1965

Louise B. Taylor, et al. v. Virginia Clar'E Johnson : Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

LOUISE B. TAYLOR, et al,
Plaintiffs and Respondents,
vs.
VIRGINIA CLARE JOHNSON,
Defendant and Appellant.

Case No. 10316

BRIEF OF APPELLANT

Appeal from Fourth District Court,
Utah County, Utah,
Hon. Marcellus K. Snow, Judge

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STATEMENT OF THE KIND OF CASE

This is an action by plaintiff, individually, and as guardian of her minor children, asking damages for the death of her husband, James W. Taylor, who was killed while working between an automobile and a trailer stopped on the highway. The trailer was struck by an automobile driven by the defendant.

DISPOSITION IN LOWER COURT

This action was originally filed and tried in Juab County, and a jury returned a verdict of "No Cause of Action". On appeal to the Supreme Court of the State of Utah, *Taylor vs. Johnson*, Case No. 9874, filed June 18, 1964, the Supreme Court of the State of Utah remanded the case to the District Court of Juab County for a new trial. The first

appeal is reported at 15 Utah 2d 342, 393 P2d 382.

Prior to the second trial, defendant filed a Motion for Change of Venue, which was granted by the District Court of Juab County, and the second trial was in the District Court of Utah County.

At trial in Utah County, a jury returned a verdict in favor of the plaintiffs and against the defendant, for $28,000.00. Judgment on the verdict was entered November 10, 1964.

The defendant filed a timely Motion for Judgment Notwithstanding the Verdict, or in the Alternative for New Trial. The Motion was denied January 6, 1965, by the Judge who tried the case, the Honorable Marcellus K. Snow of the District Court of Salt Lake County.

RELIEF SOUGHT ON APPEAL

The appellant and defendant seeks to have the Judgment on the Verdict set aside and a new trial granted.

STATEMENT OF FACTS

In the Statement of Facts, references to the transcript of testimony will be referred to as T., and references to the record, the pleadings, instructions, etc., will be referred to as R. The District Court of Utah County did not consolidate the transcript of trial and the pleadings and other filed portions of the record into one record on appeal.

There is no dispute as to the time and place

of the accident. It happened June 13, 1961, about 9:30 p.m., on Utah Highway U-28, approximately 9.3 miles south of Levan, Utah (T. 60). It was a dark moonless night. The highway was asphalt, 37 feet wide, with a broken center line (T. 105-Ex. P.20). There were painted lines on each side of the highway 2 feet 2 inches from the edge of the hard surface (T. 79). From the center line to the east edge of the hardtop it was 19 feet 2 inches, and from the center line to the west edge of the hardtop it was 17 feet 10 inches (T. 70).

About 9:30 p.m., Don Milner, driving his Chevrolet north on Highway U-28, and pulling a homemade, two-wheel, single axle trailer (T. 11), struck a deer, damaging the right rear wheel housing, and the car stopped on the highway, facing north (T. 15). The right rear wheel left a tire mark on the highway 158 feet 9 inches in length, extending south from directly under the right rear wheel, and 8 feet 3 inches east of the center line (T. 101). It was 11 feet 1 inch from the east edge of the asphalt road to the right rear wheel of the Milner car (T. 101-Ex. P. 20). The investigating officer, Rex Hill, observed the Milner vehicle on the highway and the tire mark leading to the right rear wheel (T. 101-Ex. P. 20).

After stopping, Milner, with a flashlight, flagged down a car approaching from the south (T. 10), a car driven by Everett Kester, accompanied by his wife, children and his sister-in-law (T. 9).

Kester pulled ahead of the Milner car and stopped 200 feet north (T. 10). A second car was flagged and the occupants requested to notify a wrecker. The wrecker arrived at the accident scene in about 30 minutes (T. 16). The wrecker operator, James Warner Taylor, approaching from the north, passed by the accident scene, and drove off the west side of the road and stopped at a clearing (T. 16). This clearing, just south of the scene, was about 50 feet in width (T. 110-Ex. P. 20). After the wrecker arrived, the trailer was unhitched from the Milner automobile, and moved to the east, and the wrecker was then backed into position directly behind the Milner car (T. 17). Mr. Kester then backed his car into position in front of the trailer. The trailer hitch was taken off of the Milner car, to be attached to the Kester car (T. 17). While the trailer hitch was being attached to the Kester car, the wrecker operator hooked the Milner car to the wrecker, and the rear end of the Milner car lifted up (T. 20, 42).

