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IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL BRAMEL and
WILLIAM B. BROOKS,
Plaintiffs and Respondents,

vs.

THE STATE OF UTAH,
Defendant and Appellant.

Case No. [illegible]

BRIEF OF RESPOND[illegible]

Appeal from the Judgment [illegible]
Third Judicial District Court, Salt [illegible]
State of Utah
Honorable Bryant H. Croft, *J*[illegible]

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IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL BRAMEL and
WILLIAM B. BROOKS,
Plaintiffs and Respondents,

vs.

THE STATE OF UTAH,
Defendant and Appellant.

Case No. 11479

BRIEF OF RESPONDENTS

NATURE OF CASE

This is an action to recover damages for personal injury sustained by plaintiff, Willam B. Brooks, and property damage sustained by plaintiff, Paul Bramel, resulting from a one vehicle tractor-trailer accident that occurred on the off ramp at the temporary end of Interstate Highway 15 north of what is known as 31st Street Exit at or near Ogden, Utah.

DISPOSITION IN LOWER COURT

The lower court found that the signs placed by the State of Utah failed to give notice of the dangerous condition that existed at the temporary end of the freeway and

found plaintiff William B. Brooks free from any negligence and awarded plaintiffs judgment in their favor and against the State of Utah for personal injury and property damage in the sum of $27,878.25.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the action of the lower court affirmed in entering judgment in favor of plaintiffs and against defendant.

STATEMENT OF FACTS

The State of Utah constructed a portion of a freeway in Weber County, Utah identified as Interstate Highway 15, hereinafter referred to as I-15. This freeway is being constructed and completed in sections, and at the time in question the completed section of the freeway commenced near Kaysville, Davis County, and extended to the temporary ending thereof at or near Ogden, Weber County.

On the completed section of I-15 referred to, the freeway is a divided north-south highway with three traffic lanes on the northbound portion separated by intermittent white lines. The 31st street Exit is a one lane exit off the freeway which goes in a northeasterly direction from the highway at approximately 20 degrees. The off ramp at the temporary end of the freeway north of the 31st Street exit is a one lane ramp which describes a tight arc of 270 degrees, and which funnels traffic from three traffic lanes and a speed of 70 miles per hour (T13, R59) to one lane and a reduction of speed to 25 miles per hour (T20, R66) and forces it to change from a northerly direction through

three-quarters of a turn to a westerly direction. (See Exhibit D-15)

On the day of the accident, November 29, 1966, William Brooks was employed by Paul Bramel, and at that time, he was driving a 1966 Kenworth Diesel Tractor with a 1963 Trailer loaded with a cargo of cucumbers which weighed approximately 40,000 pounds (T8-9, R54-55). The overall length of the rig was about 55 feet (T9, R55) with the trailer being 38 feet long and 13½ feet high (T10, R56). Mr. Brooks, who lives in Houston, Texas, was taking the cargo from Houston (T11, R57) to Seattle, Washington (T9, R55), and while driving had made it a practice to drive for 10 hours and rest for 8 hours. He left Houston Saturday morning and the accident occurred at approximately 8:00 o'clock P.M. Tuesday evening (T11-12, R. 57-58). At the time of the accident it was dark, with patches of fog along the highway (T12, R58) and the roadway was slightly wet (T67, R113). As Mr. Brooks neared where the accident occurred, "it wasn't real foggy, but it was hazy," and he was traveling between 30 miles per hour and 35 miles per hour with his headlights on (T13, R59). He was not tired or drowsy at the time. Mr. Brooks was not acquainted with the roadway or the nature of the off ramp at the temporary end of the freeway. He saw Chevron signs some distance from the temporary end of the freeway which indicated the ending of a lane or lanes (T19-20, (R65-66). Although Mr. Brooks reduced his speed, he was unable to negotiate the tight curve at the freeway end off ramp and the rig he was driving tipped over doing extensive damage to it and resulting in personal injury to him.

Mr. Brooks has been a driver of large tractor-trailer rigs involved in interstate traveling for about 25 years. He drives approximately 50,000 miles per year and has never had an accident before (T8, R54).

