

1963

Grant Scott Haslam v. Paul Paulsen et al : Brief of Defendant and Respondent

Utah Supreme Court

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UNIVERSITY OF UTAH
APR 13 1964

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IN THE SUPREME COURT
of the
STATE OF UTAH
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GRANT SCOTT HASLAM,
Plaintiff and Appellant,

vs.

PAUL PAULSEN, P. H. PAULSEN,
and BYRON PAULSEN, dba ACME
CRANE RENTAL COMPANY, et al.,
Defendants and Respondents.

Supreme Court, Utah

Case No.
9938

BRIEF OF
DEFENDANT AND RESPONDENT,
HYRUM PETERSEN

APPEAL FROM AN ORDER GRANTING A NEW
TRIAL OF THE THIRD DISTRICT COURT FOR
SALT LAKE COUNTY

HON. MERRILL C. FAUX, JUDGE

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**IN THE SUPREME COURT
of the
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GRANT SCOTT HASLAM,

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Defendants and Respondents.

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**BRIEF OF
DEFENDANT AND RESPONDENT,
HYRUM PETERSEN**

Comes now the Defendant and Respondent Hyrum Petersen and does hereby and herewith agree with the contents of the brief submitted by Defendants and Respondents d/h/a Acme Crane Rental Company and adopts the arguments therein contained as his own for responding to Plaintiff's appeal.

Respectfully submitted,

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I hereby certify that on this ²⁵ day of November, 1963 I mailed two copies of this brief, postage prepaid, to A. Park Smoot, Raymond M. Berry, and Skeen, Worsley, Snow & Christensen at the address shown on this brief.



APR 16 1963

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} Case No.
9938

BRIEF OF
DEFENDANTS AND RESPONDENTS,
dba ACME CRANE RENTAL COMPANY

STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries which occurred during the construction of a new church building.

DISPOSITION IN LOWER COURT

After a verdict was returned in favor of the Plaintiff and Appellant, the Lower Court granted Defendants-Respondents, dba Acme Crane Rental Company, a new trial. Thereafter, in Case No. 9935 the Plaintiff and Appellant petitioned this court for an Interlocutory Appeal, Case No. 9935, and on July 30, 1963, this court denied the Plaintiff an Interlocutory Appeal.

In the Lower Court the Defendants-Respondents,

dba Acme Crane Rental Company, in addition to a Motion for a New Trial, filed a Motion for Remittitur of Excessive Damages and a Motion to Set Aside the Jury Verdict and Judgment thereon. The new trial was granted. The Lower Court did not and has not ruled on the Defendants-Respondents' Motion for a Remittitur of Excessive Damages and Motion to Set Aside the Jury Verdict and Judgment thereon.

RELIEF SOUGHT ON APPEAL

The Defendants-Respondents, dba Acme Crane Rental Company, want this court to affirm *again* the order granting them a new trial unless this court concludes the Lower Court should be instructed to grant a judgment in favor of the Defendants-Respondents, dba Acme Crane Rental Company, of No Cause of Action, N.O.V.

STATEMENT OF MATERIAL FACTS

The Appellant's Statement of Facts is incomplete and merely shows the facts and issues as the Appellant contends them to be, and not as they were necessarily viewed to be by the trial court.

At about 1:00 P.M. on January 19, 1960, the Plaintiff was injured during the course of the construction of the Monument Park Stake House near Wasatch Boulevard and 13th South in Salt Lake City, Utah (R. 241-242). The Monument Park Stake House is located near the intersection of Wasatch Boulevard and 13th South in Salt Lake City, Utah. At the time of the accident, the Plaintiff had had seven years experience driving a ready-mix sand and gravel truck (R. 240). Exhibit 2-D,

a diagram, shows generally the location of the powerlines in relationship to the concrete pour which took place on January 19, 1960. Exhibits 23-D and 26-D show the powerlines at the job site as of April 4, 1963. In the upper lefthand corner of Exhibit 2-D, Scott Haslam drew a cross with a circle (R. 242, 243) to indicate where he stopped his truck and waited to unload it. He waited about ten or fifteen minutes to unload the truck (R. 243). Scott Haslam never saw the powerline or the poles (R. 247) prior to the accident. The weather was cold and cloudy, but it was not stormy (R. 249). While waiting to unload his truck, the Plaintiff didn't get out of the truck. He stated there was no need to get out and look around (R. 249). Prior to the accident he had made hundreds, if not thousands, of deliveries of ready-mix to job sites (R. 274).

When Mr. Haslam arrived at the job site, he drove in from 13th South in a southerly direction and turned his truck around so it faced north (R. 275). He made no examination of the premises to see whether or not it was a safe place for him to unload (R. 276). He merely assumed that everything was safe (R. 277) without looking. He never looked to see where Mr. Walker, the truck driver ahead of him, stopped his truck (R. 277). After Mr. Walker pulled out from unloading his truck ahead of Mr. Haslam, Mr. Haslam backed his truck toward the bucket but didn't back up as far as Mr. Walker had to unload (R. 278). After Mr. Haslam found out that he hadn't backed up to the bucket, he made no effort to get in the truck and back it further to facilitate unloading the truck (R. 278).

The power pole that Mr. Haslam did not see, according to his own testimony (R. 279), was some 16" in diameter and 25 to 26 feet out of the ground. Mr. Haslam never saw the power pole or the powerline when he stepped out of the truck (R. 279). He did not see the four overhead powerlines, but stated that if he had looked up, it was something he could have seen (R. 280). In fact, Mr. Haslam said that both the pole and the powerlines were something plain to be seen if he had looked up (R. 280).

At the time he was injured, Mr. Haslam was standing with the bucket hanging from the boom between him and the crane (R. 280).

Mr. Walker, the eye witness to the accident, who had worked with Mr. Haslam since about 1952 (R. 241) and who had had the same experience as Mr. Haslam, said he knew about the danger of powerlines (R. 243). He testified that he (R. 243) spotted his truck in a safe place and that he unloaded it ahead of Mr. Haslam (R. 243). He unloaded five buckets of concrete safely (R. 243).

Mr. Walker also told us that the truck driver at a job site can't unload his truck any faster than the job foreman needs the concrete, and that the truck driver takes an order from the job foreman (R. 244) as to when to start unloading, and that you don't start unloading the ready-mix truck until the concrete bucket is placed (R. 244), and that the truck driver unloads the ready-mix as slowly or as fast as they bring the bucket, unless told otherwise (R. 245). After the accident Mr. Walker unloaded Mr. Haslam's truck by backing it 6 or 8 feet fur-

ther southward (R. 247). There was no condition on the ground that kept Mr. Haslam or Mr. Walker from backing further to the south (R. 248).