After Taylor attached the wrecker to the Milner car, he went to the area where the trailer was being hitched to the Kester automobile, taking some wrenches to tighten the bolts (T. 20). The wrecker was on the roadway just east of the center line, facing south, with headlights on and two flashing amber lights on the fenders, and a rotating blue light on top (T. 18-19). The Milner trailer, with its load, was higher than the rear of the Kester automobile (T. 26). There were several fusees, reflec-

torized stands, and three pot torches in the wrecker, but none were put out (T. 114), and at no time were any flares or lanterns or signals placed on the highway (T. 26, 59).

The wrecker was not moved after being positioned behind the Milner car, and remained on the highway facing south, with the headlights on (T. 27, 51).

As the wrecker was stopped on the highway, with the Milner car attached, the wrecker obscured the tail lights of the Milner car (T. 20). The left front door of the wrecker was open (T. 102, 103). There was about three to four feet between the Milner and Kester cars (T. 59).

After Taylor completed hooking the wrecker onto the Milner car, he left the wrecker on the highway, and spent several minutes between the trailer and the Kester vehicle, working on the trailer hitch (T. 20). The trailer had electric lights, but they were not operative after the trailer was unhitched from Milner's car (T. 25).

The wrecker was south of the trailer, and as the men worked on the trailer hitch, the taillights on the Kester vehicle were obscured by the trailer (T. 26). Fifteen to twenty minutes elapsed between the time the wrecker arrived and the accident happened (T. 58).

Miss Virginia Johnson, the defendant, had driven from Provo to Richfield to visit a friend,

and she left Richfield after dark to return to Provo (T. 170).

Just south of the accident scene she was traveling at a speed she estimated to be from 50 to 60 miles per hour. It was a dark night, with no moon or other lights in the area (T. 170). She came around a slight curve, about one-half mile south of the accident scene, and observed headlights and the blue light on top of the wrecker (T. 172-177). She saw no flares, or other warning signs and assumed the wrecker was moving toward her, and on its own side of the road (T. 63, 177). She testified she looked at her speedometer and was traveling 60 miles per hour, and took her foot from the gas pedal. As she neared the wrecker, she observed it to be partially in her lane of traffic and she had to decide whether to try to stop abruptly, losing control of her car, or attempt to go to the right of the wrecker (T. 173, 174). She drove to the right of the wrecker and was blinded by the wrecker lights, and applied brakes, but struck the rear of the trailer, knocking it into the Kester car (T. 173).

Mrs. Kester testified that she observed the Johnson car approaching and that it was traveling 80 to 85 miles per hour. Sgt. Edward Pitcher testified that in his opinion the Johnson vehicle was traveling 73 miles per hour prior to the time brakes were applied (T. 147).

There were several flashlights at the scene, and

before the accident Mrs. Kester had been going south of the wrecker to wave the flashlight to warn vehicles from the south (T. 23, 46, 54). Mrs. Kester was between the Milner automobile and the Kester automobile, when she saw the Johnson car approaching, but she did not get out in front of the wrecker to warn Miss Johnson (T. 45). This was the only vehicle from the south that had not been signalled with a flashlight (T. 52).

Officer Rex Hill of the Utah Highway Patrol investigated the accident and made measurements. Atlhough the wrecker and Milner car were removed before he made his measurements, he had observed the wrecker on the road, facing south, in the northbound lane of traffic (T. 64). He observed a long tire mark on the highway running underneath the right rear wheel of the Milner automobile (T. 124). This mark was 8 feet 3 inches east of the center line (T. 101). He also observed other physical evidence on the roadway, gouge marks, skid marks (T. 73, 74, 76), and debris on the highway, where the open door of the wrecker had been struck, and paint knocked off, and he observed the damage to the wrecker door (T. 102).

Exhibit P. 20 received in evidence shows the measurements made by the officer, the location of the wrecker, Milner automobile, and other physical evidence.

