appeal is taken from the judgment on the verdict entered May 12, 1980, and from the order denying Plaintiff's motion for a new trial and judgment entered July 8, 1980. (R. 195).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED TO GIVE PLAINTIFF'S PROPOSED INSTRUCTION NO. 8 AND PROPERLY GAVE INSTRUCTIONS NUMBERED 21, 22, 23, AND 24.

Appellant devotes considerable argument to his contention that the lower court improperly instructed the jury. (Appellant's brief, pp. 6-16). An examination of the arguments, however, shows that such contention is without merit. Appellant seems to base his objections upon speculation, inferences, and assumptions which are not supported by the record and which, in any case, do not give rise to reversible error. An examination of each of Plaintiff's assertions will now be made.

A. The Court Properly Refused to Give Plaintiff's Requested Instruction No. 8.

Instruction No. 8 is a JIFU instruction intended for use in those cases where a party has the obligation of calling a witness or offering evidence to support his position but fails to do so and relies upon weaker evidence for support. The instruction in this case, however, was inappropriate at least as to Defendants.

Plaintiff complains that defendants should have called three witnesses: John Miller; the signout supervisor; and the mechanic who inspected the brakes following the accident. Under Plaintiff's argument, Defendants had an obligation to call these people in order to bolster their defense as to Plaintiff's claim of faulty brakes.

Plaintiff has misconstrued the context of this trial. It was the burden of Plaintiff, not Defendants, to produce

stronger evidence in support of his claim of faulty brakes. The testimony of John Miller in court would not have assisted Defendants in any way since Miller already stated that in his opinion the brakes were not working as well as they should be. In addition, when a witness testifies by way of deposition it cannot be said that the in-court testimony of the witness is of a stronger nature than his deposition testimony. Goggins v. Winkley, 495 P.2d 594 (Mont. 1972).

The evidence showed that the sign-out mechanic thought that the brakes were operating properly and released the bus to Mr. Miller. (R. 315-317). If Plaintiff wished to dispute this fact it was his obligation to subpoena the signout mechanic and examine him as to what he based his opinion upon that the brakes were properly working. It was Plaintiff's obligation to call the signout mechanic as his own witness if he wished to contradict the state of the evidence. Holland v. Kerr, 253 P.2d 88 (Cal. App. 1953).

Likewise, the evidence showed that Chuck Wooley, the mechanic who worked on the bus following the accident, prepared and submitted a report as to the condition of the slack adjusters. He noted that the left adjuster was out 12 and that the right one had been replaced. Defendant called Douglas Woodbury, a fleet engineer of UTA, and Charles Oliver, a lead foreman of UTA, as witnesses who

both explained what the "out of 12" notation meant and why a slack adjuster is replaced.

Since it was Plaintiff's burden to show negligence on the part of Defendants it was Plaintiff, not Defendants who should have called Mr. Wooley to explain any difference the "out of 12" notation meant from that testified to by the UTA supervisors and to explain exactly why the right slack adjuster was replaced. For example, since Mr. Woodbury stated that slack adjusters are replaced either when the mechanism can no longer be adjusted or when it is not properly functioning, it was Plaintiff's obligation to prove that the replacement occurred because of a defective slack adjuster and not merely because it was no longer functional.

In addition, this type of instruction is merely abstract and the giving or failure to give it is not prejudicial error. Bohle v. Matson Navigation Co., 412 P.2d 367 (Ore. 1966).

B. The Trial Court Properly Gave Instruction No. 21.

Appellant quotes and complains only about the last paragraph of Instruction No. 21. There are five other paragraphs preceding the one quoted by Plaintiff in his brief. (R. 158). The instruction correctly stated the rules applicable to both drivers as to using reasonable care, lookout, speed, and distance. It is fundamental

that the jury instructions when being examined on appeal must be viewed as a whole and not in isolated segments. Black v. McKnight, 562 P.2d 621 (Utah 1977).

The last paragraph of Instruction 21 was patterned after Section 41-6-69 U.C.A. which prohibits a person from suddenly stopping or decreasing speeds without first giving an appropriate signal. It was Defendant's contention that while an intersection was indeed being approached by both the bus and the automobile driven by Plaintiff, that Plaintiff cut in front of the UTA bus and abruptly stopped without warning some 50 feet in back of another bus and approximately 150 feet from the intersection.

