

1963

# Jesse P. Hanson v. General Builders Supply Co. : Brief of Defendants and Appellants

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](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.

Woodrow D. White; Attorneys for Plaintiff and Respondent;

Hanson & Baldwin; Robert K. Brandt; Attorneys for Defendant and Appellants;

---

## Recommended Citation

Brief of Appellant, *Hanson v. General Builders Supply Co.*, No. 9884 (Utah Supreme Court, 1963).

[https://digitalcommons.law.byu.edu/uofu\\_sc1/4235](https://digitalcommons.law.byu.edu/uofu_sc1/4235)

This Brief of Appellant 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](mailto:hunterlawlibrary@byu.edu).

APR 16 1964

IN THE SUPREME COURT

LAW LIBRARY

of the  
STATE OF UTAH

FILED

AUG 12 1963

JESSE P. HANSON,

Plaintiff and Respondent,

—VS—

GENERAL BUILDERS SUPPLY  
COMPANY, a Utah corporation,  
and STEPHEN G. KNIGHT,

Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No.  
9884

BRIEF OF DEFENDANTS AND APPELLANTS

HANSON & BALDWIN and  
ROBERT W. BRANDT  
Attorneys for Defendants and  
Appellants

909 Kearns Building  
Salt Lake City, Utah

DW D. WHITE

South State St.

Salt Lake City, Utah

Attorney for Plaintiff & Respondent

## TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	6
ARGUMENT	
POINT I. THE COURT ERRED IN FINDING THE DEFENDANTS LIABLE AS A MATTER OF LAW AND IN REFUSING TO SUBMIT THE ISSUE OF DEFENDANT'S NEGLIGENCE TO THE JURY. ....	6
POINT II. THE VERDICT IS EXCESSIVE, UNSUPPORTED BY THE EVIDENCE AND IS THE RESULT OF PASSION AND PREJUDICE AND THE TRIAL COURT ERRED IN REFUS- ING TO GRANT THE DEFENDANTS' MOTION FOR A NEW TRIAL OR IN THE ALTERNA- TIVE TO ORDER A REMITTITUR. ....	11
CONCLUSION .....	16

## INDEX OF AUTHORITIES

<i>Alarid v. Vanier</i> , 317 P.2d 110 (Cal. 1957) .....	7, 9
<i>Best v. Huber</i> , 3 U.2d 177, 281 P.2d 208 (Utah 1955) .....	10
<i>Duffy v. Union Pacific Railroad Company</i> , 118 Utah 82, 218 P.2d 1080.....	15
<i>Eddy v. McAninch</i> , 347 P.2d 499 (Colo. 1959) .....	9
<i>Eleganti v. Standard Coal Company</i> , 50 Utah 585, 168 Pac. 266 .....	15
<i>Lockmoeller v. Keil</i> , 137 S.W.2d 625 (Mo. 1940) .....	8
<i>McAffee v. Ogden Union R.R. Depot Co.</i> , 62 Utah 116, 218 Pac. 98 .....	15
<i>Morgan v. Ogden Union Depot</i> , 77 Utah 541, 294 P.2d 541 .....	14
<i>Pauly v. McCarthy</i> , 109 Utah 431, 184 P.2d 123.....	13, 14
<i>Phillips v. Delta Motor Lines</i> , 108 So. 409 (Miss. 1959) ..	9
<i>Stamp v. Union Pacific Railroad Co.</i> , 5 U.2d 387, 303 P.2d 279 .....	15
<i>Trudeau v. Sina Construction Co.</i> , 62 N.W. 2d 492 (Minn. 1954) .....	8
<i>Ward v. D&amp;RGWR Company</i> , 96 Utah 665, 85 P.2d 837..	15
<i>Wheat v. D&amp;RGWR Company</i> , 122 Utah 418, 250 P.2d 932 .....	14

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

JESSE P. HANSON,  
Plaintiff and Respondent,

—vs—

GENERAL BUILDERS SUPPLY  
COMPANY, a Utah corporation,  
and STEPHEN G. KNIGHT,  
Defendants and Appellants.

} Case No.  
9884

---

BRIEF OF DEFENDANTS AND APPELLANTS

---

STATEMENT OF FACTS

The plaintiff is 63 years old. He is an automobile mechanic by trade and owns and operates his own business known as J. P. Hanson Auto Service which is located at 125 West 21st South, Salt Lake City, Utah. (R. 42, 43). On August 31, 1960 at approximately 11:30 a.m. plaintiff was driving his 1936 Dodge one-half ton pickup truck east on 21st South Street in Salt Lake City intending to deliver an automobile transmission to the Automatic Exchange Transmission Company located at 17th South and State Street in Salt Lake City, Utah. (R. 43).

