

1969

Harold Memmott v. United States Fuel Company : Brief of Appellant

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

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. Paul B. Cannon; Attorney for Appellants

Recommended Citation

Brief of Appellant, *Memmott v. U.S. Fuel Company*, No. 11392 (1969).
https://digitalcommons.law.byu.edu/uofu_sc2/4431

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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

HAROLD MEMMOTT,

Plaintiff,

- vs. -

UNITED STATES FUEL COMPANY,
a corporation,

Defendant.

Case No.

~~9246~~

11392

BRIEF OF APPELLANT

On Appeal from the District Court of
Carbon County, State of Utah
Hon. F. W. Keller, *Judge*

FILED

1907

Carbon County, Utah

CANNON, GREENE,
NEBEKER & HORSLEY
Paul B. Cannon,

Attorneys for Appellants.

Therold N. Jensen,

Attorney for Respondent.

INDEX

	Page
STATEMENT OF POINTS RELIED UPON FOR REVERSAL	1
NATURE OF CASE: DISPOSITION BY THE TRIAL COURT AND RELIEF SOUGHT	3
STATEMENT OF MATERIAL FACTS	3
(a) Testimony of John Smith	5
(b) Testimony of plaintiff, Harold Memmott	7
(c) Testimony of other witnesses called by defendant....	10
(d) Additional testimony of John Smith	11
PHOTOGRAPHS	12
ACTIVITIES OF PLAINTIFF FOLLOWING THE ACCIDENT	13
ARGUMENT	26
POINT I. THERE WAS NO NEGLIGENCE BY DE- FENDANT AND PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE	26
POINT II. THE COURT ERRED IN PERMITTING THE PLAINTIFF TO AMEND HIS COMPLAINT AT THE COMMENCEMENT OF THE TRIAL	29
POINT III. JURY INSTRUCTIONS	33
POINT IV. PLAINTIFF IMPEACHED HIS OWN TESTIMONY	33
POINT V. FALSE TESTIMONY AS TO PLAIN- TIFFS DISABILITY	34
CONCLUSION	35

IN THE SUPREME COURT
of the
STATE OF UTAH

HAROLD MEMMOTT,

Plaintiff,

- vs. -

UNITED STATES FUEL COMPANY,
a corporation,

Defendant.

Case No.

~~9246~~

11392-

BRIEF OF APPELLANT

STATEMENT OF POINTS RELIED
UPON FOR REVERSAL

1. The plaintiff failed to prove negligence on the part of the defendant.

2. The evidence shows that plaintiff's own negligence was the proximate cause of the claimed injuries to the plaintiff and damages to his truck.

3. Assuming, without admitting, negligence on the part of the defendant, the plaintiff was guilty of contributory negligence in that he did not use reasonable

care in the operation of his truck, which negligence on the part of the plaintiff was a contributing proximate cause of the accident and the claimed resulting damages to the plaintiff.

4. The court erred in permitting the plaintiff to amend his complaint at the commencement of the trial.

5. The court erred in refusing to give defendant's requested instructions numbered 1, 6, 9, and 10.

6. The court erred in denying defendant's motion for judgment notwithstanding the verdict or in the alternative defendant's motion for a new trial.

7. The plaintiff, after testifying as to the facts of the case called another witness who contradicted plaintiff's own testimony as to every material fact. Plaintiff should not recover when he impeaches his own testimony on the material facts of the case by another witness.

8. Appellant and defendant may accept the testimony of the plaintiff even though contradicted by another witness, and if such testimony either fails to show negligence on the part of the plaintiff, or shows contributory negligence on the part of plaintiff, judgment should be for defendant regardless of other testimony.

9. Plaintiff's false testimony as to his claimed disability discredits his claim of permanent injury as a matter of law.

NATURE OF CASE, DISPOSITION OF CASE BY TRIAL COURT AND RELIEF SOUGHT

This case is an action for damage to a truck and for claimed personal injuries occurring at defendant's coal yard at Hiawatha, Carbon County, Utah, on the 31st day of December, 1964. The case was tried in the District Court in and for Carbon County before a jury resulting in a verdict in favor of the plaintiff and against the defendant in the amount of \$5,000.00 general damages and \$1,973.64 special damages. The appellant asks for a reversal of the judgment, for judgment in favor of the defendant notwithstanding the verdict, or in the alternative, a reversal and new trial.

STATEMENT OF MATERIAL FACTS

The facts of the case require a clear understanding of the layout of the coal yard of the defendant. At the request of the counsel for the plaintiff, a map of the coal yard was prepared by the defendant and introduced as plaintiff's Exhibit No. 1. It happened that this Exhibit was prepared so that the top of the map was looking southerly. Counsel for plaintiff reversed the map for viewing by the court and jury so that the top of the map was northerly. The legends on the map were then upside down. There were certain additions during the trial by witnesses which were placed on the map in red pencil. To avoid confusion, we have prepared a

copy of the map, which is attached inside the cover of this brief, which is identical with plaintiff's Exhibit 1, except that the legends on the map are written right-side-up and with the top of the map pointing northerly.