Plaintiff seems to argue in his brief (Appellant's brief p. 9) that where an intersection is in sight a preceding automobile may suddenly stop unexpectedly since both drivers are aware that they will eventually have to stop at the intersection. Obviously, a driver approaching a red light is under an obligation to either slow and gradually stop at the light or to signal and warn a following driver that he intends on stopping before the light.

In the instant case, for example, the plaintiff's stated desire to avoid emissions from the bus in front of him (R. 355) may have caused him to stop in back of the bus at a much greater distance than any other driver would have done and made such stop totally unanticipated and abrupt.

Since defendant Miller stated that the bus was some 50 feet ahead of the place in which the Mustang stopped, it was a question for the jury to determine whether Plaintiff's stop was sudden and whether a signal should have been given to the bus. James v. Niebuhr, 380 P.2d 287 (Wash. 1964). The evidence viewed from Defendants' position justified such an instruction. Case v. Olwell, 463 P.2d 664 (Wash. App. 1970).

As to Plaintiff's claim that the braking lights themselves were adequate signals it should be observed that the question of whether a particular signal is appropriate is a question for the jury to decide under the circumstances of the case. Apkins v. Bayer, 464 P.2d 233 (Kan. 1970).

This Court and the 10th Circuit Court of Appeals have both interpreted the requirement of signaling before sudden stops or decrease in speed as requiring more than the simultaneous application of the brakes and the brake lights. As stated by the 10th Circuit:

> A fair inference to be drawn from the testimony of Maddis and his wife is that the brake light signal which was given by the Vernon automobile was simultaneous with its sudden decrease in speed. Under such circumstances, the signal was not effective and was not in compliance with the statute which provides that an appropriate signal must be given prior to stopping or suddenly decreasing the speed of a vehicle. United States v. First Security Bank of Utah, 208 F.2d 424, 429 (10th Cir. 1953).

See also Stapley v. Salt Lake City Lines, 418 P.2d 779

(Utah 1966). For these reasons, the last paragraph of Instruction 21 was properly given by the trial court.

C. The Trial Court Properly Gave Instruction No. 22.

A review of Instruction No. 22 shows that it is a correct statement of the law concerning the obligation of a driver to maintain a reasonable lookout. There is no doubt that a driver has a duty to maintain a lookout to the rear as well as in all directions. Batty v. Mitchell, 575 P.2d 1040 (Utah 1978). It is a jury question as to whether a driver maintained his duty of lookout to the rear and whether such failure was a proximate cause of the accident. Hayden v. Cederlund, 263 P.2d 797 (Utah 1953).

Plaintiff asserts in his brief that "the collision in question was caused by the faulty brakes of the bus and by the fact that the bus driver did not keep a proper lookout and perhaps followed too close." (Appellant's brief, p. 10). This statement is correct in light of Plaintiff's theory of the case but is totally incorrect as to Defendants' theory. Defendants maintained that the collision was caused because Plaintiff cut in front of the UTA bus and abruptly stopped for no apparent reason when the bus was only some 30 feet in back of the car. Defendants maintained that the brakes were operating properly and that the bus driver acted in a reasonable manner in light of the fact that Plaintiff had placed himself in that position

and had himself chosen to stop some 50 feet in back of the preceding bus.

Defendants were entitled to an instruction supporting their theory of the case. Black v. McKnight, 562 P.2d 621 (Utah 1977). If Instruction 22 duplicated Instruction 21 such duplication is not reversible error. Woodhouse v. Johnson, 436 P.2d 442 (Utah 1968). Johnson v. Cornwall Warehouse Co., 398 P.2d 24 (Utah 1965).

Thus, Instruction 21 was properly given.

D. The Trial Court Properly Gave Instruction No. 23.

Plaintiff asserts that paragraph 3 of Instruction 23 is an incorrect statement of the law. As noted earlier, however, the simultaneous placement of the brakes and the braking lights has been deemed by this Court and the 10th Circuit Court of Appeals not to comply with the statute. In fact, paragraph 3 of Instruction 23 is exactly the same instruction which was approved by this Court in Stapley v. Salt Lake City Lines, 418 P.2d 779 (Utah 1966). See also United States v. First Security Bank of Utah, 208 F.2d 424 (10th Cir. 1953).