The Defendant, Frank Cottrell, was the job foreman for the church (R. 352). Mr. Cottrell ordered the crane from Acme Crane Rental Company (R. 365), but did not tell them where he was going to set it. The crane was brought to the job by Hyrum Petersen, the operator (R. 366), and on arrival at the job site, Mr. Cottrell (R. 366) showed Mr. Petersen where the concrete pour was to be done. Mr. Petersen and Mr. Cottrell discussed the setting of the crane and then selected the spot where it was placed, as that spot was actually the only spot available for placing the crane and using it to move the concrete from the ready-mix trucks to the place of the pour (R. 366). Mr. Cottrell also ordered the ready-mix concrete from Utah Sand and Gravel (R. 367). On Exhibit D-2 Mr. Cottrell has drawn a circle and written in "Place of Pour" to indicate the area of the foundation being poured at the time of the accident. Mr. Cottrell said that he was familiar with the customs and practices of unloading ready-mix concrete at job sites, and that the man responsible for unloading the concrete out of the truck and putting it into the gabro bucket was the driver of the truck (R. 370). Mr. Cottrell said that the powerline could not be degenerized. He was using a 320 three phase power tool in his shed, and that demanded four wires (R. 372).

Hyrum Petersen was sent to the job site by Acme Crane Rental. Mr. Petersen found there was only one place he could place the crane (R. 387), and after a con-

ference with Mr. Cottrell, he placed it in that spot for the purpose of unloading the ready-mix trucks. At the time Walker's truck pulled out, the crane operator, Hyrum Petersen, was moving the last gabro bucket of concrete from Walker's truck to the place of the pour, and did not see Scott Haslam back his truck in for unloading (R. 393). On diagram Exhibit 2-D, Mr. Petersen placed the crane at the time of the accident and drew an "F" to mark the front of the crane, and mentioned they were working over the rear of it because of more stability (R. 399). He had the crane sitting so that the boom stuck out at approximately a 70 to 75 foot degree (R. 400), and at the time of the accident the crane was equipped with a 60 foot stick or boom with a 30 foot jib attached on the end (R. 400). Mr. Petersen took a crayon and drew a circle showing the radius of the swing of the gabro bucket on the stick at the angle of the boom at the time of the injury (R. 401). This radius is shown on Exhibit 2-D. Mr. Petersen took his directions from the man in charge, Frank Cottrell, as to where the concrete pour was to be done (R. 401). Mr. Petersen told us that it is impossible to tell the distance or judge the distance between the cable of the crane and the high tension wires from his position in the cab of the crane (R. 404). At the time Mr. Haslam was injured, Mr. Peterson was lowering the gabro bucket downward and swinging the boom slightly to the north (R. 407). Mr. Petersen said he saw the bucket move to the north as it got to the ground level, but did not see the party moving it (R. 408). He did not see Mr. Haslam reach for the gabro bucket (R. 408).

Paul B. Paulsen testified that he is one of the partners in the Acme Crane Rental Company and that he did not hear about the accident until about a year before the time of trial (R. 468). Mr. Paulsen also testified that the crane was rented to the church on an hourly basis, and that he furnished the crane with the operator, Hyrum Petersen, and John Valdez, the oiler, at the rate of \$18.00 per hour (R. 468). Mr. Paulsen and none of the other defendants doing business as the Acme Crane Rental Company were present at the time Grant Scott Haslam was injured (R. 468). Mr. Paulsen said that when an operator is sent out with a crane, he takes his orders from whoever is in charge of pouring the concrete on the job (R. 470).

John Valdez, the oiler, at the time of the accident was on the wall signalling the operator where to place the bucket to dump the pour from the gabro bucket (R. 474).

In regard to his injury, Mr. Haslam testified that after the accident, Blaine Thomas took him to Dr. Silas S. Smith (R. 250). After being examined by the doctor, Mr. Haslam said he was told to come back the next day. Mr. Haslam said that he had some burns on his hands, but at the time of the trial the burns were not visible, and his hands had healed pretty much (R. 251). The day following the accident Mr. Haslam went back to work (R. 253), and he continued to work thereafter (R. 253). Dr. Silas Smith examined Mr. Haslam on the date of the accident and said that he went over him fairly carefully and decided that there was no systemic change as

far as he could determine from what was purported to be an electric shock. He said the burn on his left hand and his pulse, blood pressure, chest, and heart all seemed to be quite normal. He had him X-rayed by Dr. Winter and stated that he noticed some abrasion and slight discoloration of his left shoulder. He described the injury or the abrasion to the left shoulder as being rather superficial (R. 375). The injury did not require a bandage or dressing by Dr. Smith (R. 375), and Dr. Smith concluded that as far as any injury to the left shoulder, no medical treatment was necessary (R. 375). Dr. Smith told Mr. Haslam that he felt the injury to the shoulder was nothing, and that he could attend his work and go ahead with it without any harm to himself (R. 375). Dr. Smith said that from his examination, he thought Mr. Haslam was capable of going back to work the next day (R. 375). Dr. Silas Smith read the X-ray taken by Dr. Winter and could observe no bony change or injury (R. 375).

During the trial Mr. Smoot decided to stipulate that he was making no claim for a shoulder injury as far as separation of acromioclavicular joint (R. 376).

On cross examination Mr. Haslam said that the burns on his hand left a slight discoloration of the skin (R. 284), and that these are the only burns he had on his body (R. 284). Mr. Haslam also testified that the burns did not require any bandages (R. 285).

With regard to other injuries, these questions were asked of Mr. Haslam: (R. 285, R. 286)

Q. "Did you ever injure your body or your

shoulder or your hands in any other accident like this?"

A. "No, I had some ribs that were cracked once on a steering wheel of a truck."

Q. "And that is the only other prior injury you ever had?"

A. "Oh, I have had my back dislocated when we had our old chute, when we had to raise them with our strength and not with the hydraulic hoists."

Q. "Let me ask you this: Did you ever injure your hands in any other accident?"

A. "No."

Q. "Did you ever injure your shoulder — your left shoulder — in any other accident?"

A. "No."

Q. "How long were you in Dr. Smith's place getting this treatment — this salve on your hands?"

A. "Oh, I imagine I was there twenty or thirty minutes."

The day following the accident Mr. Haslam went back to work (R. 286).

It was not until in January of 1961, a year following the accident, that Mr. Haslam visited Dr. Pemberton, an orthopedic specialist. Dr. Pemberton testified that prior to January 5, 1961 Scott Haslam had not been a patient of his, and that he did not see him until a year after the accident (R. 304). He said that the only thing he knew about the accident on January 19, 1960 was what

Mr. Haslam told him (R. 305), and originally when he saw him on January 5, 1961, he thought Mr. Haslam had a minimal separation of the left acromioclavicular joint (R. 305). He also thought that perhaps Mr. Haslam had a rotor-cuff tear. His finding in the exploratory operation was that his original diagnosis of a rotor-cuff tear was wrong (R. 306). He also testified that separations of the type found in Mr. Haslam's acromioclavicular joint ordinarily were not painful (R. 307), and he also stated that as far as the acromioclavicular was concerned, the condition he found might have been an anatomical thing and that there was no separation at all (R. 307, 308). Dr. Pemberton also testified that after the operation Mr. Haslam had no limitation of movement in his arm, rotating it internally or externally (R. 309). Likewise, he found no limitation in adduction and none in circumduction or extension. On cross examination (R. 311) Dr. Pemberton was asked:

Q. "In answering Mr. Smoot's question as to whether or not the injury that you found, when you operated, could be related to the accident of January 19, 1960, you were assuming that the history he gave you was correct and he only had this one accident; and you were relating it to it because you had no other way to account for the injury?"

