

1962

Paul Bairas v. Lanard Johnson and Norman Cram : Appellant's Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Gardner & Burns; Nathan Goller; Attorneys for the Appellant;

Hanson & Baldwin & Merlin R. Lybbert; Olsen and Chamberlain; Attorneys for the Respondents;

Recommended Citation

Reply Brief, *Bairas v. Johnson*, No. 9597 (Utah Supreme Court, 1962).

https://digitalcommons.law.byu.edu/uofu_sc1/3979

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

Paul Bairas,

Plaintiff-Appellant

v.

Lanard Johnson and Norman Cram,
co-administrators of the estate of
Philip G. Fulstow, deceased,

Defendants-Respondents

No. 9599

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the
Sixth District Court for Kane County
Hon. Ferdinand Erickson, Judge,

Gardner & Burns
25 East Lincoln Avenue
Cedar City, Utah

Nathan Goller
9171 Wilshire Blvd.
Beverly Hills, California
Attorneys for the Appellant

Hanson & Baldwin &
Merlin R. Lybbert
515 Kearns Building
Salt Lake City, Utah

Olsen and Chamberlain
76 South Main Street
Richfield, Utah

Attorneys for the Respondents

TABLE OF CONTENTS

	<i>Page</i>
ARGUMENT	1
POINT I. DEFENDANT'S CONTENTION THAT THE TRIAL COURT COULD NOT CONSIDER PLAINTIFF'S MOTION FOR A CONTINUANCE BECAUSE THE MOTION AND AFFIDAVITS WERE NOT TIMELY FILED IS ERRONEOUS BECAUSE (1) THE MOTION WAS AN ORAL MOTION PROPERLY MADE IN OPEN COURT WHICH DID NOT REQUIRE PRIOR NOTICE AND (2) THE EARLIER REQUIREMENT OF AFFIDAVITS IN SUPPORT OF THIS TYPE OF MOTION WAS REPEALED AND CLEARLY ABOLISHED BY THE ADOPTION OF RULE 40(b) UTAH RULES OF CIVIL PROCEDURE	1
POINT II. DEFENDANTS' POINT III, BASED UPON THE DEAD MAN STATUTE AND THE WRONGFUL DEATH ACT, CANNOT BE CONSIDERED BY THIS COURT BECAUSE IT WAS NEITHER PRESENTED TO NOR PASSED UPON BY THE TRIAL COURT BUT IS RAISED IMPROPERLY FOR THE FIRST TIME ON APPEAL.	6
POINT III. EVEN ASSUMING, ARGUENDO, THAT DEFENDANTS' POINT III WERE PROPERLY BEFORE THIS COURT FOR REVIEW, WHICH IT IS NOT, IT WOULD AVAIL DEFENDANTS NOTHING BECAUSE (1) THE CONTENTION THAT PLAINTIFF'S COUNSEL ADMITTED THAT HE HAD NO EVIDENCE OTHER THAN THAT FROM THE PLAINTIFF HIMSELF IS A BIASED DISTORTION OF ONE COMMENT WRENCHED OUT OF CONTEXT AND DOES NOT REFLECT THE TRUTH, (2) THE DEAD MAN STATUTE DOES NOT DISQUALIFY THE PLAINTIFF FROM TESTIFYING AND (3) THE WRONGFUL DEATH ACT AIDS RATHER THAN HINDERS PLAINTIFF'S CASE.	9
CONCLUSION	20