As will be seen from plaintiff's Exhibit 1, the tipple at the coal yard of defendant is served by six separate railroad tracks. These tracks are numbered one through six. Cars are loaded under the tipple. The cars are placed by the railroad at some point above or westerly of the coal yard and are dropped down by gravity. Tr. 108. Between Tracks 3 and 4 and just south of the tipple office is an anchor used for holding cars or pulling them up grade from under the tipple.

There is a truck road which comes down the hill from the mine office, (the mine office not being shown on the map) crosses the tracks at the westerly end of the coal yard, then runs easterly parallel to and north of Track No. 1. While the course of this road is not shown beyond plaintiff's Exhibit 1, it goes to a stock pile northeasterly of the tipple, and also branches southerly on the east side of the tipple permitting trucks to load under the tipple from the east.

While the accident complained of occurred December 31, 1964, the events of December 28 through December 31, 1964, have a direct bearing on the case.

The matter of making a concise statement of the material facts as to how the accident occurred has a peculiar problem in this case. As is indicated by the points above stated, two completely contradictory state of facts were presented by the plaintiff in his case in chief. It is appellant's position that neither set of facts proves that the defendant was negligent and both sets of facts prove the defendant guilty of contributory negligence. It is impossible for both claimed sets of facts to have been true.

Since our defense is that neither set of facts justified a finding by the jury of negligence on the part of the defendant and both sets of facts prove contributory negligence, we will state the facts as testified to by John Smith who was called as a witness by the plaintiff as the facts which we consider to be correct, and ask in accordance with Rule 75 (p) (2) that the respondent indicate whether he agrees with this statement of facts, and if not, what state of facts he contends are correct. The jury was not required to decide what the facts were.

(a) Testimony of John Smith

This will constitute appellants statement of material facts as it claims the accident occurred. However, this does not waive what we contend under our points No. 7 and 8, that plaintiff cannot impeach his own testimony or that regardless of the testimony of other witnesses,

plaintiff should be denied recovery if his own testimony fails to prove negligence on the part of defendant or proves his own contributory negligence.

There had been a heavy snow at the mine on the morning of December 28. Tr. 94, 99, and defendant's Exhibit No. 1, being U. S. Weather Bureau report. The roads and tracks had been cleared of the snow when Mr. Memmott arrived for a load of coal on that date. Tr. 96, 97, 99, 100. John Smith directed Mr. Memmott where to go, this being traced on plaintiff's Exhibit 1 by a red line which shows that Mr. Memmott was directed and went down the road to where the road crossed the railroad tracks, thence easterly down the track leading under the tipple on Track No. 4. Tr. 94, 114. This load of coal was secured without incident and the plaintiff proceeded on his way. There was no substantial snow fall between the 28th of December and the morning of December 31, or on December 31st, the date of the accident. Tr. 95 and defendant's Exhibit 1, being government's daily report of precipitation at Hiawatha, and defendant's Exhibits 2 through 8, being tipple foreman's reports for December 28th through December 31, 1964 which, in addition to other matters, show the weather conditions. John Smith testified that there might have been one inch of snow between December 28 and December 31, 1964. Tr. 95, 96. The plaintiff arrived at the mine on the morning of December 31 for another load of coal, met John Smith at the mine office who

said "*I told him to go where he had gone on Monday.*" Tr. 94, 110, 111, being the course marked in red on the map. The road and the tracks were clear on this date, December 31st, the date of the accident. Tr. 97, 111. The exact course which the plaintiff took on the 31st was not known to Mr. Smith, but the plaintiff failed to follow the course which he was directed to take on the 28th, but instead took another course and drove his truck onto the anchor between tracks number 3 and 4 and south of the Tipple Office. It is admitted that this anchor was covered with snow at the time it was struck by the plaintiff. Tr. 95. That the plaintiff's truck was damaged is not disputed and the amount of the damages awarded for the repair of the truck is not an issue if the defendant is liable. There were no cars on Track 1. Tr. 113.

The foregoing is a statement of the material facts as testified to by John Smith, witness for the plaintiff. This evidence was adduced by the plaintiff after an entirely different set of facts had been adduced by the testimony of the plaintiff and his son, Terry. We will now review the facts of the case as presented by the plaintiff and his son Terry.

(b) Testimony of Plaintiff, Harold Memmott
And His Son, Terry Memmott

We will first summarize the testimony and then give the references to the transcript. The plaintiff testi-

fied that on the morning of the 28th he received his coal without incident; that on this occasion, he did not go down the tracks on the course shown by the red line on plaintiff's Exhibit 1, but that he went around the tipple to the east side and pulled underneath on Track 4. There was no mishap on this occasion. He then testified that on the morning of the 31st there was a *regular blizzard, snow being up to his knees*; that the road and the tracks were not cleared; that he was told to go down and get under the tipple by John Smith with no other specific directions. He says that he went down the road marked "hill" on the map and that when he came to track 1 there was a line of railroad cars blocking the road. In spite of the fact that he said he had not used the tracks previously to reach the tipple from the west, he swung his truck to the right in snow *knee deep* "circling" and "zigzagging" around in an effort to try to reach Track No. 4 under the tipple, whereupon he struck the anchor.