A. "That's true."

Q. "Let me ask you: Assume we can show you he had previous injury to this shoulder, and had injuries before, wouldn't it be a reasonable assumption, maybe one of those had

caused injury to his shoulder which you found in the bursa?"

- A. "This is a possibility, and I think we always have to depend on the history the patient gives, in making a diagnosis and proceeding with treatment. Presumably, this man had dated disability — not just pain, but disability — inability doing his work — from this injury, as he stated to me; so I went on that assumption."

Dr. Pemberton also said that if Mr. Haslam had injured his shoulder on September 14, 1957 and had had it struck by a 2 x 4 on that date, that this injury could have caused the condition of Mr. Haslam for which he operated.

Dr. Pemberton also testified that bursitis or inflammation of the bursa is a condition that people get without accident (R. 314) and that as you get older, you have more of a chance of getting it (R. 314). He likewise testified that if you operated on such a condition not caused by accident, that the appearance of the bursa would be the same as one caused by accident, and that the remedy would be the same. He also said that injury to the shoulder does not necessarily cause an inflamed bursa (R. 315). Dr. Pemberton said from his examination of the bursa that there was no indication as to when it hemorrhaged and became inflamed (R. 315). In fact, Dr. Pemberton said that the inflammation wasn't acute and that it could have been there for as many as five years or that it could have been there for three years. He said that if Mr. Haslam had had other injuries to his shoulder

while working on the job, that they could have caused the condition which he found (R. 316). He said that the only thing he actually repaired was the bursa which was removed, and that he did not know whether the accident caused it or not, and that there was no way he could tell whether it did or not (R. 315).

Mr. Orson I. Jacobson was called as a witness, and he testified that he was a Safety Director and Personnel Director at Utah Sand and Gravel Company and had been so since 1954 (R. 432). Mr. Jacobson told us in 1957 Mr. Haslam reported injuries in July and November. Mr. Jacobson testified that in November of 1957 Mr. Haslam made a report of an injury to him to give to the State Insurance Fund, and that at that time he pulled the muscles of his upper back and left shoulder (R. 434). On September 14, 1957 Mr. Jacobson testified that Mr. Haslam told him while lifting a chute, a fellow worker dropped his end, causing patient to swing around and hit a 2 x 4 with his left shoulder, causing pain, and the pain developed when he returned to work on Monday, September 16, 1957 and while he was lifting the chute again (R. 436). Mr. Jacobson also testified (R. 434) that Mr. Haslam received an injury while lifting a mixer chute in July of 1957 and that he wrenched his back.

After the injury on September 14, 1957, Mr. Haslam sought medical treatment from Dr. George F. Parker, a chiropractor who treated him after this alleged injury, and he was not called as a witness (R. 435).

Mr. Jacobson also testified that in November of

1958, Mr. Haslam again was injured, and his injury was reported to the State Insurance Fund, when he reached into the cab of his truck for a clutch lever and the door of the truck blew shut, knocking him into the door frame.

After it was brought to Mr. Haslam's attention that he had had prior injuries to his left shoulder, he did not take the stand and deny the truth of Mr. Jacobson's statements.

After returning to work Mr. Haslam was able to operate the levers that control the hydraulic system for moving the cement chute around (R. 445).

Mr. Blaine Thomas of Utah Sand and Gravel Company and the supervisor, testified that he was familiar with the general custom and practice of a truck driver while waiting to unload his truck, and that this man should stand in the clear at all times (R. 447) and that he should not touch the gabro bucket until it is on the ground (R. 448).

Dr. Paul Milligan was called as a witness by Acme Crane Rental Company. He testified that he examined Mr. Haslam's left shoulder and found a well healed scar over the top of the shoulder and over the front of the left shoulder itself. He put the shoulder through its range of motion and found that the only limitation in motion was that he lacked 20 degrees of getting it up as high as he could get the other arm, although he could push the hand the rest of the way. He found no limitation of his ability to rotate the shoulder internally or externally and no evidence of shrinkage of any muscles (R. 463). Dr. Milligan testified as to the cause of loss of

adduction or raising of the left arm, that this is due to adhesions in the left shoulder and that he did not know the cause of the adhesions. Dr. Milligan was asked if he had an opinion as to which accident caused the inflamed bursa, if any, whether it was the accident on January 19, 1960 or the one on September 14, 1957 or the one on September 16, 1957, or the one on November 18, 1958, and he reported that he had no opinion as to which of these injuries might have caused the inflamed bursa (R. 465). Dr. Milligan likewise told the court that he could not diagnose the time as to when an inflamed bursa arose (R. 467). He did, however, say that most inflamed bursae are caused by degenerative changes that occur to the shoulder without injury (R. 467).

Mr. Haslam's stay in the hospital only required five days for the operation performed by Dr. Pemberton (R. 255A).

Following the operation in February of 1961, Mr. Haslam testified that he was off work from February 7th until the 1st of May. Mr. Haslam used part of the time he was off work starting in April to build a 600 foot addition onto the rear of his house, and he stated to Dr. Milligan that he worked at digging the footings and putting in the forms himself (R. 461). He also stated that in May and thereafter, he worked on weekends to finish up the addition to his house. On recross-examination Mr. Haslam admitted that the prior injuries, at least one or two of them, required treatment by Dr. Parker (R. 479).

Prior to submitting the case to the jury, the De-

fendants, Paulsen, dba Acme Crane Rental Company, moved the court, as a matter of law, to strike from the record all testimony relating to loss of earnings on the part of the Plaintiff, past or future, all exhibits on special damages, testimony relating to Dr. Pemberton's treatment and operation charge, including hospital bill, and all claims that the Plaintiff had for permanent disability or pain arising from Dr. Pemberton's operation and the treatment of the Plaintiff (R. 491). In addition, the Defendants, dba Acme Crane Rental Company, requested Instruction No. 38A be given to the jury (R. 103) which is as follows:

Instruction No. 38A

"You are instructed that as a matter of law the plaintiff has failed to prove by a preponderance of the evidence the following items of which he claims damages, and you must not award, if you should find in favor of the plaintiff, any damages for:

1. Any loss of earnings, past and future.
2. Any special damages for medical and hospital expenses incident to Dr. Pemberton's treatment and operation upon the plaintiff.
3. Any damages for permanent disability or pain arising from Dr. Pemberton's operation and treatment of the plaintiff.

Further, you are instructed that in this law suit, the plaintiff has proved no special damages, and you must not award him any special damages for any expenses of doctors, medicines, X-rays and hospital services."

A complicated set of special interrogatories was submitted to the jury (R. 142-145). The jurors were instructed that if they returned a verdict in favor of the plaintiff for damages, that they were required to return a verdict in like amount in favor of the Paulsens against the Third Party Defendant, Hyrum Petersen (R. 145). The first time the jury returned, they returned \$50,000.00 general damages in favor of the Plaintiff, and \$558.80 special damages, but on the mandatory instruction in favor of the defendants, Paulsen, they allowed \$100.00 general damages and \$58.00 special damages, or a total of \$158.00 (R. 145). The jurors corrected their verdict in favor of the Third Party Plaintiffs only after being admonished by the court to do so and sent out a second time (R.145).

