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IN THE SUPREME CO

OF THE

STATE OF UTAH

HAROLD MEMMOTT,

Plaintiff

- vs. -

UNITED STATES FUEL
COMPANY, a corporation,

Defen

BRIEF OF RESPON

On Appeal from the
Carbon County,
Hon. F. W. Kelle

Attorne

CANNON, GREENE,
NEBEKER & HORSLEY
Paul B. Cannon

Attorneys for Appellants.

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FEB
Clerk, S

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

HAROLD MEMMOTT, *Plaintiff,* - vs. - UNITED STATES FUEL COMPANY, a corporation, *Defendant.*	Case No. 11392

BRIEF OF RESPONDENT

FACTS

Plaintiff does not agree with defendant's statement of facts. Defendant omits some material facts and inaccurately presents or interprets others. These points of difference will be more fully identified and documented in the course of this answer but briefly they are: Defendant states there had been a heavy snow at the mine on the *morning* of December 28, 1964 (Brief, 6). This is not true. Defendant's Tipple Foreman who made written weather reports with respect to his day shift, namely from 8:00 a.m. to 3:15 p.m. (Tr. 98 and Defendant's Exhibit 2) reports 18 inches of snow but not that had fallen by *morning.* Defendant's U.S. Weather Bureau report shows 1.43 inches of moisture to have fallen for the *24 hour day*

of December 28, (Defendant's Exhibit 1). However, defendant's Exhibit 1 does also show 1.21 inches of moisture to have been deposited at the Hiawatha Government Weather Station on December 25th. We submit it was the December 25th snow and not the December 28th snow which had been cleared before plaintiff arrived for his load of coal on the morning of December 28th. There was therefore a substantial snow deposit which fell between plaintiff's morning trip of December 28th and his morning trip of December 31st when the accident occured. Moreover defendant has omitted from its statement of facts the deposition testimony of its Tipple Foreman that between the heavy storm of December 28th and the morning of the accident on December 31st snow had fallen but how much he did not know, Tr. 96. We are compelled to mention these differences between us and defendent with respect to the snow fall although as we point out in our argument just when the snow fell is really of no great moment. The significant thing is that the snow, whenever it fell, had not been cleared from Track 4 and its vicinity at the time of the accident. On this point plaintiff and defendant are in disagreement. On December 31st some of the railroad tracks had been cleared of snow but not Track No. 4 as it approached the tipple from the West, (Tr. 14, 74 and plaintiff's photograph of the scene, Plaintiff's Exhibit 5). It is true the Tipple Foreman said Track No. 4 had been cleared but when shown the photograph of the snow scene taken at the

tipple he admitted Track No. 4 was not visible, Tr. 97. We also disagree with defendant's statement that on Wecember 31st the *road* was cleared of snow (Brief, 7). Its witnesses so testified but plaintiff and his witness testified to the contrary, Tr. 14, 78. Defendant's witnesses also testified the road was not blocked by railroad cars. Plaintiff's proof was to the contrary, Tr. 54, 60, 73, 79. Defendant fails to narrate in its statement of facts that on prior occasions plaintiff had followed the West approach to tipple loading bay, Tr. 11, 55. Finally, defendant's statement of facts conspicuously omits almost all reference in the record to plaintiff's injuries. These injuries and disabilities are described in the record at Tr. 16, 19, 20, 21, 27, 28, 29, 32, 34, 73, 82, 83.

ARGUMENT

Basically we have four matters for consideration:

(1) Was defendant negligent, and if so was plaintiff contributorily negligent?

(2) Was there competent evidence from which the jury might find plaintiff sustained the injuries complained of?

(3) Did the Court err in allowing plaintiff to amend his complaint?

(4) Did the Court err in its instructions?

POINT I

WAS DEFENDANT NEGLIGENT, AND IF SO, WAS PLAINTIFF CONTRIBUTORILY NEGLIGENT?

Defendant is engaged in the business of selling coal. It maintains a tipple for the loading of railroad cars and trucks near Hiawatha, Utah. On the morning of the day of the accident plaintiff, as defendant's invitee, Tr. 3, drove his truck to defendant's premises to get a load of coal. On that day and under circumstances then and there prevailing these are the reasons why defendant was negligent and why the plaintiff was not negligent:

(A) Defendant's Negligence:

On previous occasions plaintiff had driven his truck under the Company tipple used for truck loading sometimes from the East approach and sometimes from the West approach, Tr. 11, 55. On the Monday trip of December 28, 1964, which was the one last made before the accident, plaintiff says he got under the tipple from the East. John Smith, the defendant's Tipple Foreman, disagrees and says that on the previous occasion he came in from the West. It is undisputed that on the date of the accident, December 31, 1964, plaintiff pursued the West approach.

