

1963

# Harry Walters and Betty Walters v. Robert W. Brandt : Brief of Appellant

Utah Supreme Court

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## IN THE SUPREME COURT

of the  
STATE OF UTAH

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JUN 5 - 1963

HARRY WALTERS and BETTY  
WALTERS, his wife,

Clerk, Supreme Court, Utah

Plaintiffs and Respondents,

vs.

ROBERT W. BRANDT, Adminis-  
trator of the Estate of Barbara  
Best Pelly, appointed in Utah,

Defendant and Appellant.

Case No.  
9880BRIEF OF APPELLANTAppeal from Sixth District Court, Sevier County,  
Utah, Hon. Ferdinand Erickson, Judge.HANSON & BALDWIN  
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## INDEX

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN THE LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
STATEMENT OF POINTS .....	5
ARGUMENT .....	6
POINT I. THE COURT ERRED IN SUBMITTING INSTRUCTION 17 TO THE JURY, SAID INSTRUCTION BEING A VERDICT DIRECTING (FORMULA) INSTRUCTION WHICH DID NOT TAKE INTO ACCOUNT THE DEFENDANT'S THEORY OF THE CASE. ....	6
POINT II. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANT'S REQUESTED INSTRUCTION NO. 13, RELATING TO THE STATUTORY DUTY OF A DRIVER OPERATING A VEHICLE TO THE LEFT OF THE CENTER OF THE HIGHWAY IN OVERTAKING AND PASSING ANOTHER VEHICLE TRAVELING IN THE SAME DIRECTION.....	23
POINT III. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF DEFENDANT'S SPEED AS NEGLIGENCE.....	25
POINT IV. THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 7, WHICH INSTRUCTION ENCOMPASSED THE DEFENDANT'S THEORY OF THE CASE THAT THE CONDUCT OF THE PLAINTIFF CREATED AN EMERGENCY SITUATION, AND WHICH THEORY WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.....	27
POINT V. THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 3, WHICH INSTRUCTION SET FORTH THE STATUTORY RULE AS TO THE NATURE OF EVIDENCE REQUIRED WHEN THE TORT FEASOR IS DEAD. ....	29

## INDEX (Continued)

	Page
POINT VI. THE TRIAL COURT ERRED IN GIVING REPETITIOUS INSTRUCTIONS WHICH PREJUDICIALLY EMPHASIZED PLAINTIFF'S THEORY OF RECOVERY IN THE CASE. ....	30
CONCLUSION .....	34

## CASES CITED

Beckstrom v. Williams, 282 P. 2d 309, 3 Utah 2d 210.....	25, 29
Beyerle v. Clift (Calif.), 209 Pac. 1015.....	17
Clark v. Los Angeles-Salt Lake Railway Company, 73 Utah 486, 502, 508, 275 P. 582.....	21
DeVine v. Cook, 3 Utah 2d 134, 141; 279 P. 2d 1073 (1955) .....	34
FRETZ V. ANDERSON, 5 UTAH 2d 290, 300 P. 2d 642..	30
Hunter v. Michaelis, 114 Utah 242, 198 P. 2d 245.....	27
Ivie v. Richardson, 9 Utah 2d 5, 11, 336 P. 2d 781.....	15
Jensen v. Utah Railway Company, 72 Utah 366, 386, 270 P. 349 .....	20, 22
McFatrige v. Harlem Globe Trotters, 365 P. 2d 918.....	17
Morgan v. Bingham Stage Lines, 75 Utah 87, 283 Pac. 160 .....	18
Morrison v. Perry, 104 Utah 151, 140 Pac. 2d 772.....	10, 11, 20, 25, 27, 28
Rearick v. Manzella, 355 S.W. 2d 134, 136 (Mo.).....	16
Ryan v. Beaver County, 82 Utah 27, 31, 21 P. 2d 858.....	22
Sorensen v. Bell, 51 Utah 262, 170 P. 72.....	18
Shields v. Utah Light & Traction Company, 99 Utah 307, 105 P. 2d 347.....	33
Startin v. Madsen, 120 Utah 631, 237 P. 2d 834.....	25, 29
Whaley v. Crutchfield, 294 S.W. 2d 775 (Ark.).....	17

## AUTHORITIES CITED

Title 41-6-57, Utah Code Annotated, 1953.....	24
Title 78-11-12, Utah Code Annotated, 1953.....	29
Laws of Utah, 1953, Chapter 30, Paragraph 1.....	29

**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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HARRY WALTERS and BETTY  
WALTERS, his wife,

Plaintiffs and Respondents,

vs.

ROBERT W. BRANDT, Adminis-  
trator of the Estate of Barbara  
Best Pelly, appointed in Utah,

Defendant and Appellant.

Case No.  
9880

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**BRIEF OF APPELLANT**

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**STATEMENT OF THE KIND OF CASE**

Appellant appeals to the Supreme Court of Utah from a jury verdict entered in the District Court of Sevier County and the denial of Defendant's Motion for a New Trial. Plaintiffs were awarded damages for personal injuries and property damages resulting from an automobile accident that involved a pickup truck driven by plaintiff Harry Walters, and an automobile driven by Barbara Best Pelly, who was killed in the accident.

**DISPOSITION IN THE LOWER COURT**

The jury returned a verdict in favor of the

plaintiffs. Defendant filed a timely motion for new trial which was denied.

### **RELIEF SOUGHT ON APPEAL**

The appellant seeks to have the Judgment on the Verdict vacated and the case remanded for a new trial.

### **STATEMENT OF FACTS**

August 22, 1953, at about 5:15 p.m., Harry Walters, accompanied by Betty Walters, his wife, was driving south on Highway 89, approximately 1½ mile south of Aurora, Utah. Mrs. Barbara Best Pelly, accompanied by her daughter, was driving north on Highway 89. The pickup truck driven by Harry Walters collided broadside with the Chevrolet automobile driven by Barbara Best Pelly. Mr. and Mrs. Walters were injured and Mrs. Pelly and her daughter were killed.