Officer Hill found that the mark left by the

right rear wheel of the Milner automobile was 8 feet 3 inches east of the center line of the highway (T. 101). This would leave 11 feet 1 inch of hard-top surface of the highway east of the Milner automobile and the wrecker, as they were stopped on the highway (T. 101). The Milner car and the wrecker occupied 8 feet 3 inches of the east side of the highway, and there was four feet between the Milner car and the Kester car. The Kester car and trailer occupied the remaining 7 feet of the highway (Exhibit 20).

As to the probable point of impact, the police officer testified it was indicated by gouge marks and tire marks on the highway (T. 73), and that the Kester car and trailer came to rest 76 feet 4 inches north of the point of the gouge. The gouge marks were on the hard-surfaced portion of the highway, and were 4 feet 7 inches apart (T. 73). One gouge was 6 feet west of the east edge of the highway, and the other, one foot 5 inches west of the east edge (T. 105).

For the use of the Court, and to illustrate the testimony of the investigating police officer, Appendix A is a diagram of the accident scene, showing the measurements made by the officer, and the position of the vehicles as the scene was set, with the wrecker facing south with the headlights on, the trailer behind the headlights, where it was being attached to the Kester vehicle and the east half

of the highway blocked. Measurements on the illustrative diagram are the same as Exhibit P. 20.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 9 WHICH TOOK FROM THE JURY THE ISSUE OF PROXIMATE CAUSE OF ANY CONTRIBUTORY NEGLIGENCE OF PLAINTIFFS' DECEDENT, IN THE EVENT OF A FINDING THAT DEFENDANT SAW AND KNEW THE WRECKER TO BE UPON THE HIGHWAY IN SUFFICIENT TIME TO HAVE REASONABLY AVOIDED THE ACCIDENT.

This case was previously heard on appeal by the plaintiffs from an adverse judgment. Opinion was rendered in *Louise B. Taylor, et al, vs. Virginia Clare Johnson,* 15 Utah 2d 342, 347, 348, 393, P2d 382 (1964). After reviewing the factual background of the case in detail, this Court made some pertinent observations concerning the conduct of defendant and of plaintiffs' decedent at the time of the accident as it relates to proximate cause.

A reasonable basis for the decision in Miss Johnson's favor was acknowledged by this Court, although it was reversed on other grounds. A directed verdict against her was specifically rejected, and the question of her negligent conduct was reserved for the jury. The Court then detailed the conduct of Mr. Taylor immediately preceding the accident and concluded:

"But even if all these precautions were taken,

the question of whether Taylor was guilty of negligence which proximately contributed in causing the accident is a jury question."

The following language, taken from the opinion, was intended for the guidance of the Court on retrial:

> "The instructions contain no direct concise statement of the main determinative issues of fact in the case. Such issues were: (a) Whether Miss Johnson's negligence proximately caused the accident by continuing to drive for a full half mile at an unreasonably high and dangerous rate of speed, all the time knowing she was approaching a wrecker on the road but was unable to determine whether it was moving or stopped, or whether there were other vehicles stopped on the road in that neighborhood, until it was too late to avoid the accident. (b) Whether Taylor by contributory negligence proximately caused the accident by failing to place flares on the road or provide other warnings of the hazardous situation to approaching traffic. Such a statement of the issues in ordinary language not overburdened with legal terminology would have greatly clarified the jury's problems.

Over the vigorous and detailed objection by defendant's counsel, (Tr. 183), the trial court gave the following Instruction to the jury:

> "Instruction No. 9"
>
> "You are instructed that a wrecker operator in darkness has the duty to reasonably warn approaching traffic of the obstruction on the roadway by displaying lights, flares, or other

practical means, and failure to do so, may be negligence.

You are further instructed, however, that if the defendant in this case saw the wrecker and knew it to be a wrecker, in sufficient time to have reasonably avoided the collision, any negligence of James Warner Taylor, if you so find, in failing to display lights, flares, or other practical warning devices, would not be a contributing proximate cause of his death, and the defense of contributory negligence would not defeat plaintiffs' recovery." (R. 27).

The Instruction given violated the plain and precise rule of the case as set out in the opinion of this Court on the previous appeal, that the questions of negligence and proximate cause of each party be specifically reserved for jury consideration.