Again, Plaintiff contends that since the vehicles were approaching an intersection the bus driver should have anticipated the stop of Plaintiff regardless of any signal given. This argument is based on the assumption that the Plaintiff stopped in an appropriate manner and in an

appropriate place at the intersection. The evidence showed, however, that the point of accident was some 150 feet from the intersection and that the plaintiff stopped, according to Defendants' version of the evidence, approximately 50 feet in back of the preceding UTA bus.

Under these circumstances the jury was entitled to determine whether the Plaintiff suddenly stopped or suddenly decreased his speed in such a manner that a signal should have been given.

Furthermore, any repetition as to Instructions 21 and 22 is again, as previously noted, harmless error since in each instruction a different principle concept was being explained to the jury.

E. The Trial Court Properly Gave Plaintiff's Instruction No. 24.

Plaintiff complains that the lower court improperly gave Instruction No. 24 which states that a person who is without negligence on his part and is suddenly and unexpectedly confronted with peril arising from either the actual presence or the appearance of imminent danger to himself or to others is not expected nor required to use the same judgment and prudence that may be required of him in calmer and more deliberate moments. (R. 161). Plaintiff contends that even in the light most favorable to the defendants "it is uncontroverted that the bus driver followed the Christiansen

vehicle for some period of time prior to the time that the Christiansen vehicle came to its stop." (Appellant's brief p. 12).

Plaintiff's assertion is completely erroneous. Defendant John Miller testified that upon leaving the bus stop at 1950 South 7th East he proceeded south on 7th East at around 30 miles an hour. (R. 298). He stated that the Mustang pulled into his lane so it was positioned about 25 to 30 feet in front of the bus. (R. 308). Miller stated that Plaintiff's vehicle was in his lane for approximately two or three seconds before Plaintiff applied his brakes and abruptly stopped. During this short two or three second period defendant Miller was attempting to slow the bus down to increase the space between the vehicles but could not do so. (R. 309-312). When the brake lights of the Mustang went on Mr. Miller floored the brakes in a panic stop of the bus. (R. 313).

While Miller estimated that the distance the two cars traveled during the period of time after the Mustang entered his lane was 400 feet (R. 308), Mr. Rudolph Limpert Plaintiff's reconstruction expert, admitted that if the bus driver's estimate of time and speed were correct the two vehicles would only have traveled 88 feet together rather than 400. (R. 657). The jurors were entitled to determine based upon the evidence presented by the various parties

whether they believed Mr. Miller's estimate of speed and time was more accurate than his estimate as to traveled distance.

Assuming, therefore, that the bus was traveling at 30 miles an hour in the right lane and that the plaintiff cut in front of the bus at approximately the same speed leaving a 25 or 30 foot space between them, and assuming that the car only traveled for two or three seconds before abruptly braking, it was therefore proper for the jury to be instructed that the actions of the plaintiff had placed the defendant bus driver in a perilous situation which excused him from the same standard of care that is normally applicable in cases where sudden and unexpected confrontations have not occurred.

The Supreme Court of Washingtin in Grapp v. Peterson, 168 P.2d 400 (Wash. 1946) dealt with nearly an identical problem. In that case the plaintiff complained that a sudden peril instruction had been given and was not justified. The defendant, just as here, claimed that the plaintiff had darted in front of his vehicle and had abruptly stopped, therefore causing the collision. In finding that the giving of the sudden peril instruction was not erroneous the Washington Supreme Court stated the following:

> Obviously there is a difference between a situation where a respondent driver by his own choice follows so closely behind another

> car upon the highway that he is unable to stop in time to avoid a collision with the leading car, and a situation where the leading car by passing and cutting in front of the respondent, places the respondent unwittingly in a following car position. Thus in the second situation, when the leading car stops suddenly, the respondent is placed in a position of sudden peril through no fault of his own.
>
> In the first situation the respondent clearly has the responsibility of avoiding the collision. In the second situation, in accordance with the established rule, the respondent ought not to be held to the same burden to avoid a collision as one who has had time for deliberate actions. The court's instruction No. 7 properly applies to this latter situation. Id. at 403.

See also Jaeger v. Estep, 384 P.2d 174 (Ore. 1963).