On the day of the accident plaintiff says the defendant's Tipple Foreman told him to "go down and get under the tipple", Tr. 12, and the Tipple Fore-

man says he told him "to go where he had gone on Monday", Tr. 111. These "entirely different set of facts" alluded to in defendants brief (Page 7) are of no significance in the total analysis. Defendant does not fairly interpret what was said. The Tipple Foreman *did not* say to plaintiff "to follow the exact route you followed on your last trip", but said "go where you went last trip", i.e. under tipple No. 4 (there were six sets of tracks with loading bays over each). So long as plaintiff followed the Company's instructions to get under tipple No. 4 for his load, inasmuch as by previous custom approaches had been made from both the East and West sides of the tipple, plaintiff was not at fault in entering the tipple from the West. Moreover, it is difficult to understand why defendant belabors this point because in fact plaintiff did approach from the *West* on the day of the accident and according to the defendant's Tipple Foreman he actually did approach from the *West* on the previous trip, Tr. 94.

Finally on the day of the accident access to the East approach was blocked by defendant's railroad cars so that plaintiff was prevented from using that approach, Tr. 13, 73. This was disputed. The jury believed plaintiff. This court will not substitute its judgment for that of the jury on disputed testimony.

Insofar as the route of travel is concerned, therefore, defendant invited plaintiff to its premises on the day of the accident, as it had on earlier occasions, to buy coal from it. Plaintiff did not enter by a non-

designated route, but by one followed by him on earlier occasions and indeed according to defendant's own Tipple Foreman by the very West approach last pursued.

Under the circumstances then existing this Company approved approach to its tipple loading from the West was not reasonably safe for plaintiff's entry. A substantial cement anchor was maintained by defendant between track No. 3 and track No. 4 at point indicated on the map in the immediate proximity of the approach from the West (Plaintiff's Exhibit 1). It was in such close proximity to the truck route that the Company was charged with notice that any truck pursuing the uneven terrain caused by the existence of the tracks and ties and under snowy conditions might drive into or against the anchor unless its presence was clearly marked.

Both plaintiff, Tr. 74, and defendant's Tipple Foreman, Tr. 95, testified this anchor was hidden by snow on the day of the accident. No evidence was produced by defendant to the contrary. The Tipple Foreman stated:

> Q. And state whether or not the anchor was covered with snow?
>
> A. On the first occasion?
>
> Q. Yes.
>
> A. Yes.
>
> Q. And it was covered on the second occasion was it not?
>
> A. Yes.

The No. 4 set of railroad tracks approaching from the West also was covered with snow at the time of the accident. It is true there was conflicting testimony as to whether these tracks had or had not been cleared at the time of the accident. The photograph of the scene (Plaintiff's Exhibit 5) taken the following day and clearly showing the tracks of plaintiff's truck leading into and against the cement anchor establishes beyond all peradventure of doubt or dispute that the area upon and near track No. 4 had not been cleared of snow on the day of the accident. Defendant's Tipple Foreman admitted that the scene depicted in the photograph shows the tracks on the adjacent rails No's 3 and 5 to have been cleared but that those of No. 4 were not cleared, Tr. 97. Defendant's own employee, George Lake, when questioned on direct would only say that the tracks (whether he referred to all sets of tracks is not clear) were cleared only "at the lower end * * * that's as near as I could say. Near the tipple", Tr. 164.

Not only is it undisputed that the said cement anchor was concealed by snow, Tr. 95, it is undisputed that the anchor was not marked or flagged to warn of its concealed presence. Robb, defendant's General Mine Superintendent stated on cross, Tr. 181:

> Q. Now you're the General Superintendent of operations are you not?
>
> A. That is right.
>
> Q. And you are in charge of safety generally around the mine aren't you?

A. Generally, yes.

Q. And around the tipple?

A. And around the tipple.

Q. Did you instruct any of your employees to put a flag up over that snow covered anchor?

A. I did not.

Plaintiff said he saw no flag or marker, Tr. 39.