By his testimony, no one had told him to go this route and he was not directed to do so on this day. He admitted that he did not remember the string of cars at the time of his deposition the year before, but that he thought of them as he came to court on the morning of the trial. His son, Terry, testified that the plaintiff struck his head and that it was bleeding. No one else saw any blood and the plaintiff's own doctor testified that the skin had not been broken when he examined him that night.

The following is the reference to the transcript where the foregoing testimony was given:

Plaintiff had been at the mine to pick up coal a few days before the accident. Tr. 10. On that occasion he got under the tippie from the east or lower side. Tr. 11. On the 31st of December, 1964, the day of the accident, the plaintiff stopped at the mine office and John Smith "told us to go down and get under the tippie." Tr. 12. The only conversation he had with John Smith was "only just to tell me to go down, get under and be loaded and he would be down to load me." Tr. 13. As he came off the hill "there was a line of cars . . . so I took down the track." Tr. 13. The snow had not been cleared from the tracks. Tr. 13. He was just heading for the bins. Tr. 15. There was nobody there and "I was more or less waiting for John Smith to come to tell me where to go." Tr. 15. Mr. Smith didn't tell him where to go to get his coal on the day of the accident. Tr. 51. He saw the cars across the road as he came down off the hill. Tr. 54. He then just simply decided to drive under the tippie by going down the tracks. He said he could have stopped but he would have been stuck. Tr. 55. He was sure that it snowed when he got out to the mine on the 31st "just a regular blizzard" and the snow was up to his knees. Tr. 56. He said that he banked his case on the fact that it snowed at Hiawatha the day of the accident. Tr. 58. He didn't remember about the cars being across the road at the time of his deposition, but just thought about it "coming up now," and after his boy mentioned it. Tr. 61. When

he turned to the right to go down the tracks, "he was circling around to get down the road the best he could." Tr. 62. "I don't know which track I was on, I was zig-zagging around to get through them to get going." Tr. 62-63.

The foregoing testimony was reiterated by Terry Memmott, Tr. 71-80, except that he said that his father's head was bleeding. Tr. 73, 82. Dr. Orton, who examined the plaintiff the night of December 31, saw nothing but a lump on the plaintiff's head. Tr. 32.

We particularly wish to point out that according to plaintiff's own statement he was never directed to go down the tracks or in the area where the anchor was located. No directions were given him except "to go down and get under the tipple."

(c) Testimony of Other Witnesses Called by Defendant

These witnesses corroborated and supplemented the testimony of John Smith.

Oscar Wayman, a truck driver for the defendant was at the mine at the time of the accident. He drove his truck down the road from the mine office to the tipple at 8:00 o'clock on the morning of December 31, 1964. Tr. 159. It was not snowing at the time and there had been no snow the night before, and all the tracks were clear. Tr. 160. He saw the accident and it appeared that Memmott "started down Track 3 and de-

cided to go over on 4 and hit into a snowbank into the abutment." Tr. 160. On being asked whether he was hurt, Memmott said "I'm all right. Oh, my truck!" Tr. 160. Mr. Memmott was not bleeding. Tr. 161. Wayman told Memmott how to call the office, which Memmott did. Tr. 161. Wayman testified that if he were driving down the hill and there had been cars across the track that he could have stopped his truck before he got to the cars. Tr. 161. There were no cars on the tracks blocking the road on the morning of the 31st. Tr. 162.

George Burdell Lake was called by the defendant and testified as follows: He was employed as a fireman by the defendant and was at work on December 31, 1964. At that time, the weather was clear. Tr. 164. He saw Mr. Memmott after the accident and Mr. Memmott indicated that he was not hurt. Tr. 165, 166.

(d) Additional Testimony of John Smith

Mr. Smith pointed out that there was a switch stand, marked "S" on the Exhibit 1, and a sandbox marked "SB" on Exhibit 1. These lie between Tracks 4 and 5. The sandbox is approximately 4' high. Tr. 154. The plaintiff could not have driven between Tracks 4 and 5 without first striking the switch stand and sandbox.

Mr. Smith had occasion to see Mr. Memmott from time to time as he came to Hiawatha for coal on and

after January 28, 1965 and no one was with him except his son on one or two occasions. Tr. 156. Memmott's head was not bleeding after the accident but he had a bump on his head. Tr. 158.

The following significant testimony was given by John Smith on cross examination which was evidence that the tracks were clear and there was no new snow on the 31st, or any material amount of snow which fell after December 28.

The procedure for loading cars was to drop them by gravity under the tipple. Tr. 107. If there was more than 6 inches of snow, the cars could not be moved by gravity. Tr. 107 and 108. During December 29 through 31, the following number of cars were loaded, they being dropped by gravity from the yard under the tipple; December 29, 1964, 31 cars on the day shift, 17 cars on the afternoon shift, Tr. 109; December 30, 34 on the day shift; December 31, 32 on the day shift. Tr. 110.

PHOTOGRAPHS

Plaintiff offered in evidence small photographs marked plaintiff's Exhibit 3 and 5. It was agreed that Exhibit No. 5 was a photograph of the tipple taken in the summertime looking easterly straight down Track No. 4. It shows the "anchor" between tracks 3 and 4 which plaintiff struck with his truck.