As he reached the intersection at State Street

in the left turn lane, the light turned red for east-bound traffic and he stopped. He was the first car at the intersection. He testified that his brake lights were operating and his left turn signal light was on. (R. 47). He did not give an arm signal of his intention to stop. (R. 138, 140).

After coming to a stop, plaintiff's truck was struck from the rear by the General Builders Supply truck which was being driven by defendant, Stephen G. Knight. He was in the course of making a delivery of building materials and supplies and had driven the 1950 Ford 1½-ton flatbed truck from General Builders Supply at 255 West 27th South in Salt Lake City, Utah. (R. 171).

The plaintiff testified that his truck came to rest in the extreme west lane of traffic on State Street. (R. 137). Defendant, Stephen G. Knight, testified that on impact he pushed plaintiff's truck approximately 10 feet; that the front of his truck was in the pedestrian lane when it stopped with 12 to 18 inches separating the front of his truck and the rear of plaintiff's truck. (R. 174, 175). There was no damage to the front of defendant's truck. (R. 178). The tail gate, rear fender and tail light on plaintiff's 1936 Dodge pickup were damaged. (R. 50). Plaintiff made repairs in his own shop for which he claimed damages of \$75.00. (R. 132, 133, Exhibit 8).

Defendant, Stephen G. Knight, was 22 years old; he had driven a truck for the General Builders

Supply during the summer months since 1958. He had a Class "A" chauffeur's license. (R. 170-171).

Just prior to the accident, he was traveling east on 21st South Street at approximately 25 to 30 miles per hour. As he approached the intersection of State Street behind the plaintiff, he knew he was going to have to stop. He applied his foot brake — there was no response. He pumped the brake — there was still no response so he applied the hand brake which slowed him to approximately 5 miles per hour when he ran into the rear of plaintiff's pickup truck. (R. 173).

The truck defendant was driving was used less frequently than other trucks belonging to the defendant, General Builders Supply. It was used for incidental deliveries. He had driven the truck on occasions prior to the accident. (R. 176). On the morning of the accident, he had driven the truck around in the defendant's building supply yard picking up his load. He applied the brakes on several occasions and noted nothing unusual about the brakes. (R. 176, 177). He drove the truck from 27th South to 21st South and east to the point of the accident but could not recall any specific point at which he had to apply brakes prior to the accident and after leaving the defendant's yard. (R. 177). The brake lining on defendant's truck was checked and examined by mechanic Gail R. Staley in May of 1960. (R. 200). The brakes were also adusted by Staley between July 7th and July 12th, 1960, six to

seven weeks prior to the accident. (R. 198). Following the accident, plaintiff asked defendant, Knight, what had happened. Knight stated that his brakes had failed. (R. 48).

Immediately after the accident, the plaintiff got out of his truck unassisted. He testified that he was holding his neck and head, (R. 49) and was experiencing pain in his neck. (R. 49). He and defendant Knight moved the transmission that he was hauling which weighed 180 lbs., to the forward end of his truck. (R. 134). They exchanged names. No police were called to make an investigation. (R. 50, 175). Plaintiff delivered the transmission to the Automatic Transmission Exchange Company and then went to his home for the remainder of the day. (R. 50). He secured a replacement transmission the following day returning it to his garage. Thereafter, he would go to his business for part of the day but until the first of the year, left the mechanical labor to his regular employees and did no labor himself because of pain in his neck. At the time of the trial, he was still unable to perform some mechanical labor that he had done prior to the accident. (R. 53, 142, 143). Plaintiff's books and records reflect a continuous increase in net profits each month and each year following the accident as compared with months and years prior thereto. (R. 143, 144, 148 through 150, Exhibits 9 and 10).

Plaintiff was examined and given adjustments

by Dr. Billiter, a chiropractor, ten days or two weeks following the accident. (R. 54, 124, 125). He was examined on September 19, 1960, by Dr. Owen Reese and continued under his care and treatment. (R. 70, 78). Dr. Boyd Holbrook examined plaintiff April 28, 1961, and on November 27, 1962. (R. 92, 96). Plaintiff was examined by Dr. Reed Clegg on November 15, 1962.

Plaintiff had an extensive degenerative arthritis condition in his neck at the time of the accident. (R. 74, 94, 95, 126, 127).