Defendant could have prevented this accident by the simple expedient of either clearing the snow from the concealed anchor or by erecting a lath or stick or flag designating the danger point. It knew truckers might approach that route, knew the anchor was in the immediate proximity of the path, knew the anchor was snow covered and concealed, knew it had not marked the danger point or given any oral or other warning of its existence. Clearly, defendant was negligent.

(B) No Contributory Negligence:

There is nothing to suggest that plaintiff was negligent in his approach to the No. 4 tipple loading bay on the day of the accident. He was told to load at tipple No. 4 that morning, and pursued the only approach available (from the West) and a reasonably direct path to get there. He had driven into the loading bay from the West on earlier occasions with the consent and at the direction of defendant, Tr. 11, 55. The fact that he was required to drive through the snow would not suggest to him as a reasonably

prudent man that he would encounter a concealed obstruction. And anyone who drives a ten wheel tandem truck in snow over, across and on and off rails would expect his course to be somewhat irregular as he negotiated the approach. He would not expect to encounter a booby-trap.

(C) The Photographs of the Scene:

A special word about the all important photographs, plaintiff's Exhibits 3 and 5. Defendant concedes their significance by devoting to them a special segment of its brief, page 12, and then summarily wishes them away as "of little value in this case". Defendant's Tipple Foreman tells us at the time of the accident there was about fifteen inches of snow on the ground, Tr. 95. That old Chinaman was no mental slouch who told us that one picture is worth a thousand words. The picture (Plaintiff's Exhibit 5) was taken the day following the accident, Tr. 84. The fact that the truck tracks are clearly visible in the snow leading directly into and against the cement anchor, Tr. 44, 75, and that truck tracks are not molested or covered by further snow fall, Tr. 75, vouches that the picture (Exhibit 5) depicts the scene as it existed at the time of the accident. It is the finger print of this entire case:

- It shows the snow covered West approach to the No. 4 tipple bay. The many words in the record as to how much and on what earlier days or hours snow had fallen are wasted.
- It shows Track No. 4 and its immediate sur-

roundings had not been cleared of snow. This was the truck designated approach. (No gravity-drop involved).

- It shows Tracks No's 3 and 5 used by the defendant to gravity-drop its railroad cars to have been cleared of snow.
- It shows the location of the cement anchor in this general truck approach and its appearance *after* having been run into by the truck. (Defendant's discovery from the photograph that the anchor "protruded" and was visible *after having been run into* by a two-ton truck is not particularly sagacious especially when coupled (a) with the positive testimony of its own Tipple Foreman that prior to the accident it was covered with snow, Tr. 95, and (b) with defendant's statement in its brief, Page 7, "It is admitted that this anchor was covered with snow at the time it was struck by plaintiff").

Defendant in referring to the photograph (Plaintiff's Exhibit 5) really can't be serious in its brief when it writes there "was so much confusion as to when it was taken that the picture has little value in this case", (Brief, Page 13). Defendant itself must be confused. Plaintiff's wife took the picture. She took it the next day following the accident, (New Year's Day). She was not confused. Mrs. Memmott, Tr. 84:

> Q. You went up New Year's Day?
>
> A. Yes, because I just feel funny down around the miners taking pictures and so I went up New Year's Day

and I went down and took the pictures.

Her husband, the plaintiff, at first thought the pictures were taken two days after the accident, but upon being pressed further by defendant also stated the pictures at the scene were taken the day after the accident, Tr. 46, 49. It is possible defendant is confused because the picture of the truck with the wrecker, (Plaintiff's Exhibit 4) was taken a day or so later, Tr. 22, 89.

POINT II
WAS PLAINTIFF INJURED?

All through the trial, in its arguments, in its elaborate trial memoranda and now on appeal defendant has vigorously flailed its own poor straw syllogism, to-wit:

If plaintiff was able to make trips to the Hiawatha mine after the accident he could not have been injured; plaintiff did make trips to the Hiawatha mine; therefore he suffered no injuries!

Defendant strangely neglects to weave into its syllogism all the testimony, including medical, which positively established plaintiff's injuries.

The facts are:

(1) Plaintiff has never contended that the accident wholly disabled him from trucking as defendant asserts (Brief, 34). He claimed special damages for loss of income for one month only — from the date of the accident until his truck was repaired on or about

January 28, 1965, (Tr. 85, and Complaint, Paragraph 4).