In summary, therefore, the instructions given by the trial court and the one instruction refused to be given by the trial court were proper considering the state of the record at the conclusion of the trial. Appellant continually maintains that this is a case where a car slowed down and stopped for a red light and under such circumstances was not required to give any type of signal. (Appellant's brief, pp. 12-15). Were the evidence consistent with this view Plaintiff's position would be correct. However, Defendants' theory rested upon the assumption that the automobile being driven by Plaintiff cut in front of the bus, traveled with the bus for only two or three seconds, abruptly made a stop, and did so some 50 feet from the preceding bus and some 150 feet

from the red light.

The jury was therefore entitled to determine under the circumstances argued by Defendants whether or not a signal should have been given to the bus driver of this stop, whether the bus driver had done anything negligent in controlling the speed or distance between the vehicles and, of course, whether the brakes of the bus were functioning properly. Because of these considerations the jury was entitled to be instructed as to the various legal rules applicable so that the jurors could determine for themselves whether the circumstances justified the application of these rules. There was, therefore, no error committed by the lower court in the jury instructions.

POINT II

PLAINTIFF WAS NOT DENIED A FAIR TRIAL BY THE FAILURE OF DEFENDANT JOHN G. MILLER TO APPEAR AND TESTIFY.

Plaintiff asserts that he was denied a fair trial because of certain "misrepresentations" of defense counsel concerning the appearance of John Miller at trial and because of the prejudicial effect his failure to appear had upon cross-examination. Both of these contentions are unfounded.

First, Plaintiff makes numerous claims in his brief that he had been "misled" by the statements of defense counsel concerning Mr. Miller's availability. (Appellant's

brief, pp. 15-19). These assertions are completely unsupported by the record and there is no stipulation, testimony, or order as to any of the claimed representations made by Defendants' counsel. It is fundamental that contentions not preserved in the appellate record cannot be considered on appeal. Skyline Leasing v. Datacap, 545 P.2d 512 (Utah 1976). Furthermore, it is the plaintiff's obligation to protect his record as to any supposed representations or stipulations of opposing counsel and the failure to do so is fatal to such a claim. Mountain Bell v. Herrington, 555 P.2d 687 (N.M. 1976).

Second, however, what documents do exist in the record pertaining to Miller's appearance directly contradict Plaintiff's assertion of misrepresentation. On April 26, 1980, some four days prior to the trial, the plaintiff himself filed a "Motion to Permit Use of Defendant Miller's Deposition in Lieu of Defendant's Appearance." (R. 91-92) This motion stated the following:

> The plaintiff by and through counsel and pursuant to Rule 32 of the Utah Rules of Civil Procedure, hereby moves the court for an order granting the right to the plaintiff to produce a person at trial to act as the witness, John G. Miller. This motion is based upon the following:
>
> 1. Counsel for the defendant assured counsel for the plaintiff that he would produce the defendant at trial.
>
> 2. Counsel for the defendant properly notified counsel for the plaintiff by letter

of October 22, 1979, that he was having difficulty obtaining the defendant's cooperation, that he had attempted to subpoena him for trial, but as of April 22, 1980, had not been able to do so.

3. Based upon the letter of April 22, 1980, from defendant's counsel, counsel for the plaintiff has caused a subpoena to be issued and will attempt to serve such subpoena before the trial date which commences on April 3, 1980.

4. In the event that the subpoena of either the defendant's counsel or the plaintiff's counsel is not served or, in the alternative, is not observed by the defendant, the plaintiff needs to utilize the testimony of the defendant at a deposition. Such deposition has been filed with the court by defendant's counsel.

Plaintiff further moves for the publishing of the defendant's deposition for use at trial.

Dated this 26th day of April, 1980.

(signed) David K. Robinson
Attorney for Plaintiff

Thus, the record shows that Defendants' counsel notified Plaintiff's counsel as early as October 22, 1979, of the problem involved in obtaining Mr. Miller for trial. A further letter of April 22, 1980, again alerted Plaintiff's counsel as to this problem. It is therefore difficult to believe that "counsel for defendant assured counsel for plaintiff up to and including the first day of trial that Mr. Miller would be available and that they would have Mr. Miller available at the trial." (Appellant's brief, p. 18).