CASES CITED

Canning v. Star Publishing Company, 19 F.R.D. 281 (Del. 1956)	5
Christofiel v. Johnson, 40 Tenn. App. 197, 290 S.W.2d 215 (1956)	16, 18
Davis v. Pearson, 220 N.C. 163, 16 S.E.2d 655 (1941)	14
Day v. Stickle, 113 So. 2d 559 (Fla. App. 1959)	17
Gibson v. McDonald, 265 Ala. 426, 91 So.2d 679 (1956)	15, 18
Harper v. Johnson, 245 S.W.2d 277 (Tex. 1961)	16, 17
Herring v. Eiland, 81 So.2d 645 (Fla. 1955)	15, 18
Huber v. Deep Creek Irrigation Co., 6 Utah 2d 15, 305 P.2d 478 (1956)	8
Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co., 74 Utah 24, 276 P. 659 (1929)	8
Knoepfle v. Suko, 108 N.W.2d 456 (N.D. 1961)	15, 17
Krantz v. Krantz, 211 Wis. 249, 248 N.W. 155 (1933)	16, 18
Lancino v. Smith, 36 Utah 462, 105 P. 914 (1909)	5
McCarthy v. Woolston, 210 App. Div. 152, 205 N.Y.S. 507 (1924)	15, 17, 18
McGrath v. Tallent, 7 Utah 256, 26 P. 574 (1891)	5
Maxfield v. Sainsbury, 110 Utah 280, 172 P.2d 122 (1946)	12
Miller v. Walsh's Administratrix, 240 Ky. 822, 43 S.W.2d 42 (1931)	14
Re Mueller's Estate, 166 Neb. 376, 89 N.W.2d 137 (1958)	14, 18
Obradovich v. Walker Bros. Bankers, 80 Utah 587, 16 P.2d 212 (1932)	8
Rankin v. Morgan, 193 Ark. 751, 102 S.W.2d 522 (1937)	15, 17
Rogers v. Carmichael, 58 Ga. App. 343, 198 S.E. 318 (1938)	14
Sandall v. Sandall, 57 Utah 150, 193 P. 1093 (1920)	8
Seligman v. Hammond, 205 Wis. 199, 236 N.W. 115 (1931)	16, 17
Sheneybrook v. Blizzard, 209 Md. 304, 121 A.2d 218 (1956)	15, 17
Stephens v. Short, 41 Wyo. 324, 285 P. 797 (1930)	14
Turbot v. Repp, 247 Iowa 69, 72 N.W.2d 565 (1955)	15, 17
U. S. Building & Loan Ass'n v. Midvale Home Finance Corp., 86 Utah 522, 46 P.2d 672 (1935)	8
VanMeter v. Goldfarb, 317 Ill. 620, 148 N.E. 391 (1925)	14
Willhide v. Biggs, 118 W.Va. 160, 188 S.E. 876 (1936)	14
Zeigler v. Moore, 355 P.2d 425 (Nev. 1959)	14, 18

AUTHORITIES AND STATUTES CITED

Utah Rules of Civil Procedure 6(d)	3, 4
Utah Rules of Civil Procedure 7(b)(1)	3
Utah Rules of Civil Procedure 8(d)	3
Utah Rules of Civil Procedure 40(b)	4
Utah Rules of Civil Procedure 59(c)	3
Utah Code Anno. 1943, 104-23-10	4
Utah Code Anno. 1953, 68-3-1	16
Utah Code Anno. 1953, 68-3-2	16
Utah Code Anno. 1953, 78-11-12	6, 19
Utah Code Anno. 1953, 78-24-1	17
Utah Code Anno. 1953, 78-24-2(3)	6, 12, 17
Laws of Utah 1894, p. 26-27	18
80 A.L.R.2d	13
4 C.J.S., Appeal and Error, § 228, p. 665, note 70	8

IN THE SUPREME COURT OF THE STATE OF UTAH

Paul Bairas,

Plaintiff-Appellant

v.

Lanard Johnson and Norman Cram,
co-administrators of the estate of
Philip G. Fulstow, deceased,

Defendants-Respondents

No. 9599

APPELLANT'S REPLY BRIEF

The appellant is herein referred to as plaintiff and respondents as defendants, as they appeared in the lower court.

This reply brief answers new material set forth in respondents-defendants' brief.

ARGUMENT

POINT I. DEFENDANTS' CONTENTION THAT
THE TRIAL COURT COULD NOT CONSIDER
PLAINTIFF'S MOTION FOR A CONTINU-
ANCE BECAUSE THE MOTION AND AFFI-

DAVITS WERE NOT TIMELY FILED IS ERRONEOUS BECAUSE (1) THE MOTION WAS AN ORAL MOTION PROPERLY MADE IN OPEN COURT WHICH DID NOT REQUIRE PRIOR NOTICE AND (2) THE EARLIER REQUIREMENT OF AFFIDAVITS IN SUPPORT OF THIS TYPE OF MOTION WAS REPEALED AND CLEARLY ABOLISHED BY THE ADOPTION OF RULE 40(b) UTAH RULES OF PROCEDURE.