There is a conflict of evidence as to the path of the Walters' car just prior to the accident. The evidence is undisputed that the Pelly vehicle pulled slightly off to the right side of the road, approximately 55 feet south of the point of impact between the vehicles (R. 194), then turned left across a bridge to the west side of the road, and at a point approximately 4 feet west of the center of the highway (R. 260), while angled toward the northwest, the Pelly vehicle was struck in the middle of the right side by the front of the Walters' pickup truck. (R. 292-293)

Mr. Walters and his wife testified that they had passed another southbound vehicle, some distance north of the scene of the accident, and had travelled on the west side of the road for most of the distance from Aurora. (R. 182-R. 102)

Alden Roberts, an eyewitness to the accident, testified that the Walters vehicle was attempting to pass two southbound automobiles, and had travelled on the left, or the east side of the road for approximately 3 to 4 blocks. (R. 295-297) Roberts saw the Pelly car approaching from the south on its own side of the highway, and at the time Mrs. Pelly approached the bridge, near the accident scene, the Walters car was on the wrong side of the road. (R. 291, R. 302) The Pelly automobile turned sharply to the West, across the bridge, and simultaneously the Walters vehicle was suddenly turned to the west side of the road. (R. 293) The Walters vehicle collided with the right side of the Pelly automobile. (R. 208)

There was evidence at the trial by the witness Robert Averett, that he had followed the Pelly automobile for about a mile, keeping right behind it, and that he, Averett, was not travelling in excess of 50 miles per hour. (R. 196) The speed limit was posted as 60 miles per hour. Averett testified that at the moment of the impact, the Walters pickup truck was facing southwest and was turning from the east to the west side of the road, and was par-

tially on its wrong side, or the east side of the road, at impact. (R. 204, Exhibit 3) Tire marks on the east side of the road leading directly to the left wheels of the pickup truck were 40 feet in length. (R. 203, R. 204)

Just before reaching the bridge near the accident scene, the right wheels of the Pelly car were off the hard surface portion of the road. The investigating police officer identified tire marks from the east shoulder, south of the bridge, where the marks then turned to the west, across the bridge to the point of impact, the entire marks being 57 feet in length to the west edge of the highway, which was approximately 5 feet west of the impact. (R. 228, R. 232)

Photographs of the Pelly automobile and the Walters truck show the impact on the vehicles, clearly indicating that the Walters pickup truck hit the Pelly automobile broadside, in the middle of the right side, with no damage to the rear fender or front fender of the Pelly automobile. (Exhibits 5 and 6)

The action was tried to a jury and a verdict was returned in favor of the plaintiffs.

## **STATEMENT OF POINTS**

### **POINT I.**

**THE COURT ERRED IN SUBMITTING INSTRUCTION 17 TO THE JURY, SAID INSTRUCTION BEING A VERDICT DIRECTING (FORMULA) INSTRUCTION WHICH DID NOT TAKE INTO ACCOUNT THE DEFENDANT'S THEORY OF THE CASE.**

### **POINT II.**

**THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANT'S REQUESTED INSTRUCTION NO. 13, RELATING TO THE STATUTORY DUTY OF A DRIVER OPERATING A VEHICLE TO THE LEFT OF THE CENTER OF THE HIGHWAY IN OVERTAKING AND PASSING ANOTHER VEHICLE TRAVELLING IN THE SAME DIRECTION.**

### **POINT III.**

**THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF DEFENDANT'S SPEED, AS NEGLIGENCE.**

### **POINT IV.**

**THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 7, WHICH INSTRUCTION ENCOMPASSED THE DEFENDANT'S THEORY OF THE CASE THAT THE CONDUCT OF THE PLAINTIFF CREATED AN EMERGENCY SITUATION, AND WHICH THEORY WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.**

### **POINT V.**

**THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 3, WHICH INSTRUCTION SET FORTH THE STATUTORY RULE AS TO THE NATURE OF EVIDENCE REQUIRED WHEN THE TORT FEASOR IS DEAD.**

## POINT VI.

**THE TRIAL COURT ERRED IN GIVING REPETITIOUS INSTRUCTIONS WHICH PREJUDICIALLY EMPHASIZED PLAINTIFF'S THEORY OF RECOVERY IN THE CASE.**

## ARGUMENT

### POINT I.

**THE COURT ERRED IN SUBMITTING INSTRUCTION 17 TO THE JURY, SAID INSTRUCTION BEING A VERDICT DIRECTING (FORMULA) INSTRUCTION WHICH DID NOT TAKE INTO ACCOUNT THE DEFENDANT'S THEORY OF THE CASE.**

Defendant's theory and defense in this case was that the truck driven by Harry Walters was traveling on its left, or wrong side of the road, just prior to the collision and an emergency situation was created as the Walters vehicle and the Pelly automobile approached, and that both vehicles, with a headon collision imminent, turned to the west side of the road almost simultaneously.

The evidence from the eyewitness Alden Roberts, who was following the Walters pickup truck, was clear and unequivocal that the pickup truck was driven on the east half of the road, southbound, for three or four blocks, until just a second before the accident, (R297) and the Pelly automobile was on its right side of the road as it approached the bridge, and at the time the Pelly vehicle was near the bridge, Walters was still on the left side of the road (R. 291). Mr. Roberts testified that both vehicles suddenly turned to the west side of the road.

(R. 292) The physical evidence shows clearly that Mrs. Pelly was on the east side of the road, her right side, until she was within less than 60 feet from the point of impact. (R. 228, R. 232) The eye-witness Averett testified that the Pelly car was on its right side, east side, of the road until it got to the bridge, then it turned up sharply to the west side of the road. (R. 194) Averett further testified as to the position of the Walters car at impact, being angled across the center of the road, partially on the wrong side (R. 204 and Exhibit 3), and he observed tire marks on the east side of the road leading directly to the pickup truck as it was stopped after the accident. (R. 199-R. 203)

Instruction No. 17 given by the court was as follows:

“In order for you to find a verdict in favor of the Plaintiffs and against the Defendant, the Plaintiffs have the burden of proving by a preponderance of the evidence one or more of the following facts:

A. That the Defendant was driving her automobile at a speed in excess of 60 miles per hour.

B. In crossing the center line of the highway into the opposing lane of traffic when it was not safe so to do.

C. In failing to keep said automobile under proper control.

D. In failing to keep a proper lookout and in failing to see the automobile driven by the Plaintiff.

E. In running head on into the automobile of the Plaintiff.

"The plaintiffs have the burden of proving by a preponderance of the evidence that one or more of the acts or omissions designated as A, B, C, D, & E was the efficient and moving cause which in a natural and continuous sequence, unbroken by any new, independent cause, produced the collision which resulted in the injuries and damage alleged and claimed by the Plaintiff.