Likewise, Plaintiff's claim that on the first day of trial counsel for Defendants assured counsel for Plaintiff that "Mr. Miller was driving in from Chicago and would be available at the trial to testify," (Appellant's brief, p. 19) is also highly suspect in light of the opening statement made by Defendants' counsel on the first day of trial. Mr. Tim Hanson, defense counsel, stated the following to the jury:

> As you are already aware, I will represent the Transit Authority and I also represent their driver, Mr. Miller. Mr. Miller is not currently employed. He has been for some time with the Transit Authority and the evidence will show that he currently drives a long-distance truck. Hopefully we will have him here but he will be able to testify in addition to his deposition that has been taken.
>
> I don't know if you know what depositions are, but that is a procedure where the attorneys before a trial come to court here, take testimony under oath from parties or witnesses or whoever we want who knew something about the accident. Fortunately in this case that has been done with regard to Mr. Miller so you will have the benefit of his testimony. (Tr. 331).

Certainly, this statement does not seem to reflect Plaintiff's assertion that defense counsel had intended on Mr. Miller's arrival the following day.

Third, it should be noted that the deposition of Mr. Miller was introduced and read into the record by the plaintiff--not the defendants. This Court should note that Plaintiff made no objection as to any prejudice

occurring from the reading of this deposition. (Tr. 461-462). It is therefore hard to conceive how Plaintiff was prejudiced when he specifically requested the reading of the deposition both prior to trial and during trial and further failed to object to any alleged prejudice which would occur by the absence of Mr. Miller.

Finally, the claimed prejudice of being unable to cross-examine Miller as to the accident report he previously filed is also totally groundless. The Transportation Loss Report dated January 18, 1977, referred to by Plaintiff in his brief (Appellant's brief, p. 16), was actually introduced into evidence as Plaintiff's Exhibit 31. For this reason alone the jury had the benefit of the testimony of Miller and could compare it with the alleged discrepancy contained in the Transportation Loss Report.

More importantly, however, this report was specifically referred to during the time of the deposition and Mr. Miller referred to it throughout his deposition testimony. (R. 291-320). As an example, Mr. Wells in questioning Mr. Miller entered into the following dialogue:

> Q. Now, you have indicated in your loss report that you filed with the company, you stated here that you bumped into the rear of a car just as I was leaving a stop.
>
> A. Just after I had left the stop.
>
> Q. So, you're now telling us that your recollection today is different than it was at this time?

A. Well, that's what it says, just as I was leaving the stop, yes.

Q. Didn't you state that the stop was a block or two back?

A. It's not a block or two. 1950 to 2050, about a block. (R. 301).

Another example can be found in the testimony where Mr. Wells states, "Now, on page 2 of the report, they have a section here called condition of equipment. You have specifically under the place where it refers to defects stated, 'brakes very spongy. Bus had received a road call earlier in the day.' Would you tell us about that." (R. 303).

In addition, an examination of Exhibit 31P as compared with Mr. Miller's testimony shows no contradiction on its face. The Transportation Loss Report does not describe the movement of the Mustang in any way as to where it came from, how long it was in front of the driver, or any other actions it took except for the fact that it "stopped abruptly." The testimony of Mr. Miller, therefore, merely supplemented and explained in detail the rather cursory report filed with the UTA.

Plaintiff in his brief has erroneously used the word "Defendant" rather than "Plaintiff" in his heading of Point II by stating:

> The Defendant was Denied a Fair Trial by the Failure of Defendant John G. Miller to Appear at Trial . . . (Appellant's brief, p. 15).

In actuality, this statement is correct since if any prejudice occurred by the absence of Mr. Miller it was to the defendants, not to Plaintiff. Defendants were forced to rely upon the deposition of Miller which had been taken entirely by Plaintiff's attorney. Without Miller's testimony there was no evidence as to a different version of the accident than that told by the plaintiff.

For this reason, it is inconceivable that Defendants would not wish Mr. Miller present in the courtroom to testify so that defense counsel could frame the questions and present the evidence for the benefit of Defendants. Any hardship in Miller's failure to attend went directly to Defendant UTA which was then forced to rely entirely upon the deposition of Mr. Miller taken only by the plaintiff's attorney.

For the preceding reasons, therefore, the failure of Miller to appear at trial in no way prejudiced the plaintiff and the claimed error is totally without merit.

POINT III

THE LOWER COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY ON THE CONSEQUENCES OF THEIR APPORTIONMENT OF NEGLIGENCE.