At the trial, such as it was, on September 20, 1961, plaintiff made and repeated an oral motion for a continuance (R. 55, 58, 61, 71, 82), providing in support thereof two affidavits (R. 40, 43, 73). Defendants vigorously opposed this motion on the ground that it was not timely filed, citing Utah Rules of Civil Procedure 6(d), 8(d) and 59(c) (R. 52). This same ground was repeatedly pressed upon the trial court (R. 53, line 17, 29; R. 54, line 16; R. 60, line 15, 27; R. 67, line 9; R. 82, line 25). This continued and repeated insistence led the trial court into the error of assuming that the motion was, in fact, not timely (R. 73, line 13).

Defendants continue to assert this ground here. It is a faulty argument, however, because none of the rules cited by defendants requires that a motion for continuance be in writing or that notice thereof be given ahead of time if the motion is made in open court; nor do the citations require affidavits at all in support of the motion, let alone that they be filed ahead of time. Nor have we been able to find any currently in force statute or rule supporting the defendants' position.

In support of their position, defendants cited Rules 6(d), 8(d) and 59(c) to the trial court (R. 52). Rule 6(d) refers only to the time that motions in writing must be served but it does not state that this motion must be in writing; Rule 8(d) refers only to the failure to deny in the pleadings and we assume it to be an inadvertant slip of the tongue; Rule 59(c) refers only to the matter of affidavits filed in support of a motion for a new trial.

In their brief, defendants assert that Rule 6(d) is applicable, requires the serving of notice and is controlling on this controversy (Brief 14). They also assert as a corollary therefrom that the trial court, and this court, could not consider the affidavits filed at the time of making the motion for continuance.

The fallacy in this argument is defendants' contention that Rule 6(d) requires that an oral motion made in open court must, despite the inconsistency involved and that the rule does not so state, be in writing and filed and served ahead of time. The truth is that Rule 6(d) is concerned only with the time involved if a motion is a written motion and not one presented in open court. It does not purport to require that a motion for a continuance be a written motion.

Rule 7(b)(1) provides that "An application to the court for an order shall be by motion which, *unless made during a hearing or trial*, shall be in writing, . . ." (emphasis added)

Taken together these two rules simply mean that an oral motion made in open court need not be preceded

by notice (unless some other rule or statute might so require) but where a motion is not one made in open court it must be in writing and certain notice given. Plaintiff's motion was properly made in open court—no notice beforehand was required.

Defendants further assert that the affidavits filed in support of the motion were untimely and must be stricken. This contention fails because affidavits are not required to support a motion for continuance despite defendants' suggestion at pages 13 and 14 of their brief that such is the case.

Though defendants cite and quote from Rule 40(b) Utah Rules of Civil Procedure, they fail to indicate that the rule contains no requirement of affidavits and they further fail to mention that the reporter's note immediately following the rule establishes that "The motion need not be by affidavit as required formerly in the statute." The statute referred to is Utah Code Anno. 1943, 104-23-10 which was repealed when the Rules were adopted and which did require affidavits in certain instances to support a motion for continuance.

The mention in Rule 6(d) that "When a motion is supported by affidavit, the affidavit shall be served with the motion; . . ." can, when the entire rule is read, only have reference to affidavits in support of motions which must be in writing and must be served, not oral motions made in open court which, according to the rules need not be in writing and need not be served ahead of time.

Since there is no requirement of advance notice or of affidavits, the authorities cited by defendants at pages

14 and 15 of their brief are not in point, having been decided with reference to the repealed statute or an entirely different rule of procedure. *Canning v. Star Publishing Company*, 19 F.R.D. 281 (Del. 1956) concerns a motion for summary judgment under the federal rules which have specific requirements for service of the motion before the time fixed for hearing. This case is not in point. The Utah cases of *Lancino v. Smith*, 36 Utah 462, 105 P. 914 (1909) and *McGrath v. Tallent*, 7 Utah 256, 26 P. 574 (1891) are cited by defendants in support of their theory that affidavits must be filed and served ahead of time in the case of a motion for a continuance. Defendants' citations to these cases omit the date of the case and they do not tell us that these cases were decided under the earlier statutory provision requiring such affidavits. Since this statutory requirement is no longer in force, these cases add little to the defendants' position; rather they point out the weakness of defendants' argument.