(2) Plaintiff readily admitted, after his memory was refreshed from seeing the delivery tickets, that he did make the trips to the Hiawatha mine as indicated by defendant in the spring and summer of 1965, Tr. 133. The jurors were in a position to observe his demeanor and candor and determine whether he was a prevaricator as defendant contends in his earlier testimony on this point or whether he was honestly mistaken. Even before he was shown the delivery slips, in response to a question asked by defendant if he would accept the record of the mine as to the trips he had made, Memmott answered, Tr. 70:

> I guess I would if my name is signed on them I'd accept them, you bet, you know, because I signed for every load I ever got from them.

(3) Most of those trips were made either in his neighbors trucks or in his own truck with others driving, Tr. 143, 147. Plaintiff did continue working as best he could, Tr. 63.

(4) Plaintiff positively testified that he had been injured in the accident in consequence of which he had suffered severe pain in his neck and back and that the same persisted, Tr. 16, 19-21. Plaintiff had long been a victim of multiple scelerosis, but this gave him no pain. As a result of the injuries he sustained in the collision, however, he says, Tr. 20, the pain

> * * * never quits. It's never quit since the acci-

> dent. Just last night I woke up in the night with my hands back there on my neck in the night and that's unusual for me, because my neck was hurting so bad.
> * * *
>
> I have headaches. I have them and they leave and come, and I have headaches that last about three and four days and then will leave a few days and back it comes again. I never had the headaches before this accident. Never did that I can ever remember.

(5) Plaintiff's wife and son told the jury of plaintiff's appearance, injuries and of the pain suffered by him since the accident, Tr. 73, 82, 83.

> Well, he's just like another person. He's not the same man he used to be. He just can't, he gets these awful headaches and back aches. He never sleeps. He sleeps about, till about twelve o'clock at night. The kids come home at night and they can testify to this where their daddy is in the front room walking the floor or sitting up in a chair because he can't sleep because of his back, and then he has terrible headaches which he never had before.

(6) Dr. Orton, an M.D. to whom plaintiff went the night of the accident and who subsequently treated him, clearly described the persisting back and neck injuries sustained by plaintiff as a result of the accident:

> *Tr. 27-28:*
>
> Q. Will you describe what you observed and the diagnosis that you made of him at that time, what he told you?

A. First of all he had a swelling on his left forehead. Which undoubtedly was caused from a bruise and bleeding under the skin. He complained of his neck and his back. And he was in pain when he would pull his head down in this direction. Quite considerably.

Q. When he pulled his head forward?

A. Yes.

Q. And did you prescribe some treatment for him at that time, do you remember?

A. Well, I think we gave him sedatives to control the pain and then I think Colverol was given him as a muscle relaxant and to stop some of the spasm.

Q. Dr. Orton, were the symptoms that you observed at that time, his condition consistent or inconsistent with the injuries which a person might have received having been in a truck and having suddenly run into a secure object?

A. Very consistent.

Tr. 28-29:

A. As I remember it was in August of '65 he came in and still complaining of his neck and this pain in his back, especially when he'd pull his neck, and we sent him for x-rays.

Q. Where did you send him for the x-rays?

A. Utah Valley Hospital.

Q. And did you get a report on the x-rays, Doctor?

A. Yes, sir.

Q. And what was the report from the x-rays?

A. Well, it mentioned that there was some spasm, but there was no deformity or fracture of the bone.

Q. Now is this type of an injury that you have described to his neck, is that something like a whiplash.

A. Well, it is a whiplash. Pulls the head forward that way.

Q. What does it do usually to the anatomy when that happens?

A. Well, there is a certain amount of stretching, the bodies of the vertebrae are in front and when the head whips over forward it stretches the, it back, it actually stretches the spinal cord and stretches all the muscles that hold the bones together, and I have known them to complain in the absence of x-ray findings for years and years. In fact, some of them never get over it.

Tr. 32: (on cross)

Q. Now, Doctor, did you observe from what you could see of the patient when he came in anything besides the lump on his head or the hematoma?

A. Well, that's the only thing you could see, but *he was very tender over his neck. And down his back, and as I said, it gave him pain to pull his head forward and he had never had any of those symptoms before.*

Tr. 34: (on cross)

Q. Could you give any reason, Doctor, as to why you waited from December 31, 1964 to August 1965, to have this man x-rayed?