The accident was invesigated by Utah Highway Patrolman Jack Graviet who stated that he had been dispatched to this same location to investigate accidents on prior occasions (T87, R133). In making his investigation of the accident, the officer traversed the scene and a portion of the highway and stated that to the best of his recollection the following signs were in place:

All Traffic Must Exit sign—one mile from scene
Two 25 Mile Speed Limit signs—¼ mile from scene
Barricades with arrows and 25 miles per hour sign —near end of freeway
Red and white Chevron signs—at end of freeway

(T72, R118, T192-193, R238-239) but there were no flashing light at the end of the freeway (T195, R241).

John Lynn Owens, sign foreman for the State Highway Department, testified that the following signs were in place at the time of the accident (T100, R146):

End Interstate One Mile—One mile from scene
All Traffic Must Exit—By railroad crossing
Single Lane Ahead
Two 25 mph Exit signs—700 feet from ramp
Exit 25 miles per hour—50 feet from ramp
Chevron signs—Before ramp
Arrows—At exit
Barricades—At end of freeway

He stated that the State Engineer had furnished him with a diagram from which to install the signs (T121, R167), the installation of the signs began on November 14, 1968, and was completed November 21, 1968 (T100, R146), that the installation of the signs was a rush job for the dedication and opening of the roadway (T113, R159).

Dean Prisbrey, a traffic engineer for the Utah Department of Highways stated in his testimony that the placing of the signs along the freeway warning of the condition that existed was a crash program in order to get the freeway open (T177, R223). Exhibit P-8 is the Utah Department of Highway Construction Signing plan showing the types, number, kinds and locations of signs that should be in place under the circumstances of this case, and even though the State has adopted this plan, all of the signs required thereby were not in place. The 94 foot detour barricade sign with flashing amber lights showing that the road is closed and that a detour is necessary (Exhibit P-8) was not in place (T159, R205) and the Exit sign with an arrow shown on Exhibit D-7 was not in place but was substituted by a black and yellow sign showing only an arrow (T177-178, R223-224). Although Exhibit P-8 requires that:

> "Construction approach warning signs, three 48" x 48" warning signs, shall be located 500, 1,000, 1,500 feet, respectively, in advance of the point of any flagman, construction activity, detour barricade or other major traffic restriction."

No such warning signs were in place when the accident occurred (T178, R224).

Kenneth W. Anderson, Deputy State Traffic Engineer, admitted that the design given to John Lynn Owens, the State's sign forman, was "really quite crude,: and that the original design for the installation of the signs is not available (T141-143, R187-189).

Clyde Beutler was travelling approximately one-quarter of a mile behind Mr. Brooks when the accident occurred and witnessed it. (Deposition Beutler, Page 4) He saw the erratic movements of the lights on the truck and slowed down (Pages 6-7). Mr. Beutler stated that he came to the curve at the off ramp, he saw one small sign which said "Exit Speed 25" but saw no other indication that the freeway ended (Page 7). He stated that the curve to the off ramp was abrupt, that he had difficulty negotiating it (Page 12) and while he was at the scene of the accident, several cars that came along the freeway had difficulty negotiating the sharp curve that forms the off ramp at the end of the freeway (Pages 17-18).

ARGUMENT

POINT I

THE JUDGMENT AND PROCEEDINGS IN THE LOWER COURT ARE PRESUMED TO BE CORRECT BY THE REVIEWING COURT ON APPEAL.

There are many cases supporting the general proposition of law stated in Point I, and especially as it applies to the instant case. No cases have been found by respondents stating a contrary position.

Not only is there a presumption of validity on appeal of the judgment and proceeding in the lower court, but the burden is on the appellant affirmatively to demonstrate error and in the absence of such the judgment must be affirmed by the reviewing court. *Leithead vs. Adair,* 10 U. 2d 282, 351 P. 2d 956; *Coombs vs. Perry,* 2 U. 2d 381, 275 P. 2d. Again, on appeal the judgment o the trial court is presumptively correct and every reasonable intendment must be indulged in by the appellate court in favor of it. *Burton vs. Zions Co-operative Mercantile Institution,* 122 U. 360, 249 P. 2d 514; *Nagle vs. Club Fontainblue,* 17 U. 2d 125, 405 P. 2d 346; *Petty vs. Gindy Manufacturing Corporation,* 17 U. 2d 32, 404 P. 2d 30.