It would indeed be an unfair and arbitrary rule if a motion for continuance could not in a proper case such as this one be made in open court. In this instance preparations had been made for plaintiff and his California counsel to travel to Utah for trial (R. 113) and only at the last moment was plaintiff, paralyzed from the neck down by the accident in controversy, informed that he would not be able to attend. The rule advocated by defendants would be a tremendous boon to those whose only interest is the avoidance of payment of just personal injury claims because in a case such as this where unforeseen matters can arise on short notice it would be abso-

lutely impossible to give the notice defendants now ask. Such an arbitrary rule would shock the conscience of any fair-minded man and would violate the fundamental rules of due process and fair play.

Plaintiff's motion for a continuance was properly made and although there was no requirement of affidavits, affidavits were provided to show the reasons for the motion. Despite plaintiff's assertion that this motion was timely (R. 55, 58, 61, 72), defendants' continued insistence that it was not and that the court could not consider it led the trial court into error which must not be repeated here. The error induced by defendants in this regard can only have had the effect of depriving plaintiff of the court's proper consideration of the motion and the affidavits in support thereof. For this reason alone the judgment must be reversed and plaintiff granted a new trial.

POINT II. DEFENDANTS' POINT III, BASED UPON THE DEAD MAN STATUTE AND THE WRONGFUL DEATH ACT, CANNOT BE CONSIDERED BY THIS COURT BECAUSE IT WAS NEITHER PRESENTED TO NOR PASSED UPON BY THE TRIAL COURT BUT IS RAISED IMPROPERLY FOR THE FIRST TIME ON APPEAL.

Defendants' Point III rests upon the assumption that plaintiff, in fact, had only the evidence of the plaintiff himself upon which to go to trial and that either the Dead Man Statute (Utah Code Anno. 1953, 78-24-2(3)) or the Wrongful Death Act (Utah Code Anno. 1953,

78-11-12), or both, then functioned to require the trial court to dismiss the plaintiff's action.

In our Point III we will show the substantive fallacies in this argument. We are now concerned only with the question of whether this court can or should consider these issues at all. The issues raised by these contentions of the defendants are neither simple nor few. There are complex and intricate fact and law problems involved in any controversy concerning the Dead Man Statute. There are equally complex and intricate fact and law problems involved in any controversy concerning the Wrongful Death Act. None of these problems was presented to the trial court. None of these problems was passed upon by the trial court. The record is completely devoid of any reference to these many potential issues in any shape or form. The trial court had no opportunity to hear or determine any of the many-faceted fact and law problems such a presentation would entail.

Whether presented in an argument ostensibly designed to uphold the decision of the lower court, or by any other device, these many complicated law-fact issues now raised by defendants were never presented to the trial court, were never passed upon by the trial court and are now improperly raised here for the first time on appeal. Defendants cite no authority in support of their raising of these complex new matters for the first time on appeal. Indeed, with the rare exception wherein the court acts to prevent an otherwise unpreventable serious miscarriage of justice, the rule that an appellate court will not entertain matters first raised on appeal is probably the most consistently followed of all the salutary rules gov-

erning either trial or appellate practice. This court had an attempt to raise the issue of the Dead Man Statute for the first time on appeal presented to it within the relatively recent past. In disposing of this attempt, the court said, in *Obradovich v. Walker Bros. Bankers*, 80 Utah 587, 16 P.2d 212, 218 (1932)

Though we assume the witness because of her interest to be incompetent by reason of the statute to testify in this case, yet, under the state of the record we are satisfied that question is not before us. The question not having been raised in the trial court, we do not feel at liberty to pass on the question now argued by appellant in this court for the first time.

The rule that new matter will not be entertained on appeal is in accord with other decisions of this court and other courts.

Huber v. Deep Creek Irrigation Co., 6 Utah 2d 15, 305 P.2d 478 (1956); *U.S. Building & Loan Assn'n v. Midvale Home Finance Corp.*, 86 Utah 522, 46 P.2d 672 (1935); *Idaho State Bank of Twin Falls, Idaho, v. Hooper Sugar Co.*, 74 Utah 24, 276 P. 659 (1929) and *Sandall v. Sandall*, 57 Utah 150, 193 P. 1093 (1920) are representative of the Utah cases. The innumerable cases from other courts are collected at 4 C.J.S., Appeal and Error, § 228, p. 665, note 70.