Plaintiff argues in his brief that he was prejudiced because the jury was not told that a finding of over 50% negligence on the part of Plaintiff would preclude any recovery. Plaintiff admits that no formal objection was

made and that no proposed instruction was submitted to the trial court. Since Plaintiff is required under Rule 51, U.R.C.P., to specifically object to the failure of giving instructions and to file written requests of proposed instructions, the failure to do so waives any argume Plaintiff may now make.

In fact, the instant case is no different than that case cited by Plaintiff, Lampkin v. Lynch, 600 P.2d 530 (Utah 1979), where the plaintiff there also failed to properly object in the lower court and this Court stated, "This point is raised for the first time on appeal and hence was not ruled upon by the trial court. Consequently we do not consider it on appeal." Id. at 533.

It should also be noted, however, that in those state referred to by Plaintiff which now allow a jury to be told the consequences of its verdict, the large majority of states have statutorily amended the comparative negligence laws to permit this action.

Even if this is a judicial matter, however, the overruling of the McGinn decision should require extensive argument and briefing by both parties in the lower court and, of course, should comply with all procedural requirements as to preserving objections and error in the lower court.

For these reasons, Defendants believe it unnecessary

to further comment upon this claimed error now raised by Plaintiff for the first time in his brief.

POINT IV

THE JURY'S VERDICT WAS NOT A RESULT OF SYMPATHY, BIAS, PASSION OR PREJUDICE AND IS FULLY SUPPORTABLE IN LIGHT OF THE EVIDENCE.

It is basic that when a jury verdict is supported by competent evidence it is left unaltered by an appellate court unless there is a showing of passion and prejudice. Weber Basin Water Conservancy District v. Skeen, 328 P.2d 730 (Utah 1958). It has been stated that before damages will be set aside on the basis of passion or prejudice the conscience of the court must be shocked by the inadequacy or the excessiveness of the award. Town of Jackson v. Shaw, 569 P.2d 1246 (Wyo. 1977).

Appellant argues that the jury was "acting contrary to the weight of the evidence in the case and had been confused considering the apportionment of negligence, the effect on damages and was clearly a result of sympathy, bias, passion and prejudice." (Appellant's brief, p. 26). This assertion is, once again, unfounded in the record.

As mentioned previously there was ample evidence for the jury to conclude that the sudden and unexpected action of the plaintiff in darting into the right lane of traffic and suddenly stopping some 50 feet in back of a bus was a negligent action and that the conduct of the plaintiff

was the major contributing cause of the accident.

Even the authority cited by plaintiff, Heff & Heff, concludes that in certain situations the apportionment of negligence between a stopped vehicle and the following vehicle will depend upon the circumstances of the case. Quoting from that quotation cited by Plaintiff in his brief (Appellant's brief, p. 27) fully supports Defendants argument in the trial:

> It was heretofore indicated that not all rearend 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 at the stopping car are sufficient warning. However, there are instances where 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 make stopping at that point and time negligence. Heft & Heft, Comparative Negligence Manual, Section 4.50 (1971) (Emphasis added).

Thus, as to liability, there is ample evidence under Defendants' theory of the accident to support a finding of 70% negligence on the part of Plaintiff and 30% negligence on the part of Defendants. The arguments made by Plaintiff in his brief are properly addressed to the jury and not to this Court since whether the bus had "sufficient time to stop without colliding with the plaintiff" is a matter of judgment based upon the facts which is clearly within the province of the factfinder to determine.

Likewise, the assessment of damages by the jury is also within the realm of the evidence. The jury found special damages of $7,700 which included the claim of medical expenses and lost wages. The jury could have believed, for example, the testimony of Dr. Andrew Rouff who is the chief of orthopedics at the Salt Lake Veterans Administration Hospital, and who examined the plaintiff on behalf of the defendants. This witness concluded that he could find no objective evidence to support the subjective complaints made by the plaintiff. (Tr. 502).

The jury could easily have believed that much of the medical treatment received by the plaintiff was for the purpose of making it appear that the plaintiff was seriously injured. On cross-examination Plaintiff's own doctor admitted that he could not understand why the plaintiff continually visited him when the plaintiff was already being treated by an orthopedic specialist. (Tr. 475-476). The jury could also have believed that since Plaintiff's attorney suggested a specialist to consulting Dr. Wright within several days after the accident that much of the expense and claimed injuries were solely for the purpose of obtaining a judgment against the defendants. (Tr. 480).