This proposition of law is correct and is binding upon the appellate court whether the proceedings in the lower court are before a judge only or a judge and jury.

Other cases supporting this proposition are *Charlton vs. Hackett,* 11 U. 2d 389, 360 P. 2d 176; *Universal Investment Company vs. Carpets, Inc.* 16 U. 2d 336, 400 P. 2d 564; *Taylor vs. Johnson* 15 U. 2d 342, 398 P. 2d 382; *Wendelboe vs. Jacobson,* 10 U. 2d 344, 353 P. 2d 178; *Hadley vs. Wood*, 9 U. 2d 366, 345 P. 2d 197; *Daisy Distributors, Inc., vs. Local Union* 876, *Joint Council* 67, *Western Conference of Teamsters,* 8 U. 2d 124, 329 P. 2d 414.

Unquestionably an appellate court has the power to examine the findings of fact of the court below to determine whether they are supported by competent evi-

dence, but a finding of fact made by a court acting without a jury will be sustained on appeal unless it is shown by the appellant that such finding is *clearly* against the weight or preponderance of the evidence, *Jackson vs. Jackson,* 201 Okla. 292, 205 P 2d 297, 7 ALR 2d 1410; *Edmundson's Estate,* 295 Pa. 429, 103 A. 277, 2 ALR 1150; *Muggah vs. Smith,* 33 Wash. 2d 429, 206 P 2d 332, 9 ALR 2d 846; *Higbee vs. Chicago, B. & Q. R. Co.,* 235 Wis. 91, 292 NW 320 128 ALR 734, or is not supported by any *substantial* evidence, *Van Voast vs. Blaine County,* 118 Mont. 395, 167 P2d 572, 169 ALR 681; *Wilson Oil Company vs. Hardy,* 49 N.M. 337, 164 P 2d 209, 162 ALR 292; or is *clearly* erroneous, *Lassiter vs. Guy F. Atkinson Co.* (CA9 Wash.) 176 F. 2d 984, 21 ALR 2d 1313 (referring to Federal Rules of Civil Procedure, Rule 52(a)); *Patsy & Fiehrman, Inc. vs. Housing Authority,* 76 R.I. 86, 68 A 2d 126, 44 ALR 2d 1106. Where the evidence is evenly balanced, a finding of the trial court either way must be sustained as not against the great weight and clear preponderance of the evidence, *Kalsop's Will,* 229 Wis. 356, 281 NW 646, 282 NW 587, 119 ALR 1094.

It is a general rule of law that the appellate court does not ordinarily review the trial court's findings of fact whether the findings of fact are based on direct proof or upon inferences drawn from the evidence, *Idaho State Bank vs. Hooper Sugar Co.,* 74 Utah 24, 276 P. 659, 68 ALR 969.

Therefore, if appellant, the State of Utah, can prevail on the instant appeal it must be based upon the

ground that the findings of fact complained of by appellant are *clearly* against the weight and preponderance of the evidence, or that they are not supported by any substantial evidence, or that the findings of fact are *clearly* erroneous. Respondents submit that appellant is unable to do this and that the Findings of Fact, Conclusions of Law and the Judgment of the lower court must stand undisturbed.

POINT II

THE FINDING OF THE LOWER COURT THAT "AT MOST" ONLY CERTAIN LISTED SIGNS HAD BEEN IN PLACE AT THE TIME OF THE ACCIDENT IS NOT ERRONEOUS AND CONTRARY TO THE EVIDENCE.

Point II of Respondents' Brief will deal with the same subject matter and will be written in answer to Point I of Appellant's Brief.