The reasons for refusing to entertain on appeal matters not raised in or presented to the lower court are based on the practical necessity of an orderly administration of law and on fairness to the trial court and the opposite party. To entertain defendants' assertions here

would be to make far reaching decisions of fact and law in a vacuum—without the benefit of either evidence or record—without allowing plaintiff an opportunity to present his side of the controversy and would deny plaintiff his right to a jury trial on these important matters. Accordingly, the entirety of defendants' arguments concerning the Dead Man Statute and the Wrongful Death Act is premature. For these reasons this court must decline to pass upon the issues thus raised for the first time on appeal by defendants.

POINT III. EVEN ASSUMING, ARGUENDO, THAT DEFENDANTS' POINT III WERE PROPERLY BEFORE THIS COURT FOR REVIEW, WHICH IT IS NOT, IT WOULD AVAIL DEFENDANTS NOTHING BECAUSE (1) THE CONTENTION THAT PLAINTIFF'S COUNSEL ADMITTED THAT HE HAD NO EVIDENCE OTHER THAN THAT FROM THE PLAINTIFF HIMSELF IS A BIASED DISTORTION OF ONE COMMENT WRENCHED OUT OF CONTEXT AND DOES NOT REFLECT THE TRUTH, (2) THE DEAD MAN STATUTE DOES NOT DISQUALIFY THE PLAINTIFF FROM TESTIFYING AND (3) THE WRONGFUL DEATH ACT AIDS RATHER THAN HINDERS PLAINTIFF'S CASE.

Challenging defendants' arguments concerning the Dead Man Statute and the Wrongful Death Act is not to be construed as a waiver of the argument in Point II that these matters are not properly before the court

for review. Because of the gravity of this matter and because these issues were argued at some length in defendants' brief plaintiff feels constrained to answer them and requests the courts indulgence.

The keystone upon which defendants' argument rests and without which the remainder of the argument has no merit is the assertion raised at page 31 of their brief that "... plaintiff's attorney admitted that the only testimony or evidence supporting the plaintiff's claim was that of the plaintiff (R. 90)." If this assertion concerning evidence is wrong, the remainder of defendants' argument is valueless. We will show that it is wrong.

This cited comment of counsel must be considered in light of the setting in which it was made. Arrangements and reservations had been made for the plaintiff and his California counsel to travel to Utah for the trial when, at the last moment, plaintiff, paralyzed from the neck down by the accident in question, was informed by his doctors that he would not be able to attend but must undergo a trans-urethra section (R. 110, 113). Plaintiff's counsel informed court and opposing counsel as rapidly as possible of this unexpected turn of events and made properly and timely a motion for a reasonable continuance. Upon defendants' repeated insistence that the motion was not timely or sufficient, the court denied the motion and plaintiff was forced to go to trial. Obviously certain elements of plaintiff's case could only be properly presented through the plaintiff himself. This would include evidence concerning the extent of his injuries, pain and suffering, and other elements of which he would be able to testify regardless of the application or not of the

Dead Man Statute. He should be allowed to testify as to many, if not all, of the independent facts concerning the accident. The cited comment of counsel must be considered in light of the comment next preceeding it on the same page of the record (R. 90, line 4) but not mentioned in defendants' brief. Counsel said

I would like the record to show, Mr. Reporter, that this particular exhibit, Plaintiff's exhibit No. 1 which purports to be a deposition of the Plaintiff Paul Bairas, is the only sworn testimony of the Plaintiff, Paul Bairas, *that is available at this time.* (emphasis added)

It is clear upon a reading of the record that the comment cited by defendants had the same meaning as the comment quoted above but not referred to by defendants.

In the interest of a fair and honest presentation of plaintiff's position to this court we feel compelled to add that defendants' assertion that plaintiff had no other testimony or evidence is improperly asserted for another reason. That reason is that the plaintiff did have other witnesses under subpoena. In fact one of the witnesses whose names were called by defendants' counsel when plaintiff moved for the exclusion of witnesses, Mr. Crosby (R. 83), was under the plaintiff's subpoena. Others under subpoena were not in the courtroom at that moment. Just as defendants felt compelled in their statement of facts to recite matters not in the record (and they so indicate) (R. 9, voir dire examination of jurors) so does plaintiff feel compelled to bring these matters to the court's attention in order that incompleteness of the record will not prejudice this court's duty to reach a just

decision. Of course, we stand ready to show to this court's satisfaction the truth of our assertions concerning other witnesses.