"The Plaintiffs have the burden of proving by a preponderance of the evidence what damage, if any, they suffered; if you find the Defendant negligent in any one or more of the items set out in A, B, C, D, and E, and if you find that one or more of such acts or omissions were the proximate cause of the injuries to Plaintiffs, then you must find for the Plaintiffs in such amounts as your judgment dictates and directs. Such an award for Plaintiff Harry Walters, must not exceed the sum of 5,000.00 general damages and \$100.00 special damages, while damages awarded the Plaintiff. Betty Walters, must not exceed \$50,000.00 general damages and \$160.50 special damages. In specifying this limit of damages, you are not to construe it as an intimation of what your verdict as to damages should be. In determining the amount of such damages, you may consider, so far as is shown by evidence, the nature, character and extent of injuries suffered by Mr. Walters and Mrs. Walters, whether such injuries are temporary or permanent; and you may also take into consideration the pain and suffering, past

and future, so far as shown by the evidence, and to award such damages as will reasonably and justly compensate for the injuries sustained, not exceeding the sum of \$5,100.00 in the case of Harry Walters, the amount he has prayed for in his complaint, and the sum of \$50,160.50 in the case of Betty Walters, the amount she has claimed in her Complaint."

In this instruction the court set forth each and every allegation of negligence claimed by the plaintiffs, had a paragraph on preponderance of the evidence and in the third paragraph of the instruction charged the jury:

**"The Plaintiffs have the burden of proving by a preponderance of the evidence what damage, if any, they suffered; if you find the Defendant negligent in any one or more of the items set out in A, B, C, D, and E, and if you find that one or more of such acts or omissions were the proximate cause of the injuries to Plaintiffs, then you must find for the Plaintiffs in such amount as your judgment dictates and directs. (Emphasis ours)**

This is the so-called formula instruction and by telling the jury they must return a verdict for plaintiff if they found the defendant committed certain acts or omissions the court has ignored completely the defendant's theory and defense.

Instruction 17 is further erroneous in that the court in the first paragraph of the instruction, instructed the jury, that in order to find for the plaintiffs and against the defendants, the plaintiffs

had the burden of proving one or more of the facts set forth as a, b, c, d, or e.

There was no dispute in the case that the Pelly automobile was to the left side of the center of the highway at the time of collision. The defendant's theory of the case was that the Pelly vehicle turned to the left side of the road almost simultaneously with the turning to the west side of the road, back to his proper side, by Mr. Walters. Defendant's defense was based upon the factual situation that the two cars approaching headon, on the East side of the road, resulted in an emergency situation whereby Mrs. Pelly had to make an instantaneous decision, continue ahead, or try to turn off the road, to the west, to get out of the way of the Walters pickup truck. Because of the bridge on the east side of the road she was in the position of going straight ahead, directly into the approaching pickup truck, or turning to the left to attempt to get off the road.

The factual situation in this case is almost on all fours with the factual situation presented in **Morrison v. Perry**, 104 Utah 151, 140 Pacific 2nd 772. In that case the deceased (Plaintiff ) was driving on his left side of the road and the defendant was driving on his right side of the road. When the cars were approximately 225 feet apart, the defendant turned to the left side of the road and the plaintiff at that time turned right, to his proper

side of the road, and a collision occurred on the defendant's wrong side of the road. As in our case, the facts in *Morrison v. Perry*, involved a collision whereby the plaintiff and defendant collided on the plaintiff's proper side of the road, but the evidence in the case having been produced to show that plaintiff had originally been on his wrong side of road, 225 feet before impact, and with the impending emergency defendant turned left to avoid a head-on collision, just as plaintiff turned right, to his proper side of the road.

The factual situation in the *Morrison vs. Perry* case, and the instructions given in that case, are very close in fact with the case now before this court. The legal principles set forth in the *Morrison vs. Perry* decision are squarely applicable to the situation in this case and indicate without question the error in the court's instruction number 17.

In the *Morrison vs. Perry* case the court, Utah Supreme Court, in granting a new trial, and in holding that the trial court committed error in the instructions, said:

“In instruction No. 2, the court propounds the following:

1. Did the defendant, at the time of or immediately preceding this accident, drive his automobile at a high, dangerous and unlawful rate of speed or at a rate of speed faster than was reasonable and prudent, having due regard to the surface and width of the highway and traffic thereon?

2. Did the defendant, at the time of or immediately preceding this accident, drive his car without having it under immediate control, so that he could not stop it within the range of his vision?

3. Did the defendant at the time of or immediately preceding this accident, fail to keep a careful lookout ahead for other cars on the highway?

4. Did the defendant, at the time of or immediately preceding this accident, while driving his car upon the highway, suddenly and without warning swerve his car sharply to the left directly in the path of and against the truck driven by Mr. Spiers?

5. Did the defendant, at the time of or immediately preceding this accident, drive his car on the wrong, or lefthand, side of the highway?

“Following this the instruction goes on:

‘If you answer all of these questions in the negative then you should bring a verdict in favor of the defendant. But if you answer any or all of these questions in the affirmative then you must determine the following question: Was the defendant, in so driving his automobile, guilty of negligence?’

The following questions were then asked with respect to the alleged grounds of contributory negligence:

1. Did the deceased, John K. Spiers, at the time of or immediately preceding this accident, drive his truck on the wrong side of the highway?

2. Did the deceased, at the time of or immediately preceding this accident, drive his truck at a rate of speed faster than was reasonable and prudent having due regard to the surface and width of the highway and conditions then existing and the traffic thereon?