In relation to the signs and markers at and near the temporary end of the freeway where this accident occurred, the Court made, inter alia the following Findings of Fact (R 31):

> 5. That reflectors, markers and signs had been placed in various locations on the said freeway for the purpose of notifying and advising motorists of existing roadway and conditions, that at most the signs included "Freeway Ends One Mile," at a point about one mile south of the off racp, "All Traffic Must Exit" about one-half mile south of the off ramp, two black on yellow 25 miles per hour speed signs about one-fourth mile from the exit, several red and white chevron channelizing signs, a horizontal black on white

> unlighted barricade at or immediately north of the exit, a 25 miles per hour black on yellow exit sign at or immediately south of the exit and a black on yellow arrow at the north edge of the exit.

The witnesses at the trial who testified about the number and kinds of signs that were in place along the freeway when the accident occurred were William Brooks, plaintiff; Dean Prisbrey, Traffic Engineer, District I, Utah State Department of Highways; John Lynn Owens, Sign Foreman, District I, Utah State Department of Highways; Kenneth W. Anderson, Deputy State Traffic Engineer, State of Utah; Jack Graviet, Utah Highway atrolman; and Clyde Beutler, a motorist and witness to the accident who was approximately one-quarter of a mile behind Mr. Brooks when the accident occurred.

John Lynn Owens testified that certain signs were placed along the freeway by him between November 14, 1966, and November 21, 1966 (T100, R146). However, he did not know what signs were in place when the accident occurred and he had no accurate memory of what signs he originally put up (T113, R159) and that there were some signs put up and existing signs changed after the accident (T107, R153).

Dean Prisbrey testified that he had seen the signs along the freeway on November 23, 1966, and the signs he recalls being there were the following: (1) Ogden 31st Street Exit, (2) Route Marker (3) All Traffic Must Exit, (4) Advisory Speed Sign, (5) Arrow sign, and (6) 25 miles per hour sign (T156, R202). The 94 foot detour

barricade with amber flashing lights as called for by the Department of Highways' plans was not in place (T159, R205).

Kenneth Anderson stated that he drove over the section of the highway in question but did not make a record of the signs in place and hence did not know what signs had been installed (T134, R180). He did, however, know that the design for the installation of the signs "was really quite crude." (T141-143, R187-189)

Utah State Highway Patrolman Jack Graviet who investigated the accident and traversed the portion of the freeway in question said that the following signs were in place at the time of the accident: (1) All Traffic Must Exit sign about one mile from scene of accident, (2) Two 25 miles per hour speed limit signs about one-quarter of a mile from scene of accident, (3) Barricades with arrows near the end of the freeway with 25 miles per hour sign, and, (4) Red and white Chevron signs at the end of the freeway. He further stated that there were no flashing lights at the end of the freeway (T195, R241).

Clyde Beutler testified that he did not see any Chevron barricades (Deposition of Clyde Beutler, Page 24) or any Chevron signs prior to the exit (page 34) nor did he recall any signs at the exit other than a speed sign and a barricade and arrow sign (page 11) and an exit speed 25 sign at the curve of the off ramp (page 7).

It is obvious from the preceeding cursory review of the testimony of those who had any knowledge or who were supposed to have some knowledge of what signs

were in place when the accident occurred that it is very difficult to say exactly what signs were up. The testimony is in conflict, and none of appellant's witnesses had any knowledge of what signs were in place at the time of the accident.

Clyde Beutler's testimony of the in place signs was different from that of Jack Graviet, the investigating officer. Appellant complains in Point I of its brief that the lower court did not accept in total the testimony of its witnesses.

In a non-jury trial, the trial judge is empowered to reconcile conflicts and discrepancies in the proof offered, *Armstrong vs. Grant* (Tex. Civ. App.) 356 SW 2d 398. Where the evidence is in conflict, the trier of fact, whether that be a judge or a jury, determines what should be accepted as the truth and what should be rejected as untrue or false, *Cross vs. Ledford,* 161 Ohio St. 469, 53 Ohio Ops. 361, 120 NE 2d 118; *Rice vs. Cleveland,* 144 Ohio St. 299, 29 Ohio Ops. 447, 58 NE 2d 768. It is a general rule of law supported by the overwhelming weight of authority that the trier of fact may disbelieve all or any part of the testimony of a party or witness if it is tainted with evasiveness, uncertainty, or contradictions, or that the finder of fact may believe only such portion of the evidence that seems credible in the light of other evidence, *Burns vs. Radoicich,* 77 Cal. App. 2d 697, 176 P 2d 77; *Berger vs. Steiner,* 72 Cal. App. 2d 208, 164 P. 2d 559. Utah cases supporting the propositions of law stated above are *Schlatter vs. McCarthy,* 113 Utah 543, 196 P. 2d 968, reh den 113 Utah 560, 198 P. 2d 473,