Building upon their erroneous conclusion that the only evidence available to plaintiff was that of the plaintiff himself, the defendants next argue that the Dead Man Statute, Utah Code Anno. 1953, 78-24-2(3), absolutely precludes the use of any or all of this evidence. This portion of defendants' argument is also untenable. In support of their contention defendants cite four cases, one each from Utah, Wyoming, Nevada and Nebraska.

With all due deference to prior members of this court, we respectfully submit that the Utah case, *Maxfield v. Sainsbury*, 110 Utah 280, 172 P. 2d 122 (1946) is not precedent for anything in this regard but that the entire discussion in the majority opinion and in the concurring opinion concerning the Dead Man Statute is, unfortunately, only potentially misleading and confusing dicta. The case was reversed on the question of the validity of a receipt—having no bearing on the Dead Man Statute issue. Accordingly defendants' assertion that the *Maxfield* case states the Utah law in this regard deserves little weight.

It is true that the cases from those states which have unfortunately been saddled with this blind and senseless exception to the generally prevailing rule of no disqualification because of interest are in hopeless conflict. Any attempt to reconcile them would be futile. We will show, however, that the view advocated by the defendants is not the majority view as they state (Brief 31) but

on the contrary is the minority view, and a waning minority view at that.

It appears that of the jurisdictions which have apparently considered the question of whether the Dead Man Statute should be strictly construed and thus used to withhold needed evidence in automobile accident cases, or liberally construed and thus not used unnecessarily to withhold evidence in automobile accident cases, only seven (plus possibly one state which construed a similar statute concerned with partnership matters) adhere to the strict view while the remaining ten favor the liberal position. Of the ten favoring the liberal position seven of the decisions are within the last eight years while only two of the decisions favoring the strict view are within the last twenty-one years—they happen to be the Nevada and Nebraska cases upon which defendants rely. Texas and Alabama have by recent decisions moved from the strict interpretation camp to the liberal one. Citations to these various authorities will be listed later, and are to be found in an exhaustive annotation at 80 A.L.R.2d 1296.

Those cases which use the statute to preclude testimony to the greatest extent possible give such reasons as (1) prior cases on other matters have construed “transaction” to include every variety of affairs and it must be so construed here; (2) the purpose of the statute is to equalize and spread the disability whenever possible; (3) mankind is so inherently dishonest and the judicial process so faulty that we must deny the survivor a chance to speak in order to forestall the looting of estates by false claims; (4) although “transaction” can be judicially

construed to include every variety of affairs, contrary to its usual and ordinary meaning, it cannot be construed according to its usual and ordinary meaning because so to do would be judicial legislation; and (5) although the harshness and undesirability of this result is recognized by almost all courts and writers only the legislature has the power or the responsibility to do anything about it.

Jurisdictions and major cases representing this strict interpretation viewpoint are: Georgia, *Rogers v. Carmichael*, 58 Ga.App. 343, 198 S.E. 318 (1938) dealing with a partnership statute; Illinois, *VanMeter v. Goldfarb*, 317 Ill. 620, 148 N.E. 391 (1925); Kentucky, *Miller v. Walsh's Administratrix*, 240 Ky. 822, 43 S.W. 2d 42 (1931); Nebraska, *Re Mueller's Estate*, 166 Neb. 376, 89 N.W.2d 137 (1958); Nevada, *Zeigler v. Moore*, 335 P.2d 425 (Nev. 1959); North Carolina, *Davis v. Pearson*, 220 N.C. 163, 16 S.E.2d 655 (1941); West Virginia, *Willhide v. Biggs*, 118 W.Va. 160, 188 S.E. 876 (1936); and Wyoming, *Stephens v. Short*, 41 Wyo. 324, 285 P. 797 (1930).