3. Did the deceased, at the time of or immediately preceding this accident, fail to have his truck under immediate control?

4. Did the deceased, at the time of or immediately preceding this accident, while driving on the wrong side of the highway, suddenly and without warning turn his automobile into and against the car driven by the defendant?

"The court then states:

'If your answer to any of these questions is in the affirmative, then you must determine the following: Was the deceased, in so driving his truck, guilty of negligence?'

"In other instructions the court stated in substance that a person who drove an automobile in the manner described in the propounded questions was negligent, and in Instruction No. 13, instructed with respect to an emergency allegedly created by the deceased. The jury was told that if a person drove his car in a certain manner he was negligent, and also that if he drove his car in that manner they were then to determine whether or not he was negligent. Thus the jury was permitted to decide that acts of negligence as a matter of law were not negligent.

These instructions were conflicting and the giving of such instructions constitutes error. **Sorenson v. Bell**, 51 Utah 262, 170 P. 172.

"The court in question number 5 of Instruction No. 2, concerning defendant's negligence failed to take into consideration defendant's theory of the case. Defendant alleged and offered evidence to prove that deceased created an emergency by operating his truck on the wrong side of the road. The form of the instruction was such as to definitely suggest that driving on the left-hand side of the highway by defendant was in fact negligence, and it was not pointed out that his so doing, would not constitute negligence if deceased created a hazard and that plaintiff could not take advantage of deceased's wrong predicate liability on defendant's acts in failing to exercise perfect judgment to avoid an emergency.

"Defendant's theory, which was supported by evidence, was that deceased, by driving on his left-hand side of the highway, and his failure to turn to his right side in time to avoid creating an emergency, did create an emergency which confronted defendant through no fault of his. The court failed to properly separate the theories of the parties, but instead gave general instructions treating the rights and duties of each driver as being mutual without regard to defendant's theory as to deceased's negligence in first being on his wrong side of the highway. Defendant is entitled to have his case submitted to the jury on any theory justified by proper evidence. **Morgan v. Bingham Stage Line Co.**, 75 Utah 87, 283 P. 160; **Hartley v. Salt Lake City**, 41

Utah 121, 124 P. 522; **Pratt v. Utah Light & Traction Co.**, 57 Utah 7, 169 P. 868; **Smith v. Lenzi**, 74 Utah 362, 279 P. 893; **Martineau v. Hanson**, 47 Utah 549, P. 432.

“Each party is entitled to have his theory of the case presented in such a way as to aid the jury and not confuse it. In **Throne v. J. P. O'Neill Construction Company**, 40 Utah 265, 121 P. 10, 16, the court suggests the better practice of presenting the parties' theories of the case to the jury:

“‘One way the court might have followed in charging the jury would have been to charge them in separate instructions, first, in accordance with respondent's evidence; and, second, in accordance with appellant's evidence which related to the proposition covered by the instruction in question, and in each instruction have directed the jury to return a verdict in accordance with their findings upon that question.’”

Giving of a formula instruction was held reversible error in **Ivie v. Richardson**, 9 Utah 2d 5, 11, 336 P. 2d 781, for the following reasons:

“The court gave this Instruction No. 4:

“If you find from a preponderance of the evidence that the defendant failed to keep and maintain a proper lookout for the plaintiff in the driveway where the accident occurred and that such failure promixately resulted in the accident, then your verdict must be in favor of the plaintiff and against the defendant.’”

**“The above instruction, taken by itself, is in error because it fails to take into account the possible contributory negligence of the plaintiff. This kind of instruction, sometimes referred to as a ‘formula’ instruction, which makes a recital in accordance with the contention of a party and ends with a conclusion: ‘\* \* \* and if you so find, then your verdict must be for (the party)’ is not generally a good type of instruction to give. This is so because it lends itself to the error just noted and also because it tends to be argumentative rather than to set out the principles of law applicable to the issues impartially as to both parties. For such reasons it is better to avoid giving instructions of that type. It is conceded that the issue of contributory negligence was properly covered in the next instruction. This, however, pitted one instruction against the other and might have been confusing to the jury.’”**

The Missouri court in **Rearick vs. Manzella**, 355 S.W. 2d 134, 136 (Mo.), used similar language in reversing a jury award which was based upon a formula instruction:

**“It is here contended by defendant that the trial court erred in giving plaintiff’s verdict-directing Instruction No. 1 because it failed to refer to or negative plaintiff’s contributory negligence submitted as a defense in defendant’s Instruction No. 7, ‘thereby creating a conflict between the two instructions.’ In view of present controlling decisions it is our manifest duty to sustain the contention.”**

A later instruction directing the jury to consider all instructions together was held insufficient to correct the error.

The Supreme Court of New Mexico similarly observed in **McFatridge vs. Harlem Globe Trotters**, 365 P. 2d 918:

“There are innumerable cases holding that a ‘formula’ instruction must include each and every element requisite to support a verdict, and that omission of any of these elements can not be supplied by reference to other instructions correctly stating the law.”

See also **Whaley vs. Crutchfield**, 294 S.W. 2d 775 (Ark.).

In **Beyerle v. Clift** (Calif.), 209 Pac. 1015, the California court reversed a judgment because a formula instruction did not include all conditions of recovery.

“The errors relied upon consist in the giving of two instructions to the jury. In each of these instructions, the court stated certain provisions of law defining the duties imposed upon an operator of a vehicle, and then said:

“‘If, therefore, you believe that the defendant violated any of the provisions of the law above mentioned at the time of the accident complained of in this case, and that such violation was the proximate cause of the accident, you should find for the plaintiff.’

“Assuming that the issue of contributory negligence was properly before the court, there is no doubt that these were erroneous

instructions, because it is settled law that, if an instruction by its terms purports to state the conditions necessary to a verdict, it must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced.

“The court gave other instructions on the subject of contributory negligence, the correctness of which is not challenged. But this is not sufficient to overcome the prejudicial character of the erroneous instructions.