Instruction No. 9 advised the jury that if they found that the defendant "saw the wrecker and knew it to be a wrecker, in sufficient time to have reasonably avoided the accident", any negligence of Taylor was not a proximate cause and would not defeat plaintiffs' recovery.

Not only did the trial court take from the jury the question of proximate cause of Taylor's negligence, it prohibited the jury from considering all of the facts and circumstances which would properly bear upon the question of whether Miss Johnson's conduct was negligent or non-negligent. The trial

court, by its instruction, advised the jury that if she saw and knew the vehicle on the highway to be a wrecker in sufficient time to have reasonably avoided the collision, that such conduct was the sole proximate cause and eliminated the consideration of other facts or circumstances which may have affected the reasonableness of her conduct, including that of Taylor.

This Court in its previous opinion considered this very issue:

> "Until just before the accident, by her own admission Miss Johnson was exceeding the posted and statutory speed limit. This is so, even though she recognized that there was a wrecker on the highway. She makes no claim that she reduced her speed at any time before the collision slower than 50 miles per hour, the maximum speed limit, although a wrecker on the highway at night definitely should suggest to approaching traffic that there exists special hazards requiring a slower speed. *However, what a reasonably prudent person would do under the existing circumstances is a question for the jury to determine, and we can only hold a party guilty of negligence as a matter of law where it is conclusively shown that the course pursued was not that of a reasonably prudent person.* We therefore cannot direct a verdict on this question against Miss Johnson." (Emphasis added).

Thus, on retrial, the question of Miss Johnson's conduct was to be reserved for jury considera-

tion and was to be measured against the familiar standard of "what a reasonably prudent person would do under existing circumstances". The trial court in effect took this question from the jury by limiting their consideration to only some of the circumstances, and ruling as a matter of law such conduct was not only negligent, but was the sole proximate cause of the accident.

This Court has repeatedly held that the question of proximate cause of an actor's negligence, even where the violation of a statute is involved, is ordinarily a jury question.

Jensen v. Dolen, 12 Utah 2d 404, 367 P2d 191; *Gibbs v. Blue Cab*, 122 Utah 312, 249 P2d 213, on rehearing, 123 Utah 281, 259 P2d 294; *Jensen v. Taylor*, 2 Utah 2d 196, 271 P2d 838; *Hayden v. Cedarlund*, 263 P2d 796, 1 Utah 2d 171; *Thompson v. Ford Motor Company*, 395 P2d 62, (Utah 1965).

POINT II

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY IN ACCORDANCE WITH THE DEFENDANT'S THEORY OF THE CASE.

The only instruction given by the Court as to duty of the decedent, James Warner Taylor, to place warning signals or flares to warn approaching traffic of the hazardous situation was in Instruction No. 9 (R. 27). In the same Instruction, the Court instructed the jury that if the defendant, Virginia Clare Johnson, saw the wrecker on the highway and

knew it to be a wrecker that any contributory negligence of Taylor would not be a proximate cause of the accident.

It is defendant's right to have the jury instructed upon her theory of the case. Exception to the Instructions as a whole, in failing to submit the defendant's theory of the claim of negligence of the deceased, James Warner Taylor, was made by counsel at the time of trial (T. 185, 186).

In the previous decision, the Court remanded the case for a new trial with specific directions as to the issues for trial, and set forth the issue as to the contributory negligence of James Warner Taylor, and stated:

> "The instructions contain no direct concise statement of the main determinative issues of fact in the case. Such issues were: (a) * * * (b) Whether Taylor by contributory negligence proximately caused the accident by failing to place flares on the road or provide other warnings of the hazardous situation to approaching traffic. * * *"

Defendant requested instructions in accordance with the theory of negligence on the part of James Warner Taylor and in accordance with the Court's previous decision (R. 60). The failure of the Court to instruct the jury in accordance with the defendant's theory of the case was error and prejudicial to defendant.

POINT III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY CONCERNING THE PRESUMPTION OF DUE CARE ON THE PART OF THE DECEASED, TAYLOR.