The small photograph marked plaintiff's Exhibit No. 3 was introduced in evidence purporting to show the condition of the yard at the time of the accident. Mrs. Memmott said she took the picture on January 1, 1965, the day after the accident, having made a special trip from Spanish Fork to do so. Tr. 84. Mr. Memmott testified at the trial that the picture was taken January 2, 1965, two days after the accident. Tr. 23. On the deposition he said he did not know when the picture was taken. Tr. 48, 50. There was so much confusion as to when it was taken that the picture has little value in the case. Assuming, however, that the picture is to be used as having some probative value, it disproves rather than proves plaintiff's testimony. From a careful examination of the picture, it is quite obvious that the snow was not knee deep and that the "anchor" protruded through the snow so that it could be seen. The snow on both sides for a distance of at least 5-10 feet is lower than the anchor.

ACTIVITIES OF PLAINTIFF FOLLOWING THE ACCIDENT

This phase of the case was gone into on the question of the extent of plaintiff's injuries. However, the testimony of the plaintiff and of plaintiff's wife Ada Memmott as to the plaintiff's ability to drive his truck following the accident was so flagrantly contrary to the undisputed facts that it is important, not only as to the extent of the disability, but as to all facts asserted by plaintiff.

An outline of the testimony, and of inconsistent facts, later admitted and proved, is that the plaintiff testified that he was so disabled that he could not continue his business of trucking coal. (Specific references to the transcript will be supplied.) He said that except for going to the mine to get his truck, *he had never been to Hiawatha after the accident, this due to his disability caused by the accident.*

Mrs. Memmott testified to the same effect. She was his bookkeeper and knew exactly what business he transacted. She testified that no business was transacted by the plaintiff for which he was paid by Webster Inc. after December 31, 1964.

The facts are that as soon as plaintiff's truck was fixed, he continued trucking for Webster Inc., hauling 32 truck loads of coal from the mine between January 28, 1965 and September 16, 1965, admittedly driving the truck himself on many occasions.

Defendant's witnesses testified that after the accident they never saw anyone in the truck with Mr. Memmott except that his son Terry was with him on one or two occasions.

The statement of the plaintiff and his wife were so positive to the effect that the plaintiff could not drive his truck and had never gone to Hiawatha after the accident, and his testimony was so flagrantly contrary

to the facts subsequently admitted by the plaintiff, that we trust the court will bear with us for quoting at some length from the testimony.

As to Ada Memmott's knowledge of the business, she testified as follows: (emphasis added)

Q. *Well now you did testify that Mr. Memmott hauled no coal for Mr. Webster after this accident?*

A. *He never hauled no coal. He let his other truck driver friends haul it for him.* (Tr. page 117)

A. Well, he comes home and tells me. Every night I work on the books. He brings his gas slips home. *He brings what he hauls home, he brings his check from Mr. Webster. I set down every night how much he made, how much his gas cost. If he stopped and ate lunch how much his meals cost him. If he had tire trouble how much his tires cost. No matter what.*

* * *

Q. Then you, your books would have a record of how much coal, how many tons of coal he hauled each load would they not?

A. Not, I didn't put — *I put how much that he made. That's what I have to have to pay our taxes. Is how much he makes, not how many tons he hauls.* (Tr. page 118)

Mr. Memmott gave the following testimony to the fact that his wife kept his records.

Q. Has she assisted you in keeping your records and in helping you take orders and so on in connection with the coal business?

A. Yes, *she does it all the time.* (Tr. page 43)

The following is the testimony of Mr. Memmott and Mrs. Memmott that the plaintiff did not haul coal for Webster for his own account and did not go to Hiawatha after the accident, except to get his truck.

Mr. Memmott testified:

Q. Since the time of your accident have you continued trucking?

A. Yes, with my neighbors and different ones I hired to drive my truck. Is the only way I have. To keep a little business around home, I've let all my business go except around town. What little I had there I try to keep that with my boys delivering the coal to my neighbors.

Q. You have endeavored to keep your truck working, is that right?

A. Well, I've tried. My business I haven't did very much business. I've tried but I can't do it.

Q. *When you drive your, or ride in the truck what effect does that have on your back or neck?*

A. Just bothers it all the time I'm in there.
(Tr. page 39)

Mr. Memmott further testified:

Q. Mr. Memmott, do I understand you to testify that since this accident on December 31st, 1964, that *you have never been to Hiawatha except to get your truck and to take these pictures?*

A. That's all since the accident happened. *I've never been out there.*

Q. *Isn't it a fact that you have been out there and gotten truck loads of coal since that date?*

A. *No, not from Hiawatha.*

Q. Who do you haul for, Mr. Memmott?

A. Myself now, *I was hauling to Websters and I had to quit*, my truck was wrecked. I got a lot of guys down there to haul for me in to Websters to keep going until I had to give it up. I couldn't make it and hire somebody to haul it so *I just let it go.*

Q. *How long did you do this for Webster?*

A. What, hauling?

Q. Yes.

A. Oh, I don't know.

Q. After the 31st?

A. *Not very long.* I had oh, two or three guys take loads in for me and I thought I can't do her no more.

Q. *Did you ride with these men in the truck?*

A. No.

Q. *You just didn't show up at Hiawatha after?*

A. *I never went to, they never went up to Hiawatha, they went up to Carbon Fuel to get their coal. They never went to Hiawatha to get any coal.*

Q. Do I understand your testimony that neither you nor Mr. Webster bought any coal at Hiawatha after this accident."

MR. JENSEN: Now just a minute, I don't think that is a fair statement.