“\* \* \* But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff.’ *Pierce v. United Gas & Elc. Co.*, supra, 161 Cal. at page 185, 118 Pac. at page 704.”

The Utah Supreme Court has held that error arising from conflicting instructions is prejudicial and is not cured by other correct instructions, because there is no doubt whether the jury followed the proper instruction or the improper one. *Sorensen v. Bell*, 51 Utah 262, 170 P. 72.

*Morgan v. Bingham Stage Lines*, 75 Utah 87, 283 Pac. 160, was reversed for a new trial for a new trial for failure to instruct the jury in defendant’s theory of contributory negligence.

“A party is entitled to have his case submitted to the jury on the theory of his evidence as well as upon the theory of the whole evidence. *Toone v. O’Neill Const. Co.*, 40 Utah

265, 121 P. 10, **Hartley v. Salt Lake City**, 41 Utah 121, 124 P. 522, 523, and **Miller v. Utah Consol. M. Co., et al**, 53 Utah 366, 178 P. 771; **Pratt v. Utah Light & Traction Co.**, 57 Utah 7, 169 P. 868.

“The following language of Mr. Justice Straup in the case of **Hartley v. Salt Lake City**, *supra*, is particularly applicable here:

“There are two parties to a lawsuit. Each on a submission of the case to the jury is entitled to a submission of it on his theory and the law in respect thereof. The defendant’s theory as to the cause of the accident is embodied in the proposed requests. There is some evidence, as we have shown, to render them applicable to the case. That is not disputed. We think the court’s refusal to charge substantially as requested was error. That the ruling was prejudicial and works a reversal of the judgment is self-evident and unavoidable.’”

The failure of the court to properly instruct the jury on the question of contributory negligence or defendant’s theory of emergency caused by plaintiffs in connection with Instruction No. 17 had the effect of failing to submit the case to the jury on defendant’s theory of the case.

An instruction which does not contain all of the elements dealing with the particular proposition under instruction, or is susceptible to more than one conclusion, constitutes reversible error. Even though following instructions may properly define the issue in question, such does not remedy the de.

fect. The error results from pitting one instruction against another, which may confuse the jury.

In the instant case Instruction 17 was not only confusing but was in conflict with other instructions. Were the jury to follow one, it must of necessity ignore another. The offending instruction in the instant case violates the clear statement of **Morrison v. Perry**, 104 Utah 151, 140 P. 2d 772, because the instruction as given, did not "aid the jury" but could only mislead and confuse it."

In the case of **Jensen v. Utah Railway Company**, 72 Utah 366, 386, 270 P. 349, the Supreme Court condemned the use of "formula" instructions which tend to apply more general principles of law to a case without relating them to facts.

"The rule is well settled that in instructing a jury a mere abstract or general statement as to the law should be avoided, and that all instructions should be applicable to evidence on either **on or the other of the respective theories** of the parties. Instructions which are not so applicable, though abstractly they may be correct, are not helpful to the jury, are apt to be misleading and to be improperly applied. That a proposition may be correct in a sense, and yet inapplicable to the evidence or to the issue, is readily perceived."

The mere fact that another instruction mentioned the theory of defendant is insufficient to correct that error:

"It is conceded that the issue of contributory negligence was properly covered in the

next instruction. This, however, pitted one instruction against the other and might have been confusing to the jury." **IVIE v. Richardson**, 9 Utah 2d 5, 336 P. 2d 781.

**Clark v. Los Angeles-Salt Lake Railway Company**, 73 Utah 486, 502, 508, 275 P. 582, declares the law with reference to the type of error which must be committed before a reversal will be granted.

"All committed errors, of course, are not presumptively prejudicial, but, **when the error is of such nature or character as calculated to do harm, prejudice will be presumed until by the record it is affirmatively shown that the error was not nor could have been of harmful effect.** **Jensen v. Utah Railway Company**, 72 Utah 366, 270 P. 349." (Emphasis added.)

Obviously, all of the theories of the case cannot be stated in one instruction and instructions which explain a particular instruction are proper. In the instant case the "natural and obvious meaning" of Instruction 17 could only lead to conflict and confusion with Instructions 5, 11, 18 dealing with contributory negligence, because they were antagonistic to each other. To believe one was to reject another. Thus, an irreconcilable conflict was presented to the jury.

A formula instruction as given in this case has been condemned by the Utah Supreme Court because it tends to pit one instruction against another. **To have followed one instruction would have been to disregard the other.**

While the court informed the jury that each instruction set out the theory of the two parties, it did nothing to clarify or to reconcile the obvious antagonism between the instructions. The jury was still faced with the proposition of accepting one and rejecting the other.

When an instruction is prejudicially erroneous on its face, a new trial is in order because the jury is presumed to follow the instructions of the court. The Supreme Court in the case of **Ryan v. Beaver County**, 82 Utah 27, 31, 21 P. 2d 858 stated:

“The jury is bound, on questions of law, to yield full obedience to the instructions of the Court, and this applies as well to that part of the charge defining the issues, as made by the pleadings, as to the law declared by the court, and made applicable to the evidence as submitted.”

The following language of Mr. Justice Straup is taken from the case of **Jensen v. Utah Railway Company**, 72 Utah 366, 400, 270 P. 349, 362:

“However, where the committed error is of such nature or character as calculated to do harm, or on its face as having the natural tendency to do so, prejudice will be presumed, until by the record it is affirmatively shown that the error was nor or could not have been of harmful effect. Thus, if the appellant shows committed error of such nature or character, he, in the first instance, has made a prima facie showing of prejudice. The burden, or rather the duty of going forward, is

then cast on the respondent to show by the record that the committed error was not, or could not have been, of harmful effect.” (Citing cases)

## POINT II.

**THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANT’S REQUESTED INSTRUCTION NO. 13, RELATING TO THE STATUTORY DUTY OF A DRIVER OPERATING A VEHICLE TO THE LEFT OF THE CENTER OF THE HIGHWAY IN OVERTAKING AND PASSING ANOTHER VEHICLE TRAVELLING IN THE SAME DIRECTION.**

Defendant’s Requested Instruction No. 13 (R. 30) was refused by the court.