A. Yes, I always try to wait about a week or so before we x-ray them to see how much of the muscle spasm will leave. *Harold is one of these fellows that don't come back unless he has to,* and he just didn't come back about it until then.

Dr. Orton explained to the jury the effect of plaintiff's injury upon his pre-existing condition of multiple scelerosis as follows:

Tr. 30:

Well, multiple scelerosis is, the symptom of it is exaggerated by any type of, of physical injury or even, even mental tension. From chilling. From worry and all that sort of thing make it worse.

Tr. 34-35: (on cross)

Q. Doctor, do you consider there is any relationship between the multiple scelerosis and the accident which was described to you by Mr. Jensen and by Mr. Memmott?

A. I don't believe I understand just what you mean. I think the multiple scelerosis was there. I don't think it had anything to do with him having the accident. But certainly the accident causes an exacerbation of the symptoms of the multiple scelerosis.

(7) When plaintiff's pain persisted his doctors sent him to the hospital for further x-rays in 1966, Tr. 34.

(8) Dr. Gorishek an M.D. at Price, Utah at defendant's request examined plaintiff, and although defendant elected not to call him as a witness at the trial, did report of plaintiff, (plaintiff's Exhibit 8):

> He has tenderness to pressure over the cervical spine and especially in the upper portion on the right. There is also tenderness to percussion over the spine in the dorsolumbar area.

The record, therefore, is replete with competent evidence from which the jury could and did find plaintiff suffered serious injury, pain and disability from the accident. The number of trips he made to the Hiawatha mine after the accident is only one item in the total proof. And the jury was informed at great length as to these trips. Of the 172 pages of transcript testimony, 32 pages are consumed with defendant's cross-examination on this one item.

POINT III

DID THE COURT ERR IN ALLOWING PLAINTIFF TO AMEND HIS COMPLAINT?

The complaint simply alleges defendant directed plaintiff to enter its premise by an unsafe route whereas the amendment alleges defendant failed to maintain its premises in a reasonably safe condition for plaintiff's entry. The entire proof of both parties was prepared and directed (a) to disclose to the jurors the condition of the premises at the time of the accident, (b) the routes of approach into defendant's premises followed by plaintiff on this and earlier occasions and (c) the directions given by defendant's

Tipple Foreman to plaintiff on this and on earlier occasions.

Defendant at the trial did not say and does not now say that there was any other witness or item of proof whatsoever that it would have offered had it earlier known of the amendment.

Also it is most significant that at the time the amendment was offered defendant did not indicate that it was prejudiced or unready to proceed by reason of the amendment or that it needed additional time or wanted any delay in the proceeding.

Tr. 6, 7:

Mr. Jensen:

> They have their witness as to what was said and what was done, and if they need further time to talk to the witnesses in that connection, why certainly it should be granted, but there can't possibly be any different requirement of proof to meet the one case and the other.

The Court:

> The amended complaint may be filed. Do you need time to answer?

Mr. Cannon:

> Well, I haven't examined my answer to see if it covers it, but if it may be deemed that I deny the allegation with respect to the claimed negligence, I don't think I need to amend.

The Court:

> I don't think I could do anything else but al-

low it in the light of our modern rules respecting pleadings. You don't have to specify the particular acts of negligence ordinarily, and unless it prejudices you some way in that you were not prepared I think that it is proper to allow it.

Mr. Cannon:

I have no further statement to make on it, your Honor.

POINT IV

DID THE COURT ERR IN NOT GIVING DEFENDANT'S REQUESTED INSTRUCTIONS 1, 6, 9 and 10?

Defendant at the conclusion of the trial said it found no fault with the instructions given by the court, Tr. 185. Its only complaint was that its requests above identified also should have been given. Why they should have been given or wherein the Court's instructions were deficient defendant did not and does not state.

The Court succinctly and fairly instructed the jurors with respect to the issues and the relevant law.

CONCLUSION

All matters before this Court were fully briefed and argued in the Court below. Defendant moved for a directed verdict when plaintiff rested as well as at the conclusion of the trial, filed a motion for a new trial, and filed a motion for judgment notwithstand-

ing the verdict. Lengthy arguments and memoranda were carefully considered by Judge Keller. We submit there is no error in his instructions or rulings and that the judgment should be affirmed.

Respectfully,

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