MR. CANNON: I will rephrase it. I will rephrase it. First, *do I understand that you never went to Hiawatha to get coal for Mr. Webster or anyone else after this accident?*

A. Well now wait, I'll have to say I don't, or someone else did, these other guys that I had to haul I told them they could get it from Hiawatha so Mr. Webster come up and I sent him up to Carbon Fuel to look at their washer and they made a deal with them and there's where his coal come from.

Q. Mr. Memmott, will you please listen to my question carefully?

A. I'll listen.

Q. This is with respect to what coal you either hauled or that you went with somebody. *I understand that you never went to Hiawatha for coal or any other purpose after you went up and got your truck?*

A. *That is right.* (Tr. pages 63 and 64)

Q. Mr. Memmott, as I recall your testimony, and I want to be corrected if I am not correct, you said that you never went to the coal mine at Hiawatha after this accident?

A. I said unless I rode with somebody in one of these trucks that my wife told you that hauled coal for me to show them where to go and where to get the coal, and I could have signed those bills that you showed her my very own self up in the office for the coal.

Q. *Now, Mr. Memmott, didn't you tell me that you had never been to the mine at Hiawatha since this accident?*

A. That I didn't think I had I said. I didn't think I had. Let's put it that way, that's what I said.

Q. All right, you didn't think you'd been to the mine?

A. That's right. (Tr. page 127)

After the foregoing testimony, defendant produced and there was received in evidence Exhibits numbered 10 through 42 (except 36) which showed 32 weigh tickets signed by the plaintiff commencing on January 28, 1965, the day his truck was repaired, to September 16, 1965, all of which were for Webster Inc. and were signed by Memmott at the mine. The plaintiff then admitted that he signed every ticket *at the mine* and that on many occasions he was alone *and drove the truck himself*. Defendant's witnesses testified that they saw him on frequent occasions after the accident and that he was alone in the truck except on 1 or 2 occasions when his son Terry was with him.

Plaintiff was shown Exhibit No. 10 being the weigh ticket for January 28, 1965 showing a load of coal "consigned to Webster Inc.", and signed by H. H. Memmott. He reluctantly admitted the signing of the ticket on January 28 but still persisted that he never hauled any coal for Webster after that date. His testimony was as follows:

Q. *Now on the 28th of January 1965, you admit that you went up to the mine and got a load of coal?*

A. *I must have done, the ticket is signed.*
* * *

Q. . . . How much business did you do with Mr. Webster after the 28th of January 1965?

A. You've got the tickets to show that is the business that I did. Was this on my truck? *I'm saying that you got the tickets so why ask me, you've got them in your hand.* (Tr. page 133)

Q. Now with respect to this load on the 28th *did you receive the pay for that load or did somebody else receive it?*

A. *I imagine I did*, and if it was them hauling it I'd give them the money. Mr. Webster, a lot of time if I was there wrote the check out to me and I endorsed it and give it to whoever was hauling it.

Q. And you wouldn't have made anything on this trip?

A. No I never made a penny when somebody else was hauling it.

Q. And this was the case on all the trips made for Mr. Webster after this accident? Somebody else hauled it?

A. *They hauled it after the accident, I never hauled none.* (Tr. page 136)

On being shown Exhibit No. 11, a ticket for coal consigned to Webster Inc. and signed by H. H. Memmott on February 2, 1965, he still denied that he drove the truck to the mine after the accident.

Q. Did you sign that at the coal mine?

A. Yes. Well, I imagine I did. The same place as always.

MR. CANNON: And we offer Exhibit No. 11.

MR. JENSEN: May I see it? No objection.

A. What date was that please?

MR. JENSEN: February 2nd.

A. '65 (Tr. Page 141)

Q. All right, you were not driving the truck on this date?

A. That's right.

Q. Of February 2nd, you swear to this and you know that you are under oath?

A. Well, O.K., I know it.

Q. *And you never did drive the truck according to your statement to Hiawatha after the accident? That's your testimony?*

A. That's right. (Tr. page 142)

However, after it became apparent that there were additional tickets signed at the mine, the witness admitted that he did go to the mine alone and hauled coal for Webster. His testimony is as follows:

Q. And you say that you were not driving?

A. I'm going to say, I'm going, to put a phrase in that. Now there's a few trips if I got

up feeling good as Dr. Orton explained to you. Some mornings I felt better than I did others, I could have been driving it. (Tr. page 143)

MR. CANNON: For the information, this has been admitted in evidence dated March 5th, 1965, truck load of coal signed by Mr. Memmott. I show you Exhibit No. 15, Mr. Memmott. Is that your signature?