The Trial Judge instructed the jury, in Instruction No. 10 (R. 28), as follows:

> "Based upon the commonly known fact that the instinct for self preservation is such that persons use ordinary care for their own safety, *the law permits you to assume that the deceased, at the time of and immediately preceding the incident in question, was exercising due care for his own safety.* And you may make findings in accordance therewith, unless you are persuaded from a preponderance of the evidence that he was guilty of contributory negligence as elsewhere in these instructions defined." (Emphasis ours).

Exception was duly taken to Instruction No. 10 (T. 184).

In the case of *Mecham v. Allen*, 1 Utah 2nd 79, 262 P2d 285, the Court stated:

> "The Court erred in giving instruction No. 11 set out below, on the presumption that deceased used due care for his own safety. 'You are instructed that, until the contrary is proven, there is a presumption that the deceased Thomas Udell Mecham, was exercising due and proper care for the protection of his person and the preservation of his life, at the time of the accident; this presumption arises from the instinct for self-preservation

and the disposition of man to avoid personal harm. This presumption is not conclusive, but is a mater to be considered by the jury in connection with all other facts and circumstances in the case in determining whether or not the deceased was guilty of contributory negligence at the time of the accident.'

From the basic fact that a human being was accidentally killed a presumption arises which requires the trier of facts to assume the presumed facts that decedent used due care for his own safety, in the absence of a prima facie showing to the contrary, but in this kind of a presumption upon the making of such a showing, the presumption disappears from and becomes wholly inoperative in the case, and the trial from then on should proceed exactly the same as though no presumption ever existed, or had any effect on the case."

The evidence at trial of this case was uncontradicted that the decedent, James W. Taylor, arrived at the scene of the accident, drove to the west side of the road, walked over and looked at the scene, drove back to the center of the road and placed his wrecker in position, facing south, with the headlights on, and spent fifteen to twenty minutes working at the scene. He then commenced working on the trailer which was behind the headlights of the wrecker, with no tailights visible to defendant, and remained in this position until the defendants passed to the right of the wrecker, hitting the trailer. Taylor had fusees, reflectorized stands, and pot flares in his wrecker, but none were ever put out to warn

the approaching vehicles. The defendant drew the evidence of Mr. Taylor's conduct as set forth, from the plaintiffs' own witnesses. This evidence of conduct contrary to the exercise of due care for his own safety then caused the presumption of due care to become wholly inoperative in the case.

In the *Mecham v. Allen* case, it was held:

> "Since defendant's evidence was clearly sufficient to make a prima facie case, that decedent was guilty of contributory negligence which proximately caused the accident, the presumption was eliminated from the case and it was error for the court to instruct the jury on that question."

Appellant urges that the instruction given by the trial court is prejudicially erroneous in that the instruction, as given, told the jury that they could assume that the deceased at the time of the accident was exercising due care for his own safety, and told the jury that the presumption had evidentiary value. The Court wrongfully instructed the jury as to the effect of the presumption, where, in fact, the presumption was taken from this case by evidence showing the lack of due care on the part of the deceased.

As stated in the *Mecham v. Allen* case:

> "* * * for a presumption which deals only with the burden of going forward with the evidence as long as it is effective in the case is conclusive. This does not mean it is irrebuttable for it is completely rebutted and dis-

> appears from the case upon the production of prima facie evidence to the contrary. It is for the Court to determine whether a prima facie case has been made, not for the jury to consider and to weigh the presumption along with other evidence."

The error in the instruction is that it allows the jury to consider and weigh the presumption along with the other evidence in the case. It advises the jury that they may make findings in accordance with the presumption.

Appellant contends that the instruction was erroneous and prejudicial, under the facts and circumstances of this case, because any effect of such a presumption disappeared from the case following evidence rebutting it.

POINT IV

THE COURT ERRED IN ADMITTING EVIDENCE AS TO THE COEFFICIENT OF FRICTION OR "DRAG FACTOR" OF THE ROADWAY AT THE PLACE THE ACCIDENT OCCURRED.