where plaintiff's witnesses and defendant's witnesses gave conflicting testimony, the jury was entitled to believe the testimony of plaintiff's witness. *Aagard vs. Dayton & Miller Red-E-Mix Concrete Co.,* 12 Utah 2d 34, 361 P. 2d 522, which states that although the trier of fact cannot arbitrarily disregard competent, credible and uncontradicted testimony, it may determine the weight to be given testimony, and may refuse to find in accordance with it where there is any circumstance which reasonable provides a basis for such refusal.

As has been stated, the testimony of almost all witnesses is conflicting as to exactly what road signs were in place at the time and place of the accident. None of the defendant's witnesses could say what signs were in place, however, all of the State's witnesses did say that all of the signs required by the State's own plan for signing were not in place. As it was the trial Court conceded to the State of Utah most of the signs that it claims were there.

Based upon the foregoing discussion, respondents respectfully assert that Point I of appellant's brief is without merit.

POINT III

THE COURT DID NOT ERR IN FINDING ON THE EVIDENCE THAT THE SIGNS AS PLACED BY THE STATE FAILED TO GIVE ADEQUATE, REASONABLE OR SUFFICIENT NOTICE.

In relation to the signs placed at or near the place where the accident occured, the trial court made the following finding:

> 6. That at the said time and place the signs placed by the State failed to give adequate, reasonable or sufficient notice of a difficult and dangerous condition which existed or of the fact that traffic would be required to turn onto a one lane sharply curving exit road and accomplish a 270° turn;

From reading the findings of fact, it is obvious that the lower court did not find that the signs did not give any warning or notice, but that they failed to give adequate warning of a dangerous condition which existed at the end of the freeway. The dangerous condition that existed and for which the State did not give the motoring public adequate warning was, (a) a 35 mph reduction in speed from 70 to 25 mph, (b) the reduction of traffic lanes from three upon which a speed of 70 mph was permitted to one upon which a speed of only 25 mph was permitted, (c) the one lane onto which the traffic from three lanes was channelled was a narrow sharply curving exit road, (d) and that the sharply curving one lane road accomplished a 270° turn.

The lower court's finding that the State of Utah did not give the motoring public reasonable notice of a dangerous condition that existed at the end of the freeway is amply demonstrated by the evidence. It should be noted that the State did not erect all of the kinds or amounts of signs as specified by the construction signing plan adopted by it. The signs that should have been in place according to the specifications of the State Highway Department are as follows: (a) Construction approach warning signs, three in number, (b) Exit sign

with arrow, and (c) 94 foot detour barricade with amber flashing light. It appears from the evidence produced by the State of Utah that it did not even meet its own minimum requirements for adequate signing on the freeway at the place of the accident.

Title 41-6-48, Utah Code Annotated provides as follows:

> (e) The state road commission shall have exclusive authority to determine and declare prima facie evidence of a lawful speed on state high ways whether such highways be within or without the corporate limits of any city. A state highway, to be appropriately posted, must be posted with reflector type signs whereon the prima facie lawful speed limit shall be designated. Wherever there is a drop of 10 MPH or more in the posted speed limit, it must be preceded by a sign giving advance notice of such a reduction. Signs shall be as specified in the current approved "Utah Manual on Uniform Traffic Control Devices."

There was a reduction of speed of 35 mph where the accident occurred. As has been said, the speed limit was reduced from 70 mph on three lanes of traffic to 25 mph for a sharply curving narrow one-lane exit road which described a 270° arc. The State, therefore, failed to erect reduction in speed signs as required by the Statutes of the State. The signs which the State of Utah erected certainly gave notice but not of the dangerous condition that existed. An interesting analogy to the condition that existed where the accident occurred is the temporary end of the freeway at Page's Lane at or near Centerville, Davis County. There the freeway comes to

an end and the road signs so indicate. However, the road into which the freeway leads continues on in a northerly direction, and the traffic on the freeway is channelled from 3 northbound lanes on the freeway to 2 northbound lanes on the old road. At that point there is at most a 10 mph reduction in speed. A motorist who has recently traversed the freeway near Centerville as Mr. Brooks had would reasonably believe that the same condition existed at Ogden unless he was specifically warned. Of course, he was given no such notice or warning.