A. It is.

Q. And did you sign that at the mine?

A. I guess I did. That's the place I signed them. All.

Q. Were you driving a truck that day?

A. I don't remember. *I said once in a while if I got up feeling decent I drove it. How many times do I have to say that?* (Tr. page 144)

A. *Or I'd go alone a few times if I felt, got up feeling better than, than morning.* (Tr. page 147)

Q. *Then you did do business with Mr. Webster after the accident in which you hauled the coal and you received the pay?*

A. Yes. (Tr. page 148)

After it was apparent that the defendant could produce weigh tickets signed at the mine by the plaintiff Harold Memmott after the accident, plaintiff and his

council readily admitted these facts. Mr. Memmott was asked how much business he did with Mr. Webster after the 28th of January, 1965. He said:

“You have got the tickets to show; that is the business I did. Was this on my truck? I’m saying that you got the tickets so why ask me. You’ve got them in your hand.” Tr. 133.

Even so, plaintiff thereafter made some attempt to stick with his story that he did not haul after the accident. He said “I never hauled none.” Tr. 136.

The court asked the following question with respect to the tickets, and counsel for the defendant admitted that they showed that the plaintiff went to the mine each time and that he signed for coal for Webster. The following is the transcript:

THE COURT: May I ask a question? You offer these to show how many times he went to the mine in this period, is that it?

MR. CANNON: That is right, and that he signed for coal for Webster, Inc.

THE COURT: You will admit that?

MR. JENSEN: Yes. (Tr. Page 146)

We go no further with this testimony except to refer to Exhibit’s 10 through 42, excluding 36, which shows that

after the accident the plaintiff went to Hiawatha and picked up a truck load of coal and signed the weigh tickets, all for Webster, Inc. on the following dates:

Date of Weigh Ticket	Defendant's Exhibit No.
1-28-65	10
2- 2-65	11
2- 4-65	12
2- 9-65	13
3- 5-65	14
3- 9-65	15
3-11-65	16
3-19-65	17
3-23-65	18
3-25-65	19
3-29-65	20
3-31-65	21
4- 2-65	22
4- 8-65	23
4- 9-65	24
4-12-65	25
4-13-65	26
4-16-65	27
4-30-65	28
5- 6-65	29

5-17-65	30
6-17-65	31
8- 5-65	32
8- 9-65	33
8-10-65	34
8-12-65	35
9- 2-65	37
9- 7-65	38
9- 9-65	39
9-10-65	40
9-14-65	41
9-16-65	42

ARGUMENT

POINT 1.

THERE WAS NO NEGLIGENCE BY DEFENDANT AND PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

The evidence adduced by the plaintiff by the testimony of John Smith, which was inconsistent in all material details to his own testimony, was that on the 28th following the heavy snow storm, but after the tracks were cleared, the plaintiff was directed in the course shown by the red line on Exhibit 1. He had no difficulty on the 28th. On the 31st he was directed to go where he

went on the 28th and there was no reason to have difficulty as the tracks were clear and the same on both dates.

The plaintiff was an experienced truck driver. He had been specifically directed where to go on the 28th and he had traveled this course without mishap. Certainly, it was reasonable that the defendant could expect this experienced truck driver to follow a course he had traveled three days before. There was, however, contributory negligence on the part of the plaintiff in that he failed to follow the course directed on December 28.

The plaintiff, by his own negligence, failed to follow the course on which he had been directed on the 28th. It was negligence on his part to try to correct his mistake by "gunning" his truck into a snow bank. There was no need to do this. Plaintiff could have corrected his mistake without plowing into a snow bank.

In connection with this question of negligence of the defendant and contributory negligence on behalf of the plaintiff, we ask the question, why did the plaintiff present two inconsistent set of circumstances in his case in chief? We suggest that plaintiff, an experienced truck driver, knew he could not recover had he simply called John Smith to prove the facts. Plaintiff's version of the accident completely broke down when, on cross-examination, the government weather report showed no precipitation on the 30th or 31st of December, 1964. Plaintiff

had said that he "banked" his case on the fact that there was a blizzard on that morning. If the plaintiff, an experienced truck driver, had supposed that the facts as testified to by John Smith, whose deposition had been taken, would sustain a case of negligence and if he thought he could recover on those facts, why didn't he just call John Smith as his first and only witness? We suggest that the calling of John Smith, only after his own testimony as to the snow storm was proven erroneous by government weather report, clearly indicates that he, as an experienced truck driver, did not believe that John Smith's testimony would prove negligence on the part of the defendant and lack of contributory negligence on the part of the plaintiff.

The plaintiff's own statement as to facts, if true, fails to prove any negligence on behalf of the defendant. He said that he had gone around to the east side of the tipple to get his coal on the 28th of December. He testified that on the day of the accident he was simply told to go down and get under the tipple. If it were snowing and if there were cars across the road, it was his own decision to try to reach the tipple from the west side in snow knee-deep which required him to "zigzag" and "circle around." Certainly no one could have anticipated any such foolish and careless action by an experienced truck driver. Accepting the plaintiff's testimony in whole, there is no evidence of negligence on the part of the defendant and obvious contributory negligence on the part of the plaintiff.

POINT II.