There is a difference of opinion among the Courts as to what elements of fact are necessary in order to determine the coefficient of friction, or "drag factor" of a given surface. In some Courts, details concerning the weight of the vehicle, the size and type of tires, the depth of tread, the width of tires, the air temperature and the melting point of the tires are all factors to be taken in to consideration. This Court has, at least tacitly, given its ap-

proval to a "Rule of Thumb" chart published by the Utah Highway Patrol wherein three of these variables, to-wit: (1) skidding distance; (2) coefficient of friction; and (3) speed, are set forth, the purpose of which is to compute any one of the three variables which is unknown from two variables which are known. (See *Gittens v. Lundberg*, 3 Utah 2d 392, 284 P2d 115; *Peterson v. Nielsen*, 9 Utah 2d 302, 343 P2d 731).

It was the testimony of Officers Hill and Sherwood at trial that as a part of their investigation in this matter, they attempted to determine the coefficient of friction of the highway on which the accident occurred, by the use of a "nomograph" or "calculator", and which was admitted in evidence as plaintiffs' Exhibit No. 11. Officer Hill testified that two tests to determine coefficient of friction were made the morning after the accident and that a third one was made two or three days later (T. 80.) The method used was described by Officer Hill as follows:

> "We drove our car down the road thirty miles an hour and violently applied the brakes. Then you measure the skid marks left by all four wheels, divide by four and use the calculator which we were furnished" (T. 81).

Officer Sherwood, in his testimony, stated essentially the same thing as Officer Hill, with the exception that he did not mention the speed of the vehicle (T. 127).

Even if we omit all of the other factors which may be necessary to arrive at a correct coefficient of friction and agree that only those three factors used on the nomograph (Exhibit 11), are necessary in order to arrive at that figure, it is clear that in order to arrive at the coefficient of friction of any given surface, the speed of the vehicle *and* the length of the skid marks made by that vehicle stopping on the surface involved must be known in order to arrive at the unknown coefficient of friction. In this connection, neither Officer Hill nor Officer Sherwood testified concerning the length of any skid marks made by them in conducting these tests. The only information given is Officer Hill's statement that "We drove our car down the road thirty miles an hour".

Counsel for the plaintiffs objected to the testimony of these officers as to coefficient of friction, basing this objection, among other things, on the fact that there was "No evidence as to the measurements of any marks that he may have made . . ." (T. 89). This objection was overruled.

Likewise, it is axiomatic that in making tests of this kind, in order to determine the coefficient of friction on a given surface, and then applying that coefficient to determine the unknown speed of a vehicle involved in a collision, the surface being tested must be in approximately the same condition at the time the test is made as when the collision

occurred. Traffic Accident Investigator's Manual for Police, The Traffic Institute, Northwestern University, 1957 edition, P. 306. In this connection, neither Officer Hill nor Officer Sherwood gave any testimony whatever with respect to that factor. For all that the record reveals, there may have been an intervening rainstorm, resulting in a damp highway surface; or, for that matter, the test may have been conducted during a rainstorm.

The lack of these two vital factors in the plaintiffs' evidence, i.e., the length of the marks, if any, made during the skid test and the failure to establish a similarity of road conditions at the time of the accident and at the time the tests were made should nullify the testimony of Officers Hill and Sherwood as to the coefficient of friction of the highway on which the accident occurred. The objection as to the admissability of this testimony should have been sustained, and it is the contention of defendant that the Court erred in admitting this testimony.

POINT V

THE COURT ERRED IN ADMITTING THE OPINION EVIDENCE OF A POLICE OFFICER AS TO THE SPEED OF THE JOHNSON VEHICLE.

It is the contention of Appellant that the Court erred in allowing the witness Pitcher to testify, as an expert witness, concerning the speed of the Johnson vehicle, based upon the facts set forth in a cer-

tain hypothetical question put by plaintiffs' counsel.

Assuming that this Court has given judicial approval to the nomograph used by the Highway Patrol and introduced in this action as Exhibit 11, we have no doubt that anyone familiar with the use of mathematical formulae and tables, could take three known factors of skidding distance, coefficient of friction, and the grade of the highway, and by the use of said graph or the formula upon which it is based, compute the probable speed. The formula which Officer Pitcher *said that he used* (T. 148) is the same formula as that used in the nomograph, with the exception of an allowance for the grade of the highway. (See Exhibit 11)

If, however, factors other than skidding distance, coefficient of friction and grade are needed in order to determine speed, then it becomes clear that the witness Pitcher was not qualified. From the testimony of the witness, it was clear that he held no college degrees, and was not a physicist nor an engineer. Earlier in the trial, the Court had expressed his feelings with respect to speed estimates based on evidence other than skidding distance and coefficient of friction (T. 91).