Likewise, as to the loss of wages Plaintiff made a claim of some $16,000 for his inability to work during the period of time he claimed he was unable to return to

Kennecott. The jury could have believed, however, that Plaintiff could easily have worked at a job less strenuous although lower paying at Kennecott had he so desired or could, as Dr. Horne, Plaintiff's physician admitted, have worked doing plumbing privately or teaching plumbing classes. (Tr. 594). The record will show, therefore, that there was ample evidence for the jury to conclude that most of the lost wages were unnecessary and could have been offset by Plaintiff had he chosen to work.

Similarly, the award of general damages of $5,000 is not so inadequate to shock the conscience of the court. If the jury concluded that Plaintiff's injuries were grossly exaggerated or agreed with Dr. Rouff that even giving credence to Plaintiff's subjective complaints Plaintiff only suffered two percent partial total disability (Tr. 501), then $5,000 is certainly not out of line.

It was for the jury to determine the credibility of the evidence based upon the testimony and demeanor of the witnesses. For example, the plaintiff testified in the liability aspect of the case that he had been stopped roug a minute at the intersection and that he looked in his mirror and saw the bus coming when it was still half a block away. (Tr. 387-388). This version of the accident was completely contrary to the testimony of the bus driver

and was a version of the accident which was hardly argued at trial nor on this appeal. Rather, Plaintiff's attorneys seemed to concentrate upon the correctness of Defendants' version of the accident but attempted to show that faulty brakes prevented the bus from stopping quickly enough after Plaintiff's car had darted in front of it.

The jury was certainly entitled to measure the credibility of Plaintiff not only as to the liability aspects of the case but also as to the damage claim--both special and general. There is no evidence suggested by Plaintiff of any conduct during the trial which would give rise to a claim of passion or prejudice and, in fact, it would logically be assumed that any prejudice would be against the corporate entity of UTA or the driver who failed to attend his own trial.

This same argument of prejudice was raised in the lower court by Plaintiff's Motion for New Trial and the lower court, in its discretion, rejected such argument. It is axiomatic in this state that the granting or refusing of motions for new trial is a discretionary matter with the lower court. Uptown Appliance and Radio Co. v. Flint, 249 P.2d 826 (Utah 1955).

For the preceding reasons, therefore, Plaintiff's contention that the jury verdict was influenced by passion and prejudice and was contrary to the weight of the

evidence is totally without merit and must be rejected.

POINT V

THE LOWER COURT'S REFUSAL TO GRANT PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO ASSERT WILLFUL AND WANTON NEGLIGENCE DID NOT DENY PLAINTIFF A FAIR TRIAL.

Plaintiff claims that he was denied a fair trial because Judge Croft on January 18, 1980, refused to allow Plaintiff to amend his complaint seeking punitive damages and to add additional defendants. Plaintiff's motion was based on several assertions: (R. 59-60) first, that the bus driver admitted that the bus had faulty brakes when it left the garage; second, that the defendant complained to his supervisor that the brakes were defective but the supervisor said the brakes were all right and told the driver to take the bus anyway; third, that the "brakes were bad at the time the said bus left the garage"; fourth that an investigator for Plaintiff had obtained numerous statements from employees of UTA who stated that it was the management policy of UTA to send buses out onto the road even with defective brakes; fifth, that it is the policy of UTA to send buses out with defective brakes; and sixth, that this conduct is a willful and wanton disregard of the safety of others.

Plaintiff in his brief makes numerous assertions as to what transpired at the January 18, 1980 hearing and the reasons that the lower court denied Plaintiff's

motion without any record reference to such statement. In fact, such reference cannot be made because the record is barren of any of the proceedings which occurred on that date.

However, the order signed by Judge Croft states the following:

> Upon reviewing the basis for the request for leave to amend and being advised by counsel for the plaintiff that the plaintiff could not in good faith allege malice in support of his claim for punitive damages and the Court, being fully advised in the premises and good cause otherwise appearing, it is hereby ordered that the plaintiff's motion to amend his complaint to add a count for punitive damages and to add additional defendants is denied. (R. 69).

Since this is the only statement appearing in the record as to the grounds for denial of Plaintiff's motion, it must be assumed that this was in fact the reason the lower court denied Plaintiff's motion. Because malice was an essential element of Plaintiff's claim it was therefore required that the lower court deny Plaintiff's motion.