This case was tried to a jury beginning December 4, 1962. At the conclusion of the evidence, the trial judge found the defendants liable as a matter of law and submitted the case to the jury on the question of damages alone. The jury awarded the plaintiff \$387.00 in special damages and the sum of \$22,500.00 in general damages.

Thereafter, a motion was made on behalf of the defendants for a new trial on the ground that the Court erred in law by not submitting the issue of defendant's liability to the jury and upon the further ground that the judgment was excessive. Defendants, by their motion in the alternative, asked the trial Court to order a remittitur and reduce the judgment to a reasonable amount based upon the evidence. The defendants' motion was denied on February 28, 1963. (R. 27).



## STATEMENT OF POINTS

### POINT I

THE COURT ERRED IN FINDING THE DEFENDANTS LIABLE AS A MATTER OF LAW AND IN REFUSING TO SUBMIT THE ISSUE OF DEFENDANTS' NEGLIGENCE TO THE JURY.

### POINT II

THE VERDICT IS EXCESSIVE, UNSUPPORTED BY THE EVIDENCE AND IS THE RESULT OF PASSION AND PREJUDICE AND THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DEFENDANTS' MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE TO ORDER A REMITTITUR.

## ARGUMENT

### POINT I

THE COURT ERRED IN FINDING THE DEFENDANTS LIABLE AS A MATTER OF LAW AND IN REFUSING TO SUBMIT THE ISSUE OF DEFENDANTS' NEGLIGENCE TO THE JURY.

The plaintiff claimed as specific acts of negligence that defendant Knight was following too close to plaintiff's vehicle, that he was not maintaining a proper lookout and that he was operating a vehicle with defective or inadequate brakes. The defendants denied that they were negligent and denied any knowledge of defective brakes prior to the accident. (R. 4, 39).

The rule as to liability where an automobile is operated with defective brakes is set forth in Vol. 5A, Am. Jur., Automobiles and Highway Traffic, Section 248, and in part states as follows:

"\* \* \* the mere failure of brakes to func-

tion properly is not conclusive of the driver's negligence. It seems that where the brakes on an automobile have previously functioned properly but suddenly fail to respond, their failure does not render the owner guilty of negligence or contributory negligence, unless he had knowledge of the defective condition."

In *Alarid v. Vanier*, 317 P.2d 110 (Cal. 1957), the defendant's brakes failed to operate resulting in a collision with another automobile which had stopped in response to a signal light. The Court said:

"In the absence of evidence indicating that respondent was chargeable with knowledge that the brake was not or might not be in good condition, the brake failure might well be accepted by the jury as a sufficient excuse or justification of the violation. In the driving of automobiles such brake failures are not unknown and they frequently come suddenly, without any warning. The average driver is not a mechanical expert, and is not necessarily in a position to anticipate such mechanical failure. The essential question in such case is not as to exactly what caused the mechanical failure but is as to whether he had or should have had some prior knowledge of facts which should have led him to take proper steps in advance which might have prevented the brake failure. Unforeseen brake failure is a circumstance beyond the control of the driver in the ordinary case, and the evidence here supports the implied finding of the jury that this brake failure resulted from a cause or thing beyond the control of the respondent."

In **Lockmoeller v. Keil**, 137 S.W.2d 625 (Mo. 1940), the Court stated:

“In this case the evidence that truck was equipped with the kind of brakes contemplated by the statute, that they had been adjusted a week before the accident, and that they had performed properly only one short block to the east of the point of the collision when they had last been applied, made it a question for the jury as to whether defendants, Burns and Hamlet, were to be convicted of actionable negligence because of the fact that the brakes on their truck were not in good working order at the very moment of the collision.”

In **Trudeau v. Sina Construction Company**, 62 N.W.2d 492 (Minn. 1954), it was held that the failure of truck brakes which had previously functioned properly and which had been repaired two weeks before the accident did not necessarily render owner or operator of the truck guilty of negligence, but presented merely prima facia case, and together with evidence that operator of the truck had pumped foot brake and had attempted to shift into a lower gear to stop the truck as he approached the stop sign, although he had not attempted to apply the emergency brake, presented an issue for determination by jury as to whether the truck driver had been confronted with an emergency not of his own making and as to whether or not he had acted as a reasonably prudent person would have acted in the same or similar circumstances.

**In Phillips v. Delta Motor Lines**, 108 So. 409 (Miss. 1959), the Court held that:

“The fact that brakes of an automobile are defective is material in determining the question of negligence in case of a collision where the driver knew or should by proper care have known of the defect, but mere failure of brakes to function properly is not conclusive of the driver’s negligence but only makes a prima facie case which the driver may defend by showing proper inspection and a sudden failure without warning.”