It is apparent that the witness himself recognized this problem, for throughout his testimony on cross-examination, it became very clear that he was attempting to convince the court and the jury that he did not use any factors in computing the speed

of the Johnson vehicle except coeficient of friction and the skidding distance of the Johnson vehicle (T. 148-151). Even plaintiffs' attorney, in qualifying his hypothetical question, appears to have recognized the limitations of Officer Pitcher's expertise (T. 146).

Yet, despite the advocacy of the witness, after stating twice that the formula he used involved only skidding distance and coefficient of friction to determine speed (T. 148), he arrived at an answer which obviously went beyond anything stated in the hypothetical question—an answer which was at once prejudicial to the defendant and inflammatory in its effect on the jury.

The formula which the witness says he used (T. 148) may be expressed mathematically as follows:

$$\text{Speed} = 5.5 \times \sqrt{\text{skid distance} \times \text{coefficient of friction}}$$

Using the figures given in the hypothetical question, as corroborated by the witness, "distance" in the formula above is 11 feet 10 inches plus 56½ feet, a total of 68 feet 4 inches (T. 148). "Coefficient of friction" is .74 (T. 145). By substituting those figures for the symbols in the above formula, the problem would be expressed mathematically as follows:

$$\text{Speed} = 5.5 \times \sqrt{68.33 \times .74}$$

By simple mathematics, using these figures, or

by the use of Exhibit 11, which uses the same formula, it may be determined that "speed" is equal to approximately 39 miles per hour. The witness Pitcher, ostensibly using this same formula and these same figures, told the jury that the defendant's vehicle was going 73 miles per hour. The effect of this testimony on the jury certainly speaks for itself.

Later, when Officer Pitcher was called as a witness by defendant, for the purpose of propounding a proper hypothetical question, he stated that in making his former computation, "Yes, I did use damage involved" (T. 162). Thus, by his own testimony, he admitted going beyond the facts given in the hypothetical question. The original hypothetical question propounded by counsel for plaintiffs is completely devoid of any reference to damage (T. 145). The record is silent as to what "damage" the witness was using in making his computations, or the source of his information. Having originally been so emphatic in his assertion that he used *only* the facts given in the hypothetical, his self-contradiction is obvious and the answer he gave should have been stricken on defendant's motion.

In addition to the foregoing, the opinion of the witness was based, at least in part, on the information given him as to the coefficient of friction of the

surface of the roadway. If defendant's contention in Point Four is well taken, that is, the Court erred in admitting the testimony concerning coefficient of friction, then the use of that figure in any subsequent computations would nullify the validity of such subsequent computations.

A caveat has recently been expressed by this Court with respect to the expert witness, as follows:

> "In view of the importance of the function entrusted to the expert witness, it is of great importance that the Court carefully scrutinize his qualifications to guard against being led astray by the pseudo learned or charlatan who may purvey erroneous or too positive opinions without sound foundation." *Webb v. Olin Mathieson Chemical Corporation*, 9 Utah 2d 275, 342 P2d 1094.

Defendant respectfully contends that the trial court, in the case at bar, particularly in view of the above quoted language, should have excluded the testimony of the witness Pitcher.

CONCLUSION

Appellant respectfully contends that the prejudicially erroneous instructions given by the trial court and the ommision of instruction upon the de-

fendant's theory of the case together with the admission of evidence clearly erroneous and prejudicial relating as to speed and coefficient of friction constitute reversible error and a new trial should be granted.