In addition, however, Rule 15 U.R.C.P. leaves the lower court with complete discretion as to whether a party should be allowed to amend a complaint. Davis Stock Co. v. Hill, 268 P.2d 988 (Utah 1955). Since this matter was set for trial in less than two months from the time Plaintiff's motion was made it was entirely within the discretion of the lower court to deny this new claim even if Plaintiff's

statement in his brief is correct that the time element was considered by the lower court.

Further, failure to amend the complaint had no effect whatsoever upon the outcome of this trial. Had Plaintiff been able to bring in 100 people who stated that UTA customarily released buses which had defective brakes, such evidence would be immaterial to this case unless it could also be shown that the bus involved in the accident had defective brakes.

While Mr. Miller did not believe the brakes were operating properly he never stated in his deposition that they were "defective." The signout mechanic who Mr. Miller gave the bus to for a test run disagreed with Miller and stated they were satisfactory. More importantly, however, the findings by the UTA mechanics following the accident showed only that the slack adjusters were somewhat out of adjustment.

Plaintiff's own expert, Rudolph Limpert, admitted that based upon these findings the fact that one wheel was not properly adjusted would have had no effect upon the braking ability of the bus assuming the other brakes were proper. Since Plaintiff produced no evidence to show defective brakes on the remaining three wheels, Plaintiff completely failed in his burden to show defective brakes.

This failure is especially apparent in light of the

testimony of the UTA foreman and engineer who both stated that the findings by the mechanic the following day did not detract from the efficiency of the braking system and that tests had been run showing that the bus would have been in complete compliance with state standards even assuming the worst possible case speculated by the plaintiff.

Thus, had the jury awarded punitive damages such award would have had to be overturned as a matter of law since there would have been no evidence to even support the basic requirement of a showing that the brakes were defective regardless of any supposed policy that UTA may have had.

For these reasons, the trial court properly denied Plaintiff's motion to amend the complaint and it cannot be said under any stretch of the facts existing in this case that Plaintiff was in any way prejudiced by such denial.

CONCLUSION

Plaintiff continually throughout his brief presents only those facts which he wishes to utilize in support of his theory of the accident. Plaintiff ignored the evidence and testimony which the jury could have believed supporting Defendants' theory. Naturally, as long as there is substantial evidence to support the jury verdict this Court

will not disturb it.

The instructions given by the lower court were correct in that they explained rules of law applicable to this case and were based upon factual evidence in the record. Whether or not Plaintiff caused this accident by his change of lanes and abrupt stop was solely a question for the jury and the jury was, therefore, entitled to know the legal standards applicable.

The absence of the defendant Miller to attend the trial was prejudicial only to the defendant UTA since it was necessary for it to rely entirely upon a deposition taken by Plaintiff's own attorney. There is nothing in the record to show that defendant UTA or defense counsel deliberately misrepresented or mislead Plaintiff's attorneys as to the appearance of Mr. Miller. Finally, the supposed prejudice occurring because of the inability to cross-examine Mr. Miller is totally lacking in merit since Plaintiff interrogated him concerning the transportation report during his deposition, the report was actually introduced into evidence, and the report did not contradict Miller's depositional testimony.

The claim of Plaintiff as to instructing the jury concerning the effect of their verdict was waived by Plaintiff's failure to submit a jury instruction to the lower court or to object to the failure of such instruction

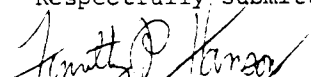
being given.

There is no evidence of bias or prejudice existing in this verdict. As has been stated, there is substantial evidence to support both the liability aspect and the damage aspect of the jury verdict. As such, the verdict should be upheld.

Finally, the failure of the lower court to amend Plaintiff's complaint for punitive damages is also groundless since the evidence at trial does not support Plaintiff's contention of defective brakes even viewing it most favorably to him. And, furthermore, Plaintiff would have been unable to show malice on the part of defendant UTA even had such brake failure been established.

For these reasons, therefore, the verdict of the lower court should be sustained and the judgment of the lower court affirmed.

Respectfully submitted,



Timothy R. Hanson
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of May, 1981, I mailed, first class postage prepaid, two copies of the foregoing Brief of Respondents to Attorneys for Appellants, Edward T. Wells and David K. Robinson of Robinson, Summerhays, Wells & Barnes, 1220 Continental Bank Building, Salt Lake City, Utah 84101.