In **Eddy v. McAninch**, 347 P.2d 499 (Colo. 1959), the defendant had purchased an automobile a week before the accident. He testified that he had had no trouble until the time of the accident; that as he approached the intersection where the collision occurred, he attempted to apply his brakes but there was no response; that he then tried to use his hand brake with the same result. There was evidence that the brakes had been inspected and were in good condition before the sale of the automobile to the defendant. Upon a jury verdict in favor of the defendant, plaintiff appealed claiming defendant was guilty of negligence as a matter of law. The Colorado Supreme Court, in affirming the judgment, cited the case of **Alarid v. Vanier**, *supra*, and stated in conclusion:

“Under the circumstances appearing from this record, we think the question of whether the presumption of negligence arising from failure of the defendant’s brakes to

operate in accordance with the provisions of the Motor Vehicle Law, had been overcome by evidence, and that the accident resulted from causes beyond the control of the defendant, was one of fact for the jury which by its verdict resolved the issue in favor of the defendant. \* \* \*

In **Best v. Huber**, 3 U.2d 177, 281 P.2d 208, (Utah 1955), the defendant testified that she was traveling about 25 miles per hour and that she applied her brakes  $2\frac{1}{2}$  to 3 car lengths away from the plaintiff's car, which was stopped at an intersection; that when she pressed the brake pedal, it went to the floor board. She pumped the brakes two or three times and didn't have time to use the hand brake nor turn aside in order to avoid hitting plaintiff's car in the rear. She further testified that she had used the foot brake on a hill just previous to the accident and that at that time she had full braking power and was surprised by the sudden failure of the brakes at the intersection.

Upon a jury verdict for the plaintiff, defendant appealed contending that the accident resulted from an unforeseeable mechanical failure and that she was not liable as a matter of law.

The Court in affirming the judgment and holding that the evidence presented a jury question said:

"It has been frequently announced by this Court that negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they

are shown (cases cited). As was said in **Linden v. Anchor Mining Company**, 20 Utah 134, 58 Pac. 355, 358: 'Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony or because the facts, being undisputed, fair-minded men will honestly draw different conclusions from them.'

There was no evidence that the defendant, Stephen G. Knight, was following too close or that he failed to maintain a proper lookout. His testimony that his brakes failed to respond suddenly and without prior warning coupled with the evidence of prior inspection and adjustment by the mechanic that maintained defendant's equipment clearly, raised issues as to the defendant's negligence that should have been submitted to the jury.

## POINT II

THE VERDICT IS EXCESSIVE, UNSUPPORTED BY THE EVIDENCE AND IS THE RESULT OF PASSION AND PREJUDICE AND THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DEFENDANTS' MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE TO ORDER A REMITTITUR.

Appellants recognize that plaintiff testified at the trial that he was not aware of the fact that he had an osteoarthritic condition in his neck prior to the accident and that he had not suffered any pain from his neck before the accident. (R. 65, 66). Dr. Rees and Dr. Holbrook both testified that, assum-

ing the plaintiff had had no pain before the accident, the accident could have precipitated the pain and stiffness complained of by the plaintiff. (R. 77, 99). Dr. Holbrook estimated that the plaintiff had a 20% disability that might be reduced to 10% through surgery. (R. 104).

It is undisputed, however, that plaintiff had a pre-existing arthritic condition in his neck. Both Drs. Holbrook and Clegg, who are specialists in the field of orthopedics, testified as to this condition. Dr. Holbrook described the condition as "rather marked degenerative changes in the lower portions; that is, between the fifth and sixth and seventh cervical vertebrae." (R. 94). Dr. Clegg described plaintiff's neck condition as one involving extensive degenerative arthritis and that it had developed to the extent that the fourth and fifth cervical vertebrae had fused together making a solid union. (R. 126, 127.) Dr. Holbrook stated that the plaintiff's symptoms could be secondary to his arthritis (R. 108) and that examining earlier x-rays taken by Dr. Reese he found no evidence of fracture or bone injury related to the accident. (R. 107).

Dr. Clegg, from his examination, found no evidence of trauma or injury from whiplash and testified that the rather extensive osteoarthritic changes in plaintiff's neck were sufficient to account for plaintiff's complaint of pain, tenderness and muscle spasm and that the symptoms were consistent with the degree of arthritis from which plaintiff was

suffering. (R. 128. While plaintiff testified that he was unable to perform labor at his garage for some three or four months following the accident, he admitted that he made daily visits to his garage where his regular mechanics were working. (R. 142, 143). His books and records disclose an increase in his business and net profits during this period as compared with similar periods prior to the accident, as well as an increase in his annual net profits each year following the accident as compared with prior years. (R. 143, 148 through 150, Exhibit 9 and 10).