On the other hand, the decisions representing the majority and growing view that the rule is either inapplicable to automobile accidents or must be liberally construed so as not to exclude evidence of the facts and occurrences of the accident voice such reasons as: (1) this provision is an anachronism persisting, truly, from the dark past when all parties in interest were disqualified as witnesses; (2) as such it is a harsh rule, and since all states have adopted liberal party testimony admission statutes, this rule is an exception only to the general rule and the general rule must be liberally construed

and this exception strictly construed in order to accomplish the primary objective of the general statute; (3) there is no reason to believe that justice is done by denying this testimony and that in fact many more honest claims are unjustly defeated than unjust claims are thwarted; (4) the guarantees of cross examination are adequate and effective to prevent fraudulent claims; (5) by its plain and usual meaning "transaction" refers to a contractual or other mutual type of negotiation or business relationship and not to the independent facts of an automobile accident as such; (6) that to extend the meaning of "transaction" to embrace every type of affairs would be an unwarranted judicial extension unintended by the legislature; (7) in any event, it is going too far to say that "transaction" applies to any and all aspects of an automobile accident; (8) the question is not whether the matter sounds in contract or in tort but whether it is a transaction in the usual and ordinary meaning of that word; (9) automobile accidents are not, as such, transactions, but are independent facts.

Jurisdictions and major cases representing this more liberal viewpoint are: Alabama, *Gibson v. McDonald*, 265 Ala. 426, 91 So.2d 679 (1956); Arkansas, *Rankin v. Morgan*, 193 Ark. 751, 102 S.W.2d 552 (1937); Florida, *Herring v. Eiland*, 81 So.2d 645 (Fla. 1955); *Day v. Stickle*, 113 So.2d 559 (Fla. App. 1959); Iowa, *Turbot v. Repp*, 247 Iowa 69, 72 N.W.2d 565 (1955); Maryland, *Sheneybrook v. Blizzard*, 209 Md. 304, 121 A.2d 218 (1956); New York, *McCarthy v. Woolston*, 210 App. Div. 152, 205 N.Y.S. 507 (1924) (since affirmed by statute); North Dakota, *Knoepfle v. Suko*, 108

N.W.2d 456 (N.D. 1961); Tennessee, *Christofiel v. Johnson*, 40 Tenn. App. 197, 290 S.W.2d 215 (1956); Texas, *Harper v. Johnson*, 345 S.W.2d 277 (Tex. 1961); Wisconsin, *Krantz v. Krantz*, 211 Wis. 249, 248 N.W. 155 (1933); *Seligman v. Hammond*, 205 Wis. 199, 236 N.W. 115 (1931).

Except for the Nevada and Nebraska cases, representing a small to negligible population effect, the strong modern trend and the decided weight of authority favor the admission of the testimony of a survivor of an automobile accident as to the facts of the accident.

Since this court has not previously spoken about the Dead Man Statute and automobile accidents, it is unfettered by undesirable precedent. It is free to analyze the problem in the light of the better reasoned cases and the more desirable social results.

The better analysis of this problem would follow the approach below described.

We have adopted the common law, but only so far as it is appropriate to our conditions. Utah Code Anno. 1953, 68-3-1. The harsh rule that statutes in derogation of the common law are to be strictly construed has been abolished by Utah Code Anno. 1953, 68-3-2, which provides that

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect

the objects of the statutes and to promote justice. . . .

The statute removing generally the disqualification previously imposed on parties at the common law, Utah Code Anno. 1953, 78-24-1, is in derogation of the harsh common law rule and is to be liberally construed to effect its objects and to promote justice. The exception to this statute—the Dead Man Statute, Utah Code Anno. 1953, 78-24-2(3)—is but a restatement of the harsh common law rule which must be strictly construed because to do otherwise would run afoul of the legislative mandate that the general statute be liberally construed. This aspect of the analysis of the problem has been adopted by the better reasoned cases. *Knoepfle v. Suko*, 108 N.W.2d 456 (N.D. 1961); *Harper v. Johnson*, 345 S.W.2d 277 (Tex. 1961); *Shaneybrook v. Blizzard*, 209 Md. 304, 121 A.2d 218 (1956); *Day v. Stickle*, 113 So.2d 559 (Fla. App. 1959); *McCarthy v. Woolston*, 210 App. Div. 152, 205 N.Y.S. 507 (1924); *Rankin v. Morgan*, 193 Ark. 751, 102 S.W.2d 552 (1937).