“You are instructed that under the laws of Utah that no vehicle shall be driven to the left side of the center of a roadway in overtaking and passing of another vehicle proceeding in the same direction unless such left side is clearly visible and is free from oncoming traffic for sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction of any vehicle overtaking. In every event, the overtaking vehicle must return to the right hand side of the road before coming within 100 feet of any vehicle approaching from the opposite direction. If you find from the evidence that Harry Walters, in passing another vehicle, and driving to the left side of the highway in overtaking and passing another vehicle proceeding in the same direction and he did not return to his own side of the highway, without interfering with the safe operation

of the Pelly vehicle approaching from the opposite direction, then Harry Walters was negligent, and if you find that his negligence was the proximate cause of the collision, then you must return a verdict in favor of the defendant and against the plaintiff. No Cause of Action."

The requested instruction is in conformity with the provisions of Title 41-6-57, Utah Code Annotated, 1953, which code section provides:

"No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction of any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within 100 feet of any vehicle approaching from the opposite direction."

Exception was duly taken to the court's refusal to instruct the jury in accordance with the defendant's theory and the statute quoted. (R. 312)

There was competent and substantial evidence by the independent eyewitness Alden Roberts that Harry Walters was attempting to pass oether vehicles travelling in the same direction, and Walters was on the left side of the highway for several blocks and remained on that side of the highway until the

Walters truck and the Pelly car, approaching from the south, were very close together. The accident occurred as both vehicles suddenly turned to the west side of the highway. (R. 290-292-293)

The refusal of the court to instruct the jury in accordance with defendant's theory as to the negligence of Harry Walters and the cause of the collision was prejudicial error. A party has a right to have his theory of the case submitted to the jury if the evidence would justify reasonable men in following the theory, and the court has the duty to cover the theory of both parties in the instructions. **Morrison v. Perry**, 104 Utah 151, 140 P. 12d 772; **Beckstrom v. Williams**, 282 P. 2d 309, 3 Utah 2nd 210; **Startin v. Madsen**, 120 Utah 631, 237 P. 2d 834.

### POINT III.

#### **THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF DEFENDANT'S SPEED, AS NEGLIGENCE.**

There is no evidence in the record to indicate that the vehicle driven by Barbara Best Pelly was driven at an excessive rate of speed or that there were any conditions existing that made the stated speed limit an unsafe speed for travel. Instruction No. 11, (R. 40) charged the jury that it was the duty of the defendant to use reasonable care under the circumstances to avoid danger to himself and others, and to observe due care in respect to:

“(d) to drive at such speed as was safe, reasonable and prudent under the circum-

stances, having due regard to the width surface and condition of the highway, the traffic thereon, the visibility, and any actual or potential hazards then existing.

“The designated speed limits for the place in question was 60 miles per hour. This means only that such speed should ordinarily be regarded as safe, reasonable and prudent in the absence of any special hazards or conditions tending to make such speed unsafe. But any speed in excess of such designated speed limit would constitute sufficient evidence to permit a finding that such speed was greater than safe, reasonable and prudent.

“Failure of the plaintiff or defendant to operate his automobile in accordance with the foregoing requirements of law would constitute negligence on his part.”

“A. That the defendant was driving her automobile at a speed in excess of 60 miles per hour.

“\* \* \*

“if you find the defendant negligent in any one of more of the items set out in A, etc., and you find that one or more of such acts or omissions were the proximate cause of the injuries to plaintiff, then you must find for the plaintiffs in such amounts as your judgment dictates and directs. \* \* \*”

The record is void of any evidence that the deceased Barbara Best Pelly was driving in excess of 50 miles per hour at or near the scene of the accident. The only evidence as to the speed of Mrs.

Pelly is the testimony of the witness Robert Averett, who testified that he had followed behind Mrs. Pelly for a mile preceding the accident, and she was travelling the same speed as Averett, around 50 miles per hour, and he was positive it was not over 50 miles per hour. (R. 196) The court instructed the jury that the speed limit was 60 miles per hour. (R. 40)

It is erroneous to submit an issue of negligence to the jury for consideration when there is no factual evidence to support that claimed act of negligence. **Morrison v. Perry**, 104 Utah 151, P. 2d 772. **Hunter v. Michaelis**, 114 Utah 242, 198, P. 2d 245, held that it was erroneous for the trial court case to instruct the jury concerning the matter of speed as negligence, where the evidence showed that the posted speed limit was 25 miles per hour and the only evidence in the case was that the defendant was travelling between 20 to 25 miles per hour. The court said, "We think the evidence not such as to justify giving an instruction on the speed of defendant's car."

#### POINT IV.

**THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 7, WHICH INSTRUCTION ENCOMPASSED THE DEFENDANT'S THEORY OF THE CASE THAT THE CONDUCT OF THE PLAINTIFF CREATED AN EMERGENCY SITUATION, AND WHICH THEORY WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.**

Defendant's Requested Instruction No. 7 was:

"If you find from the evidence in this case, that Harry Walters was driving on the left side of the highway as the car driven by Harry Walters and Mrs. Pelly approached each other, and if this driving on the left side of the highway by Harry Walters resulted in an emergency, which caused Mrs. Pelly to turn to the left and resulted in the collision, that said turning to the left side of the highway by Mrs. Pelly would not constitute negligence on her part, and she would not be negligent for turning to the left, if the turning was a result of the hazard created by Harry Walters."

This instruction requested by defendant was amply supported by the evidence of the witnesses Averett and Roberts, who testified that defendant's vehicle was on its own side of the road until just before impact and that the vehicle of plaintiffs approached on its wrong side of the road and turned suddenly to the right or west side of the road just as the defendant turned to that side of the road .

The court in refusing to give Instruction No. 7 as requested by the plaintiff, or to instruct the jury in accordance with the theory set forth in that instruction committed prejudicial error. Defendant excepted to the refusal of the court to give the instruction. (R. 311). Defendant was entitled to have the jury instructed upon defendant's theory of the case and the failure to do so was and is prejudicial error, and as stated in **Morrison v. Perry**, 104 Utah

151, 140 P. 2d 772, and cases cited therein; **Beckstrom v. Williams**, 282 P. 2d 309, 3 Utah 2d 210; **Startin v. Madsen**, 120 Utah 631, 237 P. 2d 834.