There are many cases dealing with the liability of a State for the failure of its Highway Commission or Department to erect or maintain proper traffic control signs or for the improper placing or maintenance of such. No case covers the precise question presented on appeal herein.

Brown, et al. vs. Highway Commission of Kansas, 444 P. 2d 887 (Kan. 1968) was a case that involved an automobile accident which resulted in the death of a mother and her six year old son and brain damage to her eight year old daughter who were passengers in a vehicle traveling on a state highway at an intersection with a country road. Plaintiff's vehicle was struck by tort-feasor motorist who failed to observe and stop at a stop sign on the subservient road which stop sign was obscurred from sight by bushes and trees. Plaintiffs claimed that the fact that the stop sign was obscured was a defect in the highway and the Highway Commission denied on the ground that since the stop sign was not on the travelled portion of the roadway it was not such a

defect. The court stated that even though the stop sign was not on the travelled portion of the roadway that fact did not preclude it from being a defect in the highway. The court further went on to say that the adoption of a Uniform Traffic Control Manual by the State Highway Commission imposes an absolute duty on the Highway Commission to conform to the rules set out in the Manual, and hence an absolute duty to maintain traffic control devices at the intersection with a through highway. It is sufficient merely that the defective condition affect the safety of the highway. Although the State Highway Commission has discretion to designate a road as a State Highway, once it does so it has an absolute duty to comply with the requirements of the Manual on Uniform Traffic Control Devices and to install and maintain traffic control devices sufficient and efficient to control traffic entering thereon.

In that case the Kansas Supreme Court affirmed a judgment of $102,029 for plaintiffs stating that a five foot high stop sign which was obstructed by bushes and shrubs was not effectively warning motorists, that the sign should have been at least seven feet high and hence it was a defect in the highway.

Other cases taking substantially this same view are *Fanning vs. City of Laramie,* 402 P. 2d 460 (Wyo. 1965), improperly maintained stop sign; *Luddy vs. State,* .... N.Y.S. 2d.... (N.Y. Ct. Claims, No. 42938, 1968), failure to warn motorist of a deceptively re-routed highway; *Weber vs. State,* (Cal. Trial Ct., Feb, 1968) 11 ATL New L. 156-157, failure to post sign warning of a treacherous

curve on a 65 mph road; *State vs. Watson,* 436 P. 2d 175 (Ariz. 1967); State's liability for failure to warn motorist of a narrow bridge; *Van Airsdale vs. Hollinger,* 66 Cal. Rptr. 20, 437 P. 2d 508 (Cal, 1968) City's liability for negligence of independent contractor, under non-delegable duty exception, for contractor's negligence in handling job of eradicating white line markings on a busy street while keeping one of three lanes of traffic open to traffic; *Pfeifer vs. City of Jan Joaquin,* 55 Cal. Rptr. 103 (Cal. App. 1966) County eliminated pedestrian crosswalk but failed to obliterate "Ped Xing" warning on highway. See also *Stone vs. Arizona Highway Commission,* 381 P. 2d 107 (Ariz. 1963), *Jauita Rice, Spec. Admx. vs. Clark County et al.,* 328 P. 2d 605 (Nev. 1963).

It seems abundantly clear from the facts of the instant case that the State of Utah failed to give reasonable and adequate notice or warning to motorists of the dangerous condition of the highway at the temporary end of the freeway. Not all of the necessary signs were installed and the signs that were in place were not correlated as to the warning or notice that should have been given. In fact, the signs that were installed not only failed to give adequate warning of the dangerous conditions, they were deceptive in what they stated. After having seen all of the signs, the State had installed or wanted to install, there was still not adequate notice, or any notice at all for that matter, of a greatly reduced speed limit, an extreme narrowing of the roadway, a narrow, sharp, hazardous, curving exit road, and a sudden change of direction on the narrow, sharp, dangerous and hazardous exit road of 270°.