This Court, in several cases, held that a verdict so excessive as to **appear** to have been given under the influence of passion and prejudice, and the trial Court abusing its discretion in denying a motion for a new trial, may order the verdict set aside and a new trial granted. **Pauly v. McCarthy**, 109 Utah 431; 184 P.2d 123.

The Court has quoted with approval the language of the **Pauly v. McCarthy** case. In the case of **Stamp v. Union Pacific Railroad Company**, 5 Utah 387; 303 P.2d 279, the opinion approved the statement of the law in the **Pauly v. McCarthy** case and quoted from that case as follows:

“Attention is called to the language of this Court in that (**Pauly v. McCarthy**) case as follows at pages 434-6 of the Utah Reports and page 125) of the Pacific Reporter: ‘but from the language used in these and other decisions, a view developed that this Court



was powerless to interfere with a jury verdict, no matter how outrageous. This view was exploded in the case of **Jensen v. Denver & R.G.W.R. Co.**, 44 Utah 100, 138 Pac. 1185, 1192, where, after citing with approval many of the cases above cited, we said: 'still the jury cannot be permitted to go unbridled and unchecked. Hence the Code that a new trial on motion of the aggrieved party may be granted by the court below on the ground of 'excessive damages appearing to have been given under the influence of passion or prejudice.' Whenever that is made to appear, the Court, when its action is properly invoked, should require a remission or set the verdict aside and grant a new trial." " "

This Court has held that it can and should grant a new trial if the verdict is so excessive as to show that it must have been motivated by prejudice or ill will toward a litigant, or that passion such as anger, resentment, indignation or some kindred emotion has so overcome or distorted the jury's reason that the verdict is vindictive, vengeful or punitive, it should unconditionally be set aside. **Wheat v. D&RGWR Company**, 122 Utah 418, 250 P.2d 932.

Appellants recognize that the Utah Court recognizes two classes of cases: one class of cases where a new trial must be ordered if the verdict is the result of passion and prejudice, and a class of cases whereby a remittitur is demanded by the ends of justice. **Pauly v. McCarthy**, 109 Utah 431, 184 P.2d 123; **Morgan v. Ogden Union Depot**, 77 Utah 541,

294 P.2d 541, **Ward v. D&RGWR Co.**, 96 Utah 564, 85 P.2d 837.

The Utah Court has long held that it may be proper to order a remission of the excess verdict where passion and prejudice were not necessarily present, but if passion and prejudice were present, a new trial should be granted. See **Eleganti v. Standard Coal Company**, 50 Utah 585, 168 Pac. 266, and **McAfee v. Ogden Union R.R. Depot Co.**, 62 Utah 116, 218 Pac. 98.

In the case of **Duffy v. Union Pacific Railroad Company**, 118 Utah 82, 218 P.2d 1080, the Court said:

“Previously decided cases are of little value in fixing present day standards or in assisting courts in determining excessive awards.”

This quotation was approved in **Stamp v. Union Pacific Railroad Company** case, 5 U.2d 387, 303 P.2d 279, and the Court in that case in ordering a remittitur or a new trial stated:

“Holding as we do, that the verdict is without all reasonable bounds for the detailed injury, we then have the duty of ordering a new trial, or ordering a remittitur. Since the jury’s verdict can be of no help to us, we must exercise our best judgment in arriving at a fair and just amount to compensate plaintiff for his injury.”

In that case quoted there was nothing for the Court upon which to base a holding of passion and prejudice except the amount of the verdict.

The plaintiff is 63 years old. He was never hospitalized following the accident. He followed only a conservative treatment under the care of Dr. Reese. He had a marked degenerative arthritic condition in his neck at the time of the accident. While curtailing his physical labor following the accident, he admittedly continued daily contact and supervision of his business. The sum of \$22,500.00 general damages in such a case clearly appears to have been given as a result of passion and prejudice.

## CONCLUSION

The appellants respectfully represent to the Court that the defendants should be awarded a new trial or in the alternative the Court should order a remittitur and reduce the judgment to a reasonable amount based upon the evidence of the case.

Respectfully submitted,

HANSON & BALDWIN and  
ROBERT W. BRANDT  
Attorneys for Defendants and  
Appellants

909 Kearns Building  
Salt Lake City, Utah