The Defendants, Paulsen, dba Acme Crane Rental Company, moved for a new trial upon the following grounds:

1. Excessive damages appearing to have been given under the influence of passion or prejudice,
2. Insufficiency of the evidence to justify the verdict and that it is against law, and
3. Error in law (R. 159).

The Defendants, Paulsen, dba Acme Crane Rental Company, claimed that the plaintiff and Hyrum Petersen were under the supervision and control of the defendant church, and the work each was doing was a part of a trade or business of the employer church in building the stake house, and that as such, workmen's compensa-

tion would be and was plaintiff's sole remedy, and that no recovery could be had against Acme Crane Rental Company in this suit (R. 37).

However, in instructing the jury the court disregarded the Defendant, Acme Crane Rental Company's defense in this respect, the court gave Instruction No. 12 (R. 132) which is as follows:

Instruction No. 12

"It has been established that the defendant, Hyrum Peterson, was acting as agent for the Paulson defendants and within the scope of his employment at the time of the events out of which the accident involved in this case occurred.

If, therefore, you find that said Hyrum Peterson was negligent, and that his conduct was the proximate, or a proximate, cause of plaintiff's injury, you are instructed that, as a matter of law, you may find that the Paulson defendants were negligent, and that their negligence so found was the proximate cause of plaintiff's injury."

The Defendants, Paulsen, also requested the court to return a directed verdict in their favor and against the plaintiff (R. 62).

On the question of willful misconduct, the court gave Instruction No. 7 (R. 127) which is as follows:

Instruction No. 7

"Plaintiff in this case bases his claim against defendants upon two kinds of misconduct: First, an act or acts of ordinary negligence, of which a definition has elsewhere in these instructions been given to you. Second, an act or acts that were wanton or reckless.

To make an act wanton or reckless, the party

doing the act or failing to act must be conscious of his conduct, and though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury to another. In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. It is enough that he knows or has reason to know of circumstances which would bring him to the realization as an ordinary, reasonable man, of the highly dangerous character of his actions.

Reckless or wanton misconduct differs from intentional wrong doing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes, or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless."

In the special interrogatories in answering the question as to willful misconduct, it is to be noted that the jury found Petersen guilty of wanton or reckless misconduct (R. 142), and Cottrell guilty of wanton or reckless misconduct (R. 7). The court granted the Defendants', Paulsen, motion to dismiss any claim against them because of their alleged willful or wanton misconduct (R. 484).

Instruction No. 12 (R. 132) permitted the Defendants, Acme Crane Rental Company, to be held liable for the negligent acts of Hyrum Petersen only and did not instruct that they would be responsible for willful or wanton misconduct.

ARGUMENT

POINT I.

THE COURT DOES NOT HAVE JURISDICTION TO HEAR APPEAL.

Article 8, Section 9 of the Constitution of the State of Utah provides as follows:

Sec. 9. Appeals from district court — From justices' courts.

"From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the Court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the District Courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute."

Rule 72, Utah Rules of Civil Procedure provides:

(a) From Final Judgments. *"An appeal may be taken to the Supreme Court from all final judgments, in accordance with these rules; provided,*

that in actions originating in city courts and in justices' courts, the decision of the district court on appeal shall be final, except: (1) In cases involving the validity or constitutionality of a statute or ordinance; and (2) In actions originating in city courts in which the amount in controversy exceeds \$100.00, exclusive of costs."

Rule 72(b) Utah Rules of Civil Procedure, also provides for interlocutory appeals. However, the Plaintiff-Appellant's Petition for an Interlocutory Appeal from the Order Granting a New Trial was denied by this court on July 30, 1963, Case No. 9935.

The record does not indicate, in Case No. 9935, or in this case that Plaintiff-Appellant has filed a Petition for a Rehearing from the Order Denying an Interlocutory Appeal.

In *National Farmers Union Property and Casualty Company vs. Thompson* (1955) 4 Utah 2d 7, 286 P. 2d 249, this court said an order granting a new trial is different in character than an order denying one, and the latter terminates the cause, while the former operates to vacate the judgment and reinstate the case as one undisposed of before the court, and over which the court retains jurisdiction.

It is submitted that the trial court having retained jurisdiction of the case by granting the motion for a new trial, that this court does not have jurisdiction in view of its order denying an interlocutory appeal in Case No. 9935.

POINT II.

THE PLAINTIFF FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE OPERATION AND TREATMENT OF DR. PEMBERTON AROSE FROM THE INJURIES HE RECEIVED IN THE ACCIDENT ON JANUARY 19, 1960.

Dr. Paul Pemberton, the plaintiff's orthopedic specialist, testified that the only thing he knew about the accident on January 19, 1960 was what the plaintiff told him about it (R. 305). On cross examination Dr. Pemberton (R. 311) stated that in answering Mr. Smoot's question as to whether or not the injury that he found when he operated could be related to the accident of January 19, 1960, he said *he was assuming the history he was given was correct, and that Mr. Haslam only had this one accident, and there was no other way to account for the injury.* Further, Dr. Pemberton said that assuming Mr. Haslam had injured his shoulder and back on September 14, 1957, that could also cause the condition for which he operated (R. 311-313). Dr. Pemberton said that if Mr. Haslam had had a previous injury to this shoulder, it would be a reasonable assumption that maybe one of these had caused injury to the shoulder which he found in the bursa (R. 311). Likewise, Dr. Pemberton said from the examination of the bursa, you could not tell when it became inflamed, and that the condition could have been there for as many as five years (R. 315). Likewise, Dr. Pemberton said that if Mr. Haslam had had an injury to his shoulder on at least three occasions in the period of two prior years before this accident, all of which occurred on the job, that these could very well have

caused the condition which he found (R. 316). Further, in answering to Mr. Snow's question (R. 318), Dr. Pemberton said that he didn't know whether the accident on January 19, 1960 caused the condition for which he operated in February, 1961, and that there was no way you could tell what caused the condition for which he operated. Dr. Pemberton even said the inflamed bursa could occur without accident (R. 314).

On redirect-examination Mr. Smoot asked Dr. Pemberton this question:

Q. "Now, Doctor, the counsel had made quite a point of the fact that certain things 'could have' taken place with reference to the bursa. Assuming a person who has been able to work on a ready-mix truck, as is described to you in Scott Haslam's history, and that he had no difficulty in operating that truck, and doing the work that he was accustomed to doing, and about which he related to you, assuming all that situation, you have an opinion as to what really caused this inflamed bursa?"

And the answer he got was:

A. "I believe it was, assuming that this history that I got from him was true, it was my judgment, and still is, that the inflamed bursa was due to the injury he suffered in January, the year before I saw him — 1960."