Respondent contends that on the basis of the facts of this case and the law as set forth that the lower court's finding in this regard was reasonable and accurate.

POINT IV

THE COURT DID NOT ERR IN FINDING THAT THE DRIVER, BROOKS, OPERATED THE UNIT IN A REASONABLE AND PRUDENT MANNER.

Respondent incorporates into Point IV of this brief the facts, law and argument set forth under Point III.

The lower court found "that Brooks was driving the said unit in a reasonable and prudent manner, was unable to negotiate the exit from the freeway as a result of which the unit left the roadway and overturned" (R32, 33).

In this regard it should be born in mind that it was dark, the roadway was wet or moist, it was foggy in places along the roadway, the State of Utah had not erected all of the necessary signs under its own construction signing plan, and the signs that were installed did not give warning of the dangerous condition that existed at the temporary end of the freeway. Couple this with the fact that Mr. Brooks has been an interstate trucker for about 25 years, drives approximately 50,000 miles per year and has never before had an accident, he was not tired having had a rest stop in Price, Utah, and the fact that he was driving a large rig with a load of about 40,000 pounds at a speed of approximately 30 to

35 mph. It is obvious why the trial court found Mr. Brooks free from negligence.

It is also of interest to note that the investigating police officer had been called to investigate other accidents at the place in question and it was his opinion that the accident was the result of inadequate markings and the sharp curve or inadequate engineering and markings and the sharp curve (T92, R138). Mr. Brooks also told the investigating officer that the highway was not properly marked (T72, R118). When all of this is considered with the testimony of Clyde Beutler, that the traffic control signs were inadequate, he had difficulty negotiating the curve immediately after the accident, and while he was at the scene, several other vehicles had difficulty negotiating the curve of the exit road, thunders that the cause of this accident was not caused by any negligence on the part of Mr. Brooks but because of the negligence of the State of Utah.

Respondent frankly admits that the evidence received immediately above is not conclusive but does suggest that it is extremely persuasive and is sufficient basis for the lower court's finding.

The question of negligence is a matter for the determination of the finder of fact, and unless reasonable minds could not differ, the finding of the lower court must be sustained. Respondent respectfully submits that reasonable minds could differ on whether Mr. Brooks was negligent at the time and place of the accident. If this is true, then the finding of the lower court must remain undisturbed on appeal.

The propositions of law stated herein are basic being what is commonly referred to as hornbrook law, therefore, respondent has not cited any authorities for the rules of law stated.

POINT V

THE NEGLIGENCE OF THE DRIVER, BROOKS WOULD BAR ANY RECOVERY BY THE DRIVER OR HIS EMPLOYER, OWNER OF THE DAMAGED UNIT FROM THE STATE OF UTAH.

While agreeing with the general rule of law stated in Point IV of appellant's brief, respondent denies any negligence on the part of the driver, Brooks.

There is no question that Paul Bramel owned the rig William Brooks was driving at the time and place of the accident. It is also a fact that Brooks was an employee of Bramel in the scope of his employment at the time. It is conceded that *if* Brooks was negligent at the time of and place of the accident his negligence would be a bar to any recovery by either himself or Mr. Bramel against the State of Utah. The trial court, however, found Mr. Brooks free from negligence and respondents believe that to be a reasonable finding under all the facts and circumstances of this case.

For the sake of brevity, respondent incorporates the contents of Point IV of this brief into Point V hereof.

CONCLUSION

Plaintiffs-Respondents respectfully assert that the position taken by Defendant-Appellant in this case and as presented in Points I-IV of its brief is not well taken. Considering the record on appeal, with the exhibits as part thereof, and the argument contained in its brief, appellant is not entitled to the relief it seeks in this matter since no error was committed by the trial court in its disposition of this case.

Based on the foregoing facts, authorities, and argument, it appears clear that this court should affirm the judgment of the District Court wherein judgment was granted in favor of plaintiffs and against defendant.

Respectfully submitted,

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