Following this line of thought, the better reasoned cases admit testimony of the survivor of an automobile collision as to all the independent facts of the accident, speed, direction of travel, location of vehicles, action of drivers, existing conditions and so on. *Knoepfle v. Suko*, 108 N.W.2d 456 (N.D. 1961); *Harper v. Johnson*, 345 S.W.2d 277 (Tex. 1961); *Shaneybrook v. Blizzard*, 209 Md. 304, 121 A.2d 218 (1956); *Day v. Stickle*, 113 So. 2d 559 (Fla.App. 1959); *Rankin v. Morgan*, 193 Ark. 751, 102 S.W.2d 552 (1937); *Turbot v. Repp*, 247 Iowa 69, 72 S.W.2d 565 (1955); *Seligman v. Hammond*, 205

Wis. 199, 236 N.W. 115 (1931); *Gibson v. McDonald*, 265 Ala. 426, 91 So. 2d 679 (1956).

Again, the better reasoned cases dealing with one car accidents arrive at the same conclusion, admitting the survivor's testimony. *Christofiel v. Johnson*, 40 Tenn.App. 197, 290 S.W.2d 215 (1956); *Krantz v. Krantz*, 211 Wis. 249, 248 N.W. 155 (1933); *Herring v. Eiland*, 81 So.2d 645 (Fla. 1955); *McCarthy v. Woolston*, 210 App. Div. 152, 205 N.Y.S. 507 (1924).

This line of reasoning would give the statute its normal and logical interpretation, would admit evidence in accord with the mandate of the general statute on admissibility of evidence and would implement what must have been the legislative intent, because, while the Dead Man Statute may be harsh when applied to business and commercial affairs it is not asking the impossible for people to put their negotiations and agreements in writing, but it is asking the impossible to expect them to reduce the facts of an automobile accident to an admissible writing. In fact, we respectfully submit, the legislature did not have the independent facts of an automobile accident in mind at all when in 1894 the Dead Man Statute exception was enacted in substantially its present form. Laws of Utah, 1894, p. 26-27.

Such minority view cases as those cited by defendants, *Re Mueller's Estate*, 166 Neb. 376, 89 N.W.2d 137 (1958) and *Zeigler v. Moore*, 335 P.2d 425 (Nev. 1959) have but two arguments in their favor. (1) The rule they establish is easy of application and (2) they keep pacified and quiet the vocal insurance lobbies which

have no higher motivation than the minimization of just claims. Little else can be said in their favor.

If and when a case involving the Dead Man Statute and an automobile accident is properly presented to this court, right reason and logic will require that this court so construe the statute as to effect the humane and socially desirable ends attainable only by admission of all evidence available in such cases.

The final contention made by defendants in this line of argument is that, and again assuming no evidence to be available other than that of the plaintiff himself, the Wrongful Death Act (Utah Code Anno. 1953, 78-11-12) compels affirmance of the lower court because of the provision in that act that the plaintiff "shall not recover judgment except upon some competent satisfactory evidence, other than the testimony of said injured person."

We have shown that there was evidence available other than the testimony of plaintiff himself. Accordingly, even were this contention ripe for appeal, it would fail.

Not only does this provision not assist defendants, it assists plaintiff. When it is considered that this is a recently enacted statute, the quoted phrase can have had no effect intended other than to repeal the disqualification in the Dead Man Statute but in so doing to request some other independent evidence in corroboration.

Accordingly, were it ripe for appeal, the Wrongful Death Act would not require affirmance but reversal of the lower court, which must in any event for other reasons be reversed.

CONCLUSION

For the reasons set forth in the initial brief and in this reply brief, plaintiff respectfully submits that the trial court abused its discretion in failing to grant plaintiff's timely motion for a continuance and in failing to grant plaintiff's motion for a change of venue.

Plaintiff renews the prayer of its initial brief that this court reverse or vacate the judgment of the lower court and remand this case for a trial on the merits in a county free from bias and prejudice, and in any event that it be reversed and remanded for a trial on the merits.

Respectfully submitted,

Gardner & Burns
25 East Lincoln Avenue
Cedar City, Utah

Nathan Goller
9171 Wilshire Blvd.
Beverly Hills, California
Attorneys for the Appellant