#### POINT V.

**THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 3, WHICH INSTRUCTION SET FORTH THE STATUTORY RULE AS TO THE NATURE OF EVIDENCE REQUIRED WHEN THE TORT FEASOR IS DEAD.**

Defendant requested the court to give requested Instruction No. 3, which requested instruction is identical with the instruction No. 5.1, Jury Instructions for Utah, and is the instruction incorporating the provisions of Title 78-11-12, Utah Code Annotated, 1953, as amended, Laws of Utah, 1953, Chapter 30, Paragraph 1. The statute provides:

“Causes of action arising out of physical injury to the person or death, caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer, and the injured person or the personal representatives or heirs of one meeting death, as above stated, shall have a cause of action against the personal representatives of the wrongdoer; provided, however, that the injured person or the personal representatives or heirs of one meeting death shall not recover judgment except upon some competent satisfactory evidence other than the testimony of said injured person.”

Barbara Best Pelly, driver of the car which was involved in the collision with the vehicles of plaintiffs died as a result of the accident. Prior to 1953

and the adoption of Title 78, Chapter 11, Section 12, Utah Code Annotated, 1953, any cause of action for personal injury abated with the death of the tortfeasor. The legislature, in providing for the "no abatement" of a cause of action upon the death of a wrongdoer, provided certain restrictions as to the evidence necessary for injured parties to recover against the personal representative of the alleged wrongdoer. The statute, giving, in effect, a cause of action to plaintiffs, which they would not have had previously, places a restriction upon the plaintiff's cause of action, and the court erred in not instructing the jury as to the restrictions and the burden of proof required by the statute for plaintiffs to recover. The Utah Court in the case of **Fretz v. Anderson**, 5 Utah 2d 290, 300 P. 2d 642, recognized that the plaintiff in a personal injury action, where the alleged tortfeasor was dead, had the burden of proving the negligence in the manner set forth by the statute.

Defendant was prejudiced by the failure of the court to instruct the jury in accordance with the provision of Title 78-11-12, Utah Code Annotated, 1953.

#### **POINT VI.**

**THE TRIAL COURT ERRED IN GIVING REPETITIOUS INSTRUCTIONS WHICH PREJUDICIALLY EMPHASIZED PLAINTIFF'S THEORY OF RECOVERY IN THE CASE.**

Defendant made timely exception to the court's

instructions as a whole as being prejudicial and over emphasizing plaintiffs' theory of the case. (R. 318)

The court in Instruction No. 1 (R. 34) charged the jury:

"Plaintiffs allege that defendant's negligence and unlawful conduct, which proximately caused the accident and resultant injuries, consisted of the following:

A. In driving at an excessive rate of speed, to-wit, in excess of 60 miles per hour.

B. In crossing over the dividing center line of said highway into the opposing lane of traffic when it was not safe to do so.

C. In failing to keep said automobile under proper control.

D. In failing to keep a proper lookout in failing to see the automobile driven by Plaintiff, Harry Walters.

E. In running head on into the automobile of Plaintiff, Harry Walters, then and there perfectly visible and approaching from the opposite direction in its own lane of traffic."

The court in Instruction No. 11 (R. 40) instructed the jury again concerning the various duties and obligations of the plaintiffs and defendants, as follows:

"It was the duty of the plaintiff and the defendant each to use reasonable care under the circumstances in driving his automobile to avoid danger to himself and others, and to observe and to be aware of the conditions

of the highway, the traffic thereon, and to observe due care in respect to:

(a) To use reasonable care to keep a proper lookout for other vehicles and other conditions reasonably to be anticipated.

(b) To keep his automobile under reasonably safe and proper control.

(c) To drive his automobile on his own right side of the highway.

(d) To drive at such speed as was safe, reasonable, and prudent under the circumstances, having due regard to the width, surface, and condition of the highway, the traffic thereon, the visibility and any actual or potential hazards then existing.

“The designated speed limit for the place in question was 60 miles per hour. This means only that such speed should ordinarily be regarded as safe, reasonable, and prudent in the absence of any special hazards or conditions tending to make such speed unsafe. But any speed in excess of such designated speed limit would constitute sufficient evidence to permit a find that such speed was greater than safe, reasonable, and prudent.

“Failure of the plaintiff or the defendant to operate his automobile in accordance with the foregoing requirements of law would constitute negligence on his part.”

The court again instructed the jury regarding the claimed negligence on the part of defendant in Instruction No. 17 (R. 46) as follows:

“In order for you to find a verdict in

favor of the plaintiffs and against the defendant, the plaintiffs have the burden of proving by a preponderance of the evidence one or more of the following facts:

"A. That the defendant was driving her automobile at a speed in excess of 60 miles per hour.

"B. In crossing the center line of the highway into the opposing lane of traffic when it was not safe so to do.

"C. In failing to keep said automobile under proper control.

"D. In failing to keep a proper lookout and in failing to see the automobile driven by the plaintiff.

"E. In running head on into the automobile of the plaintiff."

In three separate instructions the court set forth the items of claimed negligence on the part of the defendant's decedent, Babraba Best Pelly.

Our Supreme Court has long subscribed to the principle of law which prohibits reiteration of legal propositions to the jury. This doctrine was stated in the case of **Shields v. Utah Light & Traction Company**, 99 Utah 307, 105 P. 2d 347, as follows:

"... (R)esulting emphasis on applicable laws favorable to plaintiff's side as the result of the continual reference and repeating of certain law propositions resulted in the unbalancing of the charge, and error."

The fact that the instructions as given are each technically correct does not remedy the error. In the case of **Devine v. Cook**, 3 Utah 2d 134, 141;

279 P. 2d 1073 (1955), the court, in considering the rule, declared:

“Even assuming that the instructions of the Court, taken in their entirety, could be considered correct as given, the continual repetition of instructions of contributory negligence . . . unbalanced the instructions in favor of the defendants and influenced the jury in bringing its verdict of no cause of action. . . .”