Mr. Jacobson, the Safety and Personnel Director for Utah Sand and Gravel Company, testified following Dr. Pemberton that in November of 1957 he twice reported injuries, and that while turning around in a small area, he pulled the back muscles of the upper back and left

shoulder (R. 434). Also, Mr. Jacobson testified that in July of 1957 he received an injury while lifting a mixer chute and wrenched his back. In September of 1957 Mr. Jacobson said Mr. Haslam reported that while lifting a chute, a fellow worker dropped his end, causing him to swing around and strike a 2 x 4 board with his left shoulder causing pain, and that he saw Dr. Parker as a result of this injury (R. 436). Mr. Haslam also reported an injury to Mr. Jacobson in November of 1958, saying that while pouring curb and gutter, he reached into the cab and that the door of the truck blew shut, knocking him into the door frame and injuring his back (R. 440).

None of these injuries were reported to Dr. Paul Pemberton prior to his testifying for the plaintiff on direct examination.

Dr. Pemberton was not recalled as a witness.

Dr. Paul Milligan, the defendants' witness, testified that you could not diagnose the time as to when an inflamed bursa arose (R. 467), and said he had no opinion as to which of the four previous injuries may have caused the inflamed bursa (R. 467).

On further cross examination, Mr. Haslam admitted that he had had the other prior injuries (R. 478).

He made further admissions as to the prior injuries on rebuttal examination by his own counsel (R. 477, 478).

Mr. Haslam admitted the history he gave Dr. Pemberton of only an accident and injury on January 19, 1960 was not true, and Dr. Pemberton qualified his opin-

ion, saying that assuming the history was true, that he would relate the inflamed bursa to the accident on January 19, 1960 (R. 318).

The plaintiff's minor disability is a result of adhesions following the operation by Dr. Pemberton. The trial court refused to strike from the record all testimony relating to loss of earnings on the part of the plaintiff, past or future, and all exhibits on special damages, testimony relating to Dr. Pemberton's treatment, and testimony relating to his permanent disability (R. 491), and refused to give requested Instruction No. 38-A (R. 103). The jury filled in the void and supplied the proof for the plaintiff.

In *Moore vs. the Denver and Rio Grande Western Railroad Company* (1956) 4 Utah 2d 255, 292 P. 2d 489, where a suit was brought for injuries to the plaintiff's back and nervous system, including a ruptured intervertebral disc in the lower lumbar region of the spine, and where the testimony of Dr. Clegg was based upon examination plus history of pain as given by the plaintiff, and that there was a nerve irritation, and that it was possible the accident initiated the condition, and the nerve irritation was possibly due to pressure on nerve because of irritation from a disc, and where the testimony was merely sufficient to establish that a disc injury was not impossible, this court held the District Court should have given the defendant's requested instruction taking consideration of a ruptured intervertebral disc to the jury on the ground there was no competent evidence on the matter, and reversed a verdict for the plaintiff and

granted the defendant a new trial. In the principal case Judge Faux decided to keep jurisdiction and grant a new trial.

In *Chief Consolidated Mining Company vs. Salisbury* (1922) 61 Utah 66, 210 P. 929, where the plaintiff's testimony was to the effect the accident might have, or could have, accelerated heart disease, and there being no other evidence than this, the court held that an award upon such speculative evidence must be annulled.

In this case there are a number of probabilities or possibilities as to when Mr. Haslam obtained his inflamed bursa. He may have got the inflamed bursa in July of 1957; September, 1957; November, 1957; or November, 1958, or even in the accident in question on January 19, 1960. None of the doctors could say. A choice of probabilities does not meet the requirement of a preponderance of the evidence.

In *Alvarado vs. Tucker* (1954) 2 Utah 2d 16, 268 P. 2d 896, where the plaintiff's witness, a police officer, testified on direct examination the speed of the plaintiff's car was 35 m.p.h., but on cross examination, modified his testimony and said the speed was somewhere between 25 to 30 m.p.h., our court said the burden of proving the charge of speeding was upon the plaintiff, and that this burden was not satisfied with speculation or conjecture, but only on a preponderance of the evidence, and that a choice of probabilities does not meet this requirement.

Actually, in this case the plaintiff does not even come up with a choice of probabilities as Dr. Pemberton

said his opinion relating the need for the operation to the accident on January 19, 1960 was only true if the history he was given was true, and this was clearly shown not to be the case.

When the conflict in testimony comes from the plaintiff's own witnesses or the plaintiff's own testimony, the plaintiff is not entitled to the most favorable probability, *Fowler vs. Pleasant Valley Coal Company* (1898) 16 Utah 348, 52 P. 594. In *Alvarado vs. Tucker*, supra., this court said the testimony of a witness on direct examination is no stronger than modified on cross examination, and that a single part of an officer's testimony cannot be singled out to the exclusion of other parts of his testimony.

As Dr. Pemberton said his opinion relating the operation and treatment to the accident on January 19, 1960 was only true if there were no other injuries, there is no competent medical evidence to support the verdict, and the trial court properly granted a new trial.

POINT III.

EXCESSIVE DAMAGES WERE GIVEN UNDER THE INFLUENCE OF PASSION AND PREJUDICE.

The best exhibit as to the passion and prejudice of the jury is shown by the answers they gave to questions 10 and 11 in the special interrogatories (R. 145). Although the jury was instructed to award the Third Party Plaintiffs, the Paulsens, verdicts in the same amount as they awarded the Plaintiff in the foregoing interrogatory, they, nevertheless, refused to follow the court's

mandatory instruction and while they gave the Plaintiff \$50,000.00 general damages, they gave the Paulsens only \$100.00 general damages, and where they gave the Plaintiff \$558.80 special damages, they gave the Paulsens only \$58.00 and had to be admonished and directed by the court to go back and correct their verdict. Mr. Haslam was able to go back to work the day following the accident, and worked straight through. His loss of earnings and medical specials did not arise until an operation a year following the accident and then his own doctor, Dr. Pemberton, stated he could only relate the treatment and operation he performed to the accident if he could assume the history was true, and this was found not to be true.

The loss of earnings was not substantial, and it was shown that Mr. Haslam lost at least a part of his time from work because of an addition of 600 sq. ft., which he was building on his house (R. 461). We all know it is a little hard to build a 600 sq. ft. addition at home and do the footings and concrete work and have additional time to work overtime extra hours to increase our earnings. Mr. Haslam's only disability was a 10 to 15 per cent limitation and adduction of his left arm, or inability to raise it straight over his left shoulder. There is no showing that this type of disability would limit his earnings or his ability to hold a job, and in fact, prior to the trial, he got a better job working for the Teamster's Union.