Respectfully submitted,

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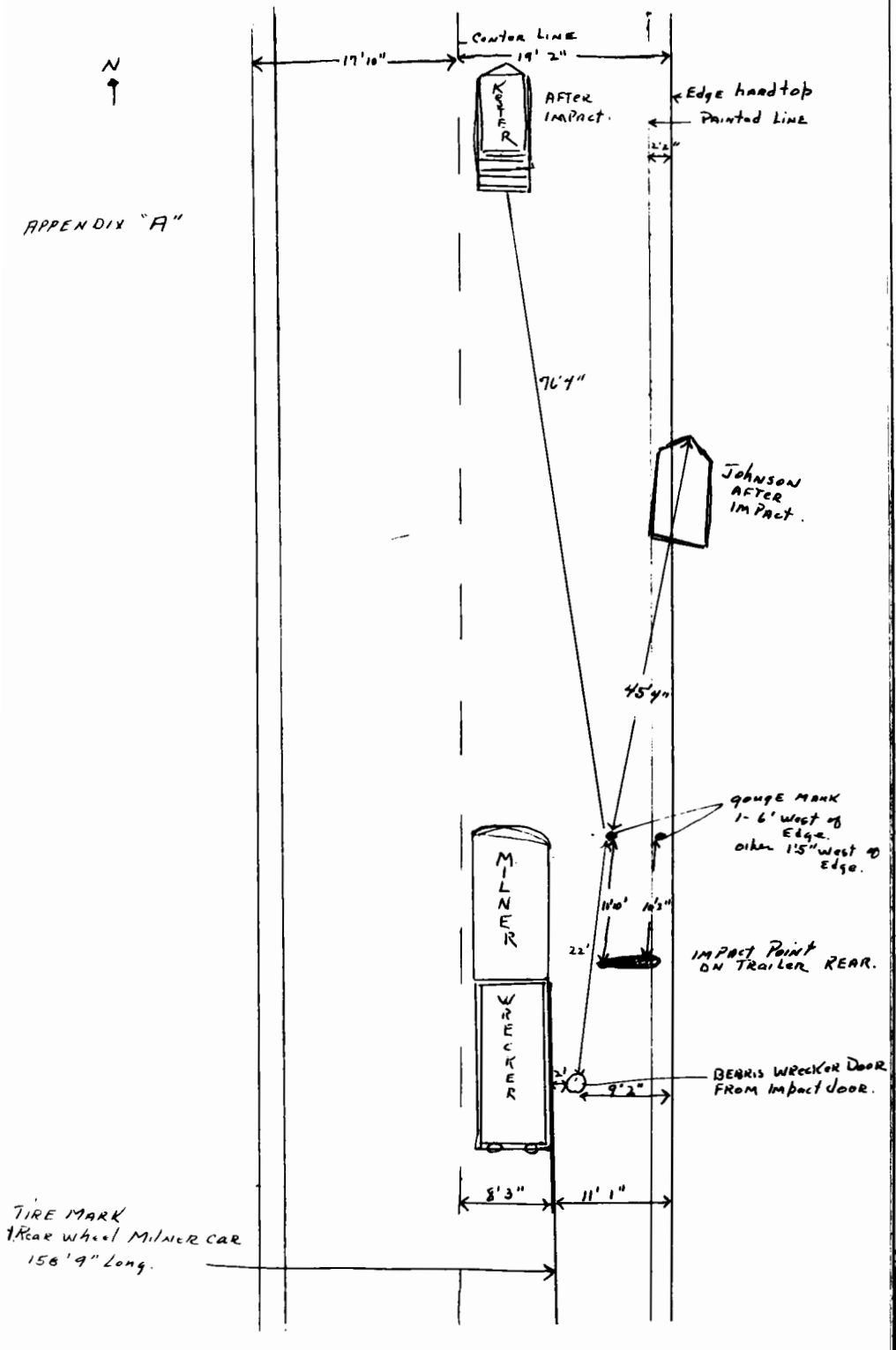
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APPENDIX "A"
Center Line
19' 2"
17'10"
KEYER
AFTER IMPACT.
Edge headtop
Painted Line
2'2"
76'7"
JOHNSON AFTER IMPACT.
45'4"
gouge MARK 1- 6' west of Edge. other 1'5" west of Edge.
MILNER
WRECKER
11'0"
10'3"
22'
IMPACT POINT ON TRAILER REAR.
2'
9'2"
BEARS WRECKER DOOR FROM Impact DOOR.
8'3"
11' 1"
TIRE MARK
Rear wheel MILNER CAR
158'9" Long.