It is respectfully submitted that the cumulative effect of the instructions given resulted in an imbalance in favor of plaintiffs, and that defendant was materially prejudiced thereby.

### CONCLUSION

Prejudicial error was committed by the trial court, and the court erred in failing to grant defendant and appellant's Motion for New Trial, which motion was timely made. The error at trial, giving erroneous jury instructions and failing to give jury instructions to which defendant was entitled prevented defendant and appellant having a fair trial. Justice and law requires that the Judgment Upon the Verdict be set aside and the case remanded for new trial.

Respectfully submitted,

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# INDEX

	<i>Page</i>
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN THE LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
STATEMENT OF POINTS.....	8
ARGUMENT .....	8
POINT I. ANSWER TO POINT I OF APPELLANT'S BRIEF, i.e., THAT THE COURT ERRED IN SUBMIT- TING INSTRUCTION 17 TO THE JURY, SAID IN- STRUCTION BEING A VERDICT DIRECTING (FORMULA) INSTRUCTION WHICH DID NOT TAKE INTO ACCOUNT THE DEFENDANT'S THEORY OF THE CASE. ....	8
POINT II. ANSWER TO POINT II OF APPEL- LANT'S BRIEF, i.e., THAT THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY IN ACCORD- ANCE WITH DEFENDANT'S REQUESTED IN- STRUCTION NO. 13, RELATING TO THE STATU- TORY DUTY OF A DRIVER OPERATING A VE- HICLE TO THE LEFT OF THE CENTER OF THE HIGHWAY IN OVERTAKING AND PASSING AN- OTHER VEHICLE TRAVELING IN THE SAME DIRECTION. ....	15
POINT III. ANSWER TO POINT III OF APPEL- LANT'S BRIEF, i.e., THAT THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE QUES- TION OF DEFENDANT'S SPEED AS NEGLI- GENCE. ....	21
POINT IV. ANSWER TO POINT IV OF APPEL- LANT'S BRIEF, i.e., THAT THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY DEFEND- ANT'S REQUESTED INSTRUCTION NO. 7, WHICH INSTRUCTION ENCOMPASSED THE DEFEND- ANT'S THEORY OF THE CASE THAT THE CON- DUCT OF THE PLAINTIFF CREATED AN EMER- GENCY SITUATION, AND WHICH THEORY WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE. ....	24
POINT V. ANSWER TO POINT V OF APPEL- LANT'S BRIEF, i.e., THAT THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 3, WHICH IN- STRUCTION SET FORTH THE STATUTORY RULE AS TO THE NATURE OF EVIDENCE REQUIRED WHEN THE TORT FEASOR IS DEAD. ....	26

# INDEX—Continued

	<i>Page</i>
POINT VI. ANSWER TO POINT VI OF APPELLANT'S BRIEF, i.e., THAT THE TRIAL COURT ERRED IN GIVING REPETITIOUS INSTRUCTIONS WHICH PREJUDICIALLY EMPHASIZED PLAINTIFF'S THEORY OF RECOVERY IN THE CASE. ....	28
CONCLUSION .....	31
<b>CASES CITED</b>	
Beckstrom v. Williams, 3 Utah 2d 210, 282 P.2d 309.....	17, 24
Bruner v. McCarthy, 105 Utah 399, 142 P. 2d 649.....	29
Davis v. Heiner, 54 Utah 428, 181 P. 587 .....	29
DeVine v. Cook, 3 Utah 2d 134, 279 P. 2d 1073.....	30
Fretz v. Anderson, 5 Utah 2d 290, 300 P. 2d 642.....	27
Hoag v. Washington & Oregon Corp., Ore. 144 P 574.....	20
Hunt v. P. J. Moran, Inc., 46 Utah 388, 150 P. 953.....	23
Hunter v. Michaelis, 114 Utah 242, 198 P. 2d 242.....	22
In Re Richards' Estate, 5 Utah 2d 106, 297 P. 2d 542.....	19
Ivie v. Richardson, 9 Utah 2d 5, 336 P. 2d 781.....	12
Martineau v. Hanson, 47 Utah 549, 155 P. 432.....	14
McDonald v. Union Pacific Railroad Co., 109 Utah 493, 167 P. 2d 685 .....	14
Meacham v. Allen, 1 Utah 2d 79, 262 P. 2d 285.....	28
Meads v. Dibblee, 10 Utah 2d 229, 350 P. 2d 853.....	28
Morgan v. Mammoth Mining Co., 26 Utah 174, 72 P. 688.....	14
Morris v. Fitzwater, 187 Ore. 191, 210 P. 2d 204.....	20
Morrison v. Perry, 104 Utah 151, 140 P. 2d 772.....	10, 24
Redd v. Airway Motor Coach Co. Lines, Inc., 104 Utah 9, 137 P. 2d 374 .....	13, 14
Shields v. Utah Light & Traction Co., 99 Utah 307, 105 P. 2d 347 .....	19, 30
Sorenson v. Bell, 51 Utah 262, 170 P. 2d 72.....	10
Startin v. Madsen, 120 Utah 631, 237 P. 2d 834.....	13, 17, 24
Taylor v. Weber County, 4 Utah 2d 328, 293 P. 2d 925.....	29
Toone v. O'Neill Construction Co., 40 Utah 265, 121 P. 2d 10....	11
Walkenhorst v. Kesler, 92 Utah 312, 67 P. 2d 654.....	14
<b>OTHER AUTHORITIES CITED</b>	
104-14-7, Utah Code Annotated, 1943 .....	18
Rule 61, Utah Rules of Civil Procedure.....	18
Randall's Instructions to Juries, Art. 409.....	20
Reid's Bransons Instructions to Juries, Art. 100, Page 289....	20
Reid's Bransons Instructions to Juries, Vol. 1, Page 285.....	29
78-11-12, Utah Code Annotated, 1953.....	27
ULR, Vol. 7, Page 362.....	28