In *Stamp vs. the Union Pacific Railroad Co.* (1954) 5 Utah 2d 397, 303 P. 2d 279, where the award made by the jury had no basis in fact and was so excessive as to be

shocking to one's conscience and too clearly indicated passion or prejudice, and it abundantly appeared that there was no evidence to support or justify the verdict, this court held the trial court abused its discretion in refusing to grant a new trial. In *Stamp vs. Union Pacific Railroad Company*, supra., where the plaintiff claimed he continued to suffer recurrent pain as particles of a torpedo worked out of his eyeball where they had lodged after an explosion, and where he continued to work except for 12 days immediately following the accident, and where the case was tried about a year after the accident, and where at the time of trial the plaintiff complained of headaches and that he feared loss of his eyesight, and that he worried, although he had not inquired of his doctors as to any justification for his worry, and where the plaintiff's doctor, an eye specialist, testified that he had examined the plaintiff and that in his opinion the plaintiff was not in any danger, and that he had advised the plaintiff at the time of the first examination 13 days after the accident, and that there was no damage to plaintiff's ability to see, and where a verdict was returned in the sum of \$12,500.00 less \$2,500.00 deducted under the F.E.L.A. rule, this court held the verdict was without all reasonable bounds for the detailed injury and that it had a duty of awarding a new trial or a remittitur. Since *Jensen vs. Denver and Rio Grande Western Railroad* (1914) 44 Utah 100, 138 P. 1185, 1192, the rule in Utah has been that the jury cannot go unbridled and unchecked in awarding damages.

In considering the damages to award the plaintiff, the jury should have been limited to the damages and

injuries he sustained on the date of the accident and the treatment rendered by Dr. Silas Smith.

POINT IV.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE VERDICT, AND THE VERDICT WAS AGAINST THE LAW.

In support of this point, we will submit no argument in addition to that raised under Points II and III.

POINT V.

WORKMEN'S COMPENSATION WAS THE PLAINTIFF'S EXCLUSIVE REMEDY.

Utah has an extremely broad Workmen's Compensation act. Section 35-1-42, Utah Code Annotated 1953, is as follows:

35-1-42. Employers enumerated and defined — Regularly employed — Independent contractors — “The following shall constitute employers subject to the provisions of this title:

(1) The state, and each county, city, town and school district therein.

(2) Every person, firm and private corporation, including every public utility, having in service one or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic servants; provided, that employers of agricultural laborers and domestic servants, shall have the right to come under the terms of this title by complying with the provisions thereof and the rules and regulations of the commission.

“The term ‘regularly’ as herein used shall include all employments in the usual course of the

trade, business, profession or occupation of the employer, whether continuous throughout the year or for only a portion of the year.

“Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this section, employees of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this section. The term ‘independent contractor,’ as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer’s design.”

From the above definition, it’s obvious that you do not have to be on the payroll of any certain person to be an employee within the definition of the Workmen’s Compensation Act. If the church retained supervision or control in any respect over the work being done by Scott Haslam and Hyrum Petersen in the building of the stake house, both Hyrum Petersen and Scott Haslam were employees within the meaning of the Workmen’s

Compensation Act. Everyone agrees that Frank Cottrell, the foreman for the church, ordered the concrete, ordered the crane, controlled the rate of pour, and arranged the job site to pour the concrete. Mr. Haslam could not go up and dump the concrete until the church was ready to receive it, and Mr. Hyrum Petersen could not take the concrete and dump it until the church was ready for the pour. Without any doubt, both of these men were under the supervision and control of the church.

35-1-60, Utah Code Annotated 1953, reads as follows :

35-1-60. Exclusive remedy against employer, or officer, agent or employee — Occupational disease excepted. — *“The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. Nothing in this section, however, shall prevent an employee (or his dependents) from filing a claim with the industrial commission of Utah*

for compensation in those cases within the provisions of the Utah Occupational Disease Disability Act, as amended.”

In *Murray vs. Wasatch Grading Company* (1929) 73 Utah 430, 274 P. 940, where the plaintiff was not on the immediate payroll of the employer, he was held, nevertheless, to be an employee, and that Workmen's Compensation was the exclusive remedy. In *Murray vs. Wasatch Grading Company*, supra, Wasatch Grading Company had a contract to widen the highway in Spanish Fork Canyon adjacent to the railroad tracks of the Denver and Rio Grande Western Railroad Company. Rock was blasted from the mountainside and rolled onto the tracks. The plaintiff Murray, was on the payroll of the railroad company and was taken to the job site by the railroad roadmaster. The grading company was required to reimburse the railroad company for the wages of the plaintiff, and the plaintiff's duties required that he receive messages as to when trains would arrive and that by telephone he would communicate with the railroad dispatcher. When not communicating, he was required to flag trains and assist in removing rocks from the tracks with other employees of Wasatch Grading Company. Wasatch Grading Company carried Workmen's Compensation insurance with the State Insurance Fund and did not list the plaintiff as an employee. The plaintiff was injured while removing rocks from the tracks, and the trial court refused to direct a verdict in favor of Wasatch Grading Company, and on appeal this court said where any employer procures any work to be done wholly or in part for him by a contractor over whose

work he retains supervision or control and the work so procured to be done is a part or process in the trade of the employer, then such subcontractor and all persons employed by him are employees, and where the jury returned a verdict in favor of the plaintiff, the trial court erred in refusing to direct a verdict for the defendant.

The common law right of an employee to bring a suit was lost with the adoption of the 1917 compensation act. Now the employee does not have to prove fault or negligence on the part of his employer, and no longer can he be sued by a fellow employee for his own negligence. In other words, our Utah Compensation act offers the employee double protection. It is not unique, and it is like the compensation act of a number of other states.

In Oregon Workmen's Compensation is the exclusive remedy. In *Pruett vs. Lininger* (1960) 224 Ore. 614, 356 P. 2d 547, where an employee of a general bridge contractor brought a subrogation action against the owners of a crane being rented by his employer to use in pouring concrete, and where the evidence showed that the operator of the crane was employed on an hourly basis and operated the crane under the direction of the bridge contractor, and where the employee that was injured was guiding a concrete bucket when a cable from which the bucket was suspended came in contact with a 7,200 volt line, and where the employee received a traumatic injury and was paid compensation under the Oregon Workmen's Compensation Act, and where the Oregon act provided that Workmen's Compensation was the exclusive remedy against one in the same employment, the

Oregon Supreme Court reversed a verdict in favor of the employee and against the owners of the crane, saying that where the crane operator and the employee injured were both subject to joint control from the bridge contractor, they were in the same employment, and the injured employee could not maintain an action against the owners of the crane because the injured man's rights were limited by the Workmen's Compensation Act.

In Idaho in *Cloughley vs. Orange Transportation Company* (1958) 80 Ida. 226, 327 P. 2d 369, where an employee and a compensation carrier brought a similar subrogation action as the one in the principal case, where the plaintiff was an employee of Detweiler, Inc., and where Detweiler consigned a shipment of boilers to a job site via Orange Transportation Company, and where Detweiler's superintendent told the driver of Orange Transportation Company where to place a tractor and trailer while the boilers were being unloaded from the trailer, and where Detweiler's superintendent directed the plaintiff as to his tasks in unloading the boilers which were to be lifted off with a hook and a crane, and where it was arranged between the superintendent for Detweiler and the driver of Orange Transportation Company that the driver would drive the truck from under the boiler, and where the superintendent advised the driver that he would station himself to the rear of the truck, and by means of signals which he gave to the driver, Park, Park was to observe the signals and move the truck forward as directed and stop it in accordance with the superintendent's signals, and where the boiler

became wedged to the truck and the boom broke on the crane and the plaintiff was injured and paid compensation by Detweiler's compensation carrier, the Idaho court reversed a judgment for the plaintiff against Orange Transportation Company, saying:

"It is clear from the evidence that it was the duty of Detweiler, Inc., the consignee, to unload the boilers, and that Detweiler, Inc. recognized the duty, and actually took charge of it and performed the unloading operation. From this it follows that Park, in operating the truck during the attempted unloading, was a co-employee or fellow servant of plaintiff. Neither Park nor his general employer, Orange Transportation, were third parties against whom plaintiff could maintain a tort action for damages under Section 72-204, Idaho Code."