THE COURT ERRED IN PERMITTING THE
PLAINTIFF TO AMEND HIS COMPLAINT
AT THE COMMENCEMENT OF THE
TRIAL.

The amendment of the complaint in the beginning of the trial was not only a departure from the alleged acts of negligence contained in the original complaint, but it was contrary to the pre-trial order.

Admittedly, under the present practice a plaintiff is not required to allege specific acts of negligence. However, it is intended that the defendant can be apprised of the specific acts of negligence claimed by the plaintiff through discovery proceedings or by a pre-trial order. In this case the plaintiff did, in his original complaint, specifically plead the claimed act of negligence stating,

“that employees of defendant directed plaintiff with respect to the route he was to travel in his truck in order to be loaded at the tippie of defendant; *that in the path so designated for travel by defendant there was a large and solid post*, the presence of which was completely obscured from the view of plaintiff by snow . . .” Page one of the record and of plaintiff’s Complaint. (Emphasis added)

This act of negligence was denied. On February 7, 1967, there was both a pre-trial hearing and the depositions of the plaintiff and of John Smith. The pre-trial was reported and is a part of the record on appeal. (See second transcript) No change in the charge act of negligence was suggested but the allegations of the Complaint were, in fact, incorporated as the pre-trial order of the court. The following is a statement of the pre-trial hearing:

MR. JENSEN: If the Court please, the negligence which we allege is that, well briefly set forth in Paragraph 2 of our Complaint.

THE COURT: Well, all right, is there any — that is it, isn't it, Gentlemen? Did the employees of the Defendant direct the Plaintiff what course to pursue at the time he received the injury, at the time he received the alleged injury?

And was the Defendant negligent in the way it maintained the road that he traveled pursuant to that direction? Isn't that it, and then what damages?

MR. CANNON: Well, those would be the fundamental questions of neglect. Then he claims damage to the truck, some of which we would deny was caused by the accident at the mine. We think that some of the damages he claims were due to the faulty towing of the truck with which we had nothing to do and, of course, there is the question of whether or not he received any personal injuries at the time and what extent of injuries, if any. I think the Complaint . . .

THE COURT: Well, is there really, Gentlemen, any need for a trial order here?

MR. JENSEN: I don't think so.

THE COURT: It's just the usual case, isn't it?

MR. CANNON: Yes, *I think the pleadings state it about as simply as any pre-trial order could do it.*

THE COURT: Very well, the court will make no pre-trial order, but the record may show that counsel and the Court are in agreement on what the issues are *as revealed by the pleadings*. Is this all right?

MR. CANNON: That is agreeable with me.

MR. JENSEN : *That is agreeable.* (Emphasis added) (Transcript of hearing February 7, 1967, pages 2 and 3).

By the foregoing, the allegations of the Complaint as to negligence constituted the pre-trial order. There was no reason for the plaintiff to change his case as outlined in pre-trial as he had, a year before the trial, taken the deposition of John Smith. Nevertheless on the morning of the trial the plaintiff proposed and was allowed to file an Amended Complaint changing the pre-trial order as to the act of negligence from directing the plaintiff to go in a path where the anchor or obstruction was located, and stating that the defendant simply said,

“‘go down and get his truck under the tippie’ that defendant following the only reasonable route which was apparent for him to gain entry to said tippie; that in said general route there was a cement anchor which protruded above the ground for approximately 18 inches, the presence of which was completely obscured from the view of plaintiff by the snow cover on the ground.”

Objection had been made that this was a different claim of negligence than that stated in the Complaint and which had been incorporated in the pre-trial order. Tr. 3, 4, 5 and 6. The specific question was raised that the allegations of the Complaint were to be considered as incorporated in a pre-trial order, counsel for defendant stating,

“Well, your Honor, we had a pre-trial on this and it was agreed that the pleadings would be sufficient for the pre-trial. And, in fact, we have a pre-trial order that negligence is as charged in the Complaint, and the fact that I took his deposition with respect to his allegations doesn’t justify a change in the pleading in the trial, in what amounts to a pre-trial order.” Tr., page 6.

The amendment of the complaint in this case was not just the ordinary amendment of a complaint. It was a complete change by the plaintiff as to the facts which he said he intended to prove *by the pre-trial order*. The amendment in effect changed the whole case as to plaintiff’s claim and this, after full discovery proceed-

ings by deposition and an agreement as to the claimed act of negligence at the pre-trial. This was prejudicial to the defendant.

POINT III

JURY INSTRUCTIONS

As shown by the statement of points, defendant claims error in the failure to give defendant's requested instructions numbered 1, 6, 9 and 10. We submit that these instructions stated the law which should have applied to the facts of the case.

POINT IV

PLAINTIFF IMPEACHED HIS OWN TESTIMONY.

Points number 7 and 8 are the questions of whether or not a party, if he fails to make a case on his own sworn testimony, can make a case by calling another witness and recover upon an entirely different and contradictory set of facts than sworn to by the plaintiff under oath. Under these circumstances, we assert that if the plaintiff's testimony fails to prove negligence on the part of the defendant and shows contributory negligence on the part of the plaintiff, there should be no recovery, regardless of other testimony, if such other testimony contradicts the plaintiff's sworn testimony.

POINT V

FALSE TESTIMONY AS TO PLAINTIFF'S
DISABILITY.

The testimony in this case clearly shows that the plaintiff and his wife testified falsely as to whether or not the plaintiff was able to drive his truck after the accident and whether or not he made trips to the mine, the testimony of the plaintiff and his wife repeatedly being that he was unable to and made no trips to the mine. It cannot be disputed that this was false and that he made 32 trips to the mine for coal after the accident. We say that this discredits the plaintiff's claim of permanent disability and the court should so rule as a matter of law.

Never in our experience has there been such a complete refutation of evidence reiterated time after time under oath. The plaintiff chose, in an attempt to prove that he was totally disabled from driving his truck, to say that he never drove it to Hiawatha after the accident and, in fact, that he had never been to Hiawatha after the accident except to get his truck on January 2, 1965. Possibly plaintiff will claim that his memory was bad. We submit that no one's memory, who purported to have a vivid memory of a snow storm and on other things material to a case, could have forgotten that he went to the mine 32 times after the accident, a record

of which would have to have been made in his books by his wife who also testified that he had never been to the mine.

Under these circumstances we submit that plaintiff's entire testimony as to disability is discredited as a matter of law.

CONCLUSION

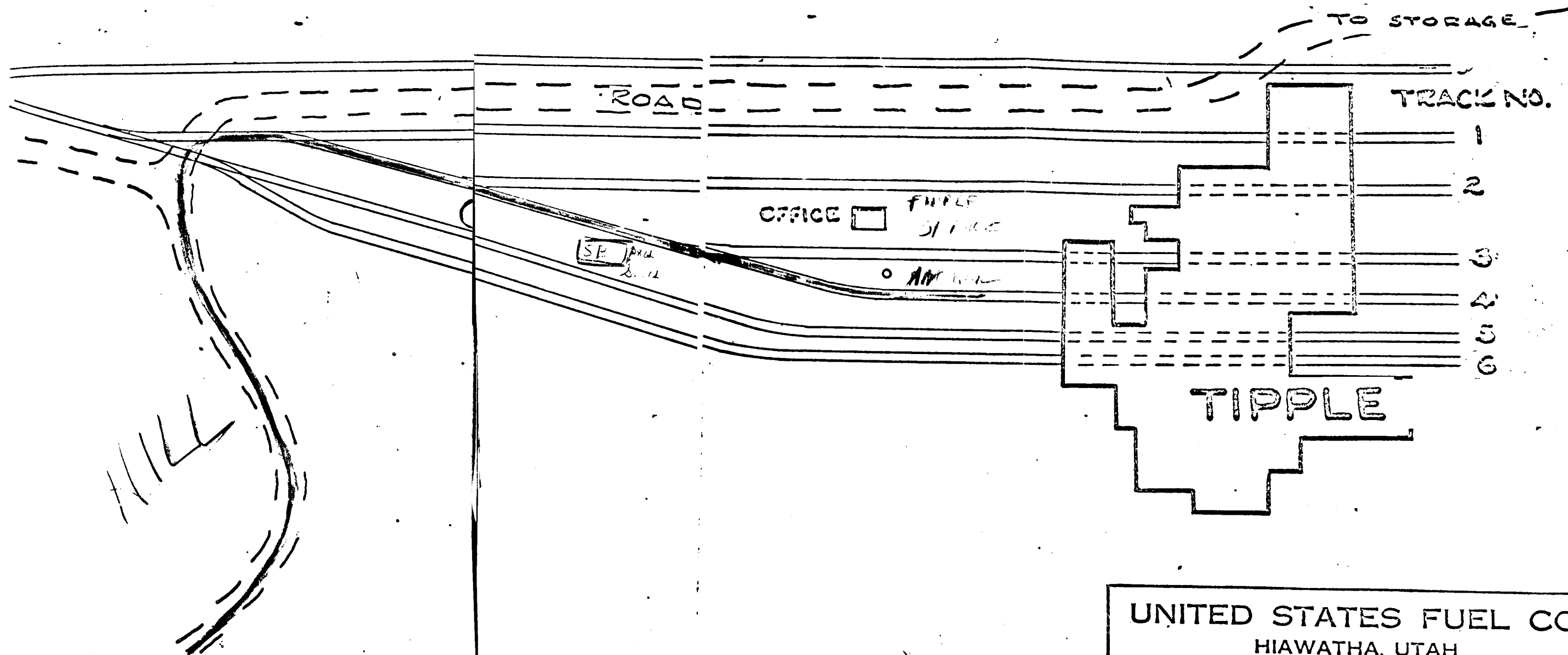
We submit that this case should be reversed and the trial court directed to enter judgment for the defendant notwithstanding the verdict. In the alternative defendant should be granted a new trial.

Respectfully submitted,

CANNON, GREENE,
NEBEKER & HORSLEY

PAUL B. CANNON

Attorneys for the Defendants



UNITED STATES FUEL CO
HIAWATHA, UTAH

TRACK LAYOUT
PREP PLANT

SCALE:	1"=50'	SHEET	OF	SHEET
DRAWN:				
CHECKED:				
APPROVED:				

DRAWING NO.

Q-420