The Idaho Code like the Utah Code, Section 35-1-62, provides for subrogation when the injury shall have been caused by the wrongful act or neglect of another not in the same employment as the injured employee.

In Massachusetts in *McPadden vs. W. J. Halloran Company* (1958) 338 Mass. 189, 154 N.E. 2d 582, where an action was brought in the right of an employee of Stafford Iron Works for the benefit of the plaintiff and Stafford's compensation carrier against a contractor of Stafford Iron Works which it could have been found negligently injured the plaintiff, and where it was shown Stafford Iron Works sold and agreed to install the steel members or beams in a restaurant building, and where Stafford Iron Works hired Halloran's mobile crane and two men to move the fabricated steel members from

Stafford's truck, where Stafford did not own a crane and had no personnel qualified to operate a crane, where Stafford paid an hourly rate for the crane and where the operator and oiler received their compensation from the crane company, and where Stafford's foreman supervised the position of the crane, and where Stafford's employees signalled the movements of the crane, and where Stafford first unloaded steel members to free the truck and thereafter, where Stafford's employees were engaged to disengage the hooks once the steel was in place, and where the plaintiff contended the relationship was for the jury, the Massachusetts court held in favor of the defendant crane company as a matter of law saying the employer and the crane owner were engaged in common employment and that the employee who was injured when the boom collapsed had no option to sue the crane owner at common law.

— The very nature of ready-mix concrete makes it obvious that Mr. Petersen and Mr. Haslam were acting under the direction and supervision of the church and that they were not free of the church's control in unloading the concrete at a time and place of their own choosing. The testimony of Frank Cottrell and the appellant in his brief admits that Frank Cottrell, the foreman for the church, was the man in charge of the operation.

Although it appears the trial court could have decided as a matter of law the plaintiff and Hyrum Petersen were in the same employment, if it did not do that, it should have submitted the question to the jury under proper instructions, and it well may be that the trial

court granted the new trial because it erred in not directing a verdict for the defendants or in submitting this issue to the jury as requested (R. 90, 91, 92).

It is submitted that if the Supreme Court concludes it has jurisdiction and does not affirm the new trial, then it should instruct the trial court to enter a judgment in favor of the defendant, dba Acme Crane Rental Company, "No Cause of Action" as Workmen's Compensation was the plaintiff's exclusive remedy.

POINT VI.
THE TRIAL COURT ERRED IN FORMULATING
THE SPECIAL INTERROGATORIES.

The first question submitted to the jury in the special interrogatories (R. 142) was:

1. Was the defendant, Hyrum Petersen, negligent in the placing *or* operation of the crane immediately before *or* at the actual time of the accident in this case?

Answer: Yes

Signed: LeMoyne L. Hatch

Foreman

The second question asked was:

2. Did the negligence of Hyrum Petersen proximately cause, *or participate in causing* the accident and injury of which plaintiff complains?

Answer: Yes

Signed: LeMoyne L. Hatch

Foreman

We claim it was error on the part of the court to word its questions to the jury in disjunctive form.

On the subject of special interrogatories, it is stated in 53 AM. Jur. - Trial 1070:

1070 *Generally* — “Special interrogatories should be so clear and concise as to be readily understood by the jury, and when practicable each question should be so framed as to call for a simple and categorical answer. Only such questions as can be fairly and definitely answered should be submitted; interrogatories requiring mere speculation or opinion by the jury as to what might or might not have been a certain contingency are not proper. *As a general rule, questions should not be framed in the alternative or disjunctive, since the answer to a question of such nature might not necessarily express the unanimous verdict of the jurors.*” (Emphasis added)

Four of the jurors may have thought Mr. Petersen was negligent in the operation of the crane before the accident, and four may have thought he was negligent at the time of the accident, or all of them may have thought that he was negligent in placing the crane before the accident and not negligent in the operation or the use of the crane at the time of the accident. On the question of causation, the second interrogatory or question was also in the disjunctive and does not answer whether or not the negligence of Hyrum Petersen proximately caused the accident. In answering this question, the jurors may have merely assumed his negligence participated in causing the accident, and the answer to this interrogatory which was worded in the disjunctive failed to state

the negligence of Hyrum Petersen was the proximate cause.

In *Martin vs. Ebert* (1944) 245 Wis. 341, 13 N.W. 2d 907 where the verdict in an action for assault rendered in response to a question submitted by the court as to whether each defendant did participate in, induce, or give substantial assistance to, or encouragement to others in, an assault and battery on plaintiff was held invalid, since the question being in the disjunctive, it was impossible to determine whether all the jury agreed as to the elements submitted or whether some of them agreed on one element and others on another element.

In *Boyer vs. Gulf, Colorado & Santa Fe Railroad Company* (1957) Tex. Civ. App. 306 S.W. 2d 215 where the jury failed to answer a special interrogatory as to whether train crew's failure to discover plight of the injured person was a proximate cause of death of injured person, the court held failure to answer the interrogatory was not remedied by making an award of damages.

The jurors may have thought Hyrum Petersen was negligent only before the accident, and they may have thought that his negligence participated in causing the accident, but that it was not the proximate cause. The amended pretrial order (R. 35) shows the plaintiff claimed Hyrum Petersen was negligent in the manner in which he operated the crane, and placing or operating the crane before the accident, even if negligently done, would not support a verdict any more than negligently

driving my car last week would support a verdict in an accident at an intersection today.

With regard to other errors in the special verdict, I will not comment for sake of brevity. It is, however, submitted the trial court correctly concluded that it erred in the wording of the special interrogatories, and that it properly granted a new trial because the questions asked were not clear and concise.

POINT VII.

THE TRIAL COURT ERRED PREJUDICALLY IN SUBMITTING WANTON OR WILLFUL MISCONDUCT TO THE JURY.

The evidence in this case fails to show that Mr. Petersen saw the plaintiff was going to take hold of the gabro bucket under the powerline or that he observed that Mr. Haslam had parked his truck under the powerline. It also appears that since the powerline and the power pole was something plain to be seen that he would not realize that Mr. Haslam would not recognize the danger. Mr. Petersen did not observe Mr. Walker and Mr. Haslam switch trucks and did not know that Mr. Haslam had spotted his truck where it was at the time he claims to have been injured.

If Mr. Petersen's conduct was reckless or wanton misconduct, then it is difficult to see why merely driving an automobile is not always reckless or wanton misconduct. We have no Utah cases under this type of factual situation supporting reckless or wanton misconduct. In an automobile case in *Milligan vs. Harward* (1960) 11 Utah 2d 74, 355 P. 2d 62, where the driver, Harward, was

charged with willful misconduct in momentarily taking his eyes off the road to reach for a cigarette, our court said:

“Harward’s act in reaching for the cigarette cannot be construed as willful misconduct. Willful misconduct is the intentional doing of an act or intentional omitting or failing to do an act, with knowledge that serious injury is a probable and not merely a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences. Willful misconduct cannot be predicated upon mere inadvertence or even gross negligence.”

Mr. Petersen took his eyes off Mr. Walker’s truck when he swung the last load of concrete from it around in place and did not observe the switch in trucks. If it’s not willful misconduct to take your eyes off the road to reach for a cigarette, it would seem likewise that it is not wanton or willful misconduct to take your eyes of a truck when you are engaged in doing another task. In *Ricciuti vs. Robinson* (1954) 2 Utah 2d 45, 269 P. 2d 282 where an action was instituted against the automobile driver by a passenger upon the theory the act of the driver in driving 60 m.p.h. in a 30 m.p.h. speed zone showed willful misconduct, and where the jury returned a verdict for the plaintiff, and where thereafter there was an appeal, our court defined willful misconduct as follows:

“Willful misconduct under our guest statute is the intentional doing of an act or intentional omitting or failing to do an act, with knowledge that serious injury is a probable and not merely

a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences.”

In *Ricciuti vs. Robinson*, supra., the court then said even if you assumed the defendant was traveling 60 m.p.h. in a residential zone, that would not indicate the defendant had knowledge or any reason to believe that speed probably or even possibly would result in a lighted cigarette accidentally falling out of his mouth and an accident occurring. Such an event just as well could have occurred while driving 25 m.p.h. in any kind of weather and in any speed zone. It was not the speed, but the dropping of a lighted cigarette that resulted in the loss of control, and this accidental and involuntary circumstance cannot be said to be willful misconduct under any reasonable theory or basis of fact.

In this case it was Mr. Petersen’s failure to see that the trucks had been switched and that Mr. Haslam had not spotted his truck as far southward as Mr. Walker stopped his. This was an accidental and involuntary circumstance and does not show willful misconduct or recklessness under any reasonable theory.

The instruction on recklessness and willful misconduct was highly prejudicial, as it gave counsel for the plaintiff a chance to inflame the jury and argue that among all else we were liable because we placed the crane where boom of it could come in contact with the powerlines, and thus we were liable because we did not have the foresight to foresee that Mr. Haslam would

stop his truck where he did. Mr. Haslam was not an invitee of Acme Crane Rental Company.

POINT VIII.

ON THE QUESTION OF CONTRIBUTORY NEGLIGENCE, THE TRIAL COURT CORRECTLY CONCLUDED THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The evidence shows that Mr. Haslam had been driving a ready-mix cement truck some seven years prior to the time of the accident, and that he was an experienced truck driver. He arrived at the job site about 12:30 P.M. on a cloudy, cold day and had some ten or fifteen minutes in which to wait and observe all of the hazards and problems incident to unloading his truck. However, by his own testimony, he admits that he failed to see the powerline and power pole and the hazards involved which were items which he admits were plain to be seen, and that he did not back his truck into a safe area and spot it in a spot as did Mr. Walker for unloading.

In summary the great weight of the evidence shows that he was negligent in not keeping a proper lookout for his own safety at the job site.

POINT IX.

TRIAL COURTS HAVE A WIDE LATITUDE IN GRANTING NEW TRIALS.

The trial court did not abuse its discretion in granting a new trial, and in fact, acted properly. In *Beck vs. Dutchman Coalition Mines Co.* (1954) 2 Utah 2d 104, 269 P. 2d 867, this court said:

"Trial courts have wide latitude in granting or denying motions for new trials. Considering

the evidence which respondent adduced, which evidence the jury was entitled to believe, we cannot say as a matter of law that the court below abused its discretion in denying the motion****.”

Likewise, in *Bowden vs. Denver & Rio Grande Western Railroad Company* (1955) 3 Utah 2d 444, 286 P. 2d 240 the court said a trial court has a wide discretion in granting or denying motions for a new trial, and that the reviewing court will interfere with the exercise thereof only if there is a clear abuse of discretion.

In *Holmes vs. Nelson* (1958) 7 Utah 435, 326 P. 2d 722, where the trial judge concluded the evidence was insufficient to justify the verdict, this court affirmed the granting of a new trial.

In the case in question, although the jurors received a mandatory instruction to award the Third Party Plaintiffs a judgment in like amount against the Third Party Defendant as they awarded the Plaintiff, they arbitrarily disregarded this instruction, although they answered a complicated set of special interrogatories prior to refusing to follow this instruction, and thereafter, they gave Third Party Plaintiff the first time they were sent out \$100.00 general daamges, and \$58.00 in special damages, and not until they were sent out the second time did they follow the court's instructions.

Further, the medical testimony shows that the medical treatment the plaintiff required following the accident was of a minor nature, yet the jurors awarded general damages of \$50,000.00. Moreover, there was a considerable amount of evidence to support a finding of

contributory negligence. On the question of contributory negligence, it would seem that in all probability the great weight of the evidence showed plaintiff was contributorily negligent. The court, knowing the jury disregarded the instruction on damages and then used the same scale of justice to weight the evidence on contributory negligence, had reason to believe the jurors did not fairly weight the facts in considering the question of contributory negligence.

In the trial of this case there were several errors, all of which had an adverse and prejudicial cumulative effect. In *Ivie vs. Richardson* (1959) 9 Utah 2d 5, 336 P. 2d 781, this court ordered a new trial saying:

“It is unnecessary and would serve no useful purpose for us to decide whether any one of the errors above discussed, considered separately, would constitute sufficient prejudicial error to require a new trial. The question is, whether the case was presented to the jury in such a manner that it is reasonable to believe there was a fair and impartial analysis of the evidence and a just verdict. If errors were committed which prevented this from being done, then a new trial should be granted, whether it resulted from one error, or from several errors cumulatively. We expressly do not mean to say that trivia which would be innocuous in themselves can be added together to make sufficient error to result in prejudice and reversal. The errors must be real and substantial and such as may reasonably be supposed would affect the result. However, errors of the latter character, which may not by themselves justify a reversal, may well, when consid-

ered together with others, render it clear that a fair trial was not had. In such event justice can only be served by the granting of a new trial, absent the errors complained of. It is so ordered. Costs to appellants.”

CONCLUSION

The trial court correctly concluded that justice would be served only if a new trial were granted because:

1. Excessive damages appeared to it to have been awarded under the influence of passion and prejudice.
2. The evidence was insufficient to justify the verdict, and the verdict was against the law.
3. It erred in instructing the jury and formulating the questions submitted as special interrogatories.

Respectfully submitted,

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I hereby certify that on this day of November, 1963, I mailed two copies of this Brief by United States Mail, postage prepaid to A. Park Smoot; two copies to George H. Searle; and two copies to Skeen, Worsley, Snow and Christensen at the address shown on this Brief.