1970

Freal Stratton v. Ira Nielsen, D/B/A J & I Trucking Co. And Sherman Kay Christensen : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

FREAL STRATTON,
Plaintiff and Appellant

vs.

IRA NIELSEN, d/b/a
J & I TRUCKING CO.
and SHERMAN KAY CHRISTENSEN
Defendants and Respondents.

Case No.
12031

BRIEF OF APPELLANT

Appeal from judgment of the Sixth Judicial
Court for Sevier County, Honorable Ferdinand
Judge

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AUTHORITIES AND STATUTES CITED

CASES CITED

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STATEMENT OF KIND OF CASE

This is an action brought by Freal A. Stratton to recover damages for personal injuries caused by the defendants, Ira Nielson, d/b/a J. & I. Trucking Company and Sherman Kay Christensen. The action arose out of an accident involving a semi-truck driven by Sherman Kay Christensen and a semi-truck driven by plaintiff.

DISPOSITION IN LOWER COURT

The case was tried to a jury before the Honorable Ferdinand Erickson in the District Court in and for Sevier

County. At the close of the evidence, the court submitted the case to the jury as to the negligence of defendants and the contributory negligence of plaintiff. The jury returned a verdict of no cause of action.

RELIEF SOUGHT ON APPEAL

Plaintiff, Freal Stratton, seeks a reversal of the judgment entered in the lower court or in the alternative a new trial.

STATEMENT OF FACTS

Plaintiff, Freal A. Stratton is a resident of Henderson, Nevada, where he presently resides with his wife, three children of his own and five grand-children that he is raising. (Tr. 107, 109). At the time of this accident, Mr. Stratton was 53 years old and had driven a truck for many years. (Tr. 107). He had, in fact, driven the very route on which this accident happened for 20 years. (Tr. 108).

On or about April 28, 1963, plaintiff left Las Vegas, Nevada driving a Peterbilt tractor and pulling a two-axel trailer. (Tr. 110). The weather was clear and dry. Visibility was good. (Tr. 111).

Defendant, Sherman Kay Christensen, a resident of Redmond, Utah, was traveling the same route on the same day, driving a 60-foot three-deck cattle truck, fully loaded. (Tr. 66). Mr. Christensen had been employed as a truck driver by the defendant J & I Trucking Company, a partnership with its principal place of business in Centerfield, Utah (Tr. 17), for two or three months prior to the accident and had no prior experience driving a truck of this

size. (Tr. 66). His training in the occupation of truck driver consisted of two or three trips to Salt Lake City with defendant, Ira Nielson as instructor. (Tr. 67).

According to the testimony of Mr. Christensen, he left Las Vegas, Nevada in the evening on or about the 28th day of April, 1963, and proceeded toward Los Angeles, California on U.S. Highway 91 or Interstate 15. (Tr. 70). Kent Johnson, a driver for defendant, J & I Trucking Company, was in the sleeper. (Tr. 70). The truck was driven by Mr. Christensen to an area known as Baker grade which is a steep downhill grade for eighteen miles. (Tr. 71).

At that time four lanes of traffic were in use on the Baker grade; two north-bound lanes and two south-bound lanes. (Tr. 74, 75). Mr. Christensen stopped at the crest of Baker grade to check his vehicle. (Tr. 76). At this time plaintiff's vehicle passed the vehicle of defendant and Mr. Christensen was out checking his tires. (Tr. 117). After checking his tires, Mr. Christensen proceeded down the grade and smelled hot brakes. He was traveling in the direction of Baker, California and as he approached Baker, he noticed two trucks ahead of him in the right lane of traffic heading in the same direction. (Tr. 76). The two lead trucks were approximately one mile in front of Mr. Christensen's vehicle when he first saw them. As they continued down the grade, the vehicle directly in front of defendants' truck, which would be the plaintiff, pulled into the left lane and defendant, Sherman Kay Christensen saw the brake lights light up on plaintiff's trailer. (Tr. 77). Plaintiff testified that he turned on his left turn signel before pulling into the left lane. (Tr. 128).

Mr. Christensen testified that the plaintiff's truck pulled parallel to the lead truck (known hereafter as the Little Audrey truck at which time Christensen was five or six hundred yards behind the two vehicles. (Tr. 77). Defendant Christensen also stated that he saw the brake lights of both vehicles come on and that he could tell plaintiff's truck was slowing down to the speed of the other vehicle. At this time the defendants truck was five or six hundred yards behind plaintiff's vehicle. (Tr. 78).

Mr. Christensen could not remember whether or not plaintiff put on his left turn signal, (Tr. 78), but he could see the brakes sparking and flashing on the Little Audrey truck. (Tr. 80).

The following testimony of Mr. Christensen is found on line 17, page 81 of the Transcript:

> Q. All right. Do you know what happened then—what was going on?
>
> A. "I took for granted that the vehicle that pulled into the left lane, when he started slowing down and his brake lights coming on, that he would pull up along side and roll down his window and tell the other driver that his brakes were flashing and sparking and smoking and he stayed there and as I seen that, as I was back on the hill, I started slowing my vehicle down more to compensate for the slowness of the other vehicle."

Mr. Christensen was in the right lane of traffic and began slowing down to compensate for the speed of the two trucks in front of him. (Tr. 81). Defendants' truck was five or six hundred yards behind the lead vehicles and Mr. Christensen pulled into the left lane to follow plain-

tiff's truck around the Little Audrey truck (Tr. 82). Defendants' vehicle then covered the five or six hundred yards and crashed into the rear of plaintiff's trailer causing the tractor and trailer of plaintiff to bolt out in front of the little Audrey truck, over into the right lane of traffic, and out into the desert (Tr. 86, 87), and defendants' vehicle passed the Little Audrey truck and plaintiff's truck and continued three to five hundred yards past the point of impact.

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO GRANT JUDGMENT FOR PLAINTIFF NOTWITHSTANDING THE VERDICT.

The facts enumerated in plaintiff's Statement of Facts come from defendants' own mouth or are uncontradicted. Plaintiff, driving an empty trailer, passed Defendant at the top of Baker grade. At that time defendant was checking the tires on his fully loaded three-deck cattle truck. (Tr. 117). Baker grade is a steep downhill grade for eighteen miles. (Tr. 71). Defendants' vehicle, fully loaded, was traveling at such a rate of speed that it caught the vehicle of plaintiff, which was empty, before plaintiff could reach the bottom of Baker grade. Defendants' vehicle was five or six hundred yards behind plaintiff at the time plaintiff was alongside the Little Audrey truck. (Tr. 77). Defendant testified that he expected plaintiff to slow long enough to warn the Little Audrey driver of his danger, and then proceed down the highway (Tr. 81). Defendant knew exactly what was happening

and was aware of plaintiff's actions and anticipated them. Plaintiff was doing exactly what defendant would have done. (Tr. 85).

The jury in the instant case returned a verdict of no cause of action and in order to do this the jury must have found, either plaintiff was contributorily negligent or defendant was free from negligence. It is plaintiff's contention that reasonable minds could not differ on either of these propositions and would find them both in plaintiff's favor.

Reasonable minds would not find plaintiff contributorily negligent in this case. The law clearly places upon defendant the burden of proving contributory negligence and showing that said contributory negligence was the proximate cause of the injury. *Ewan v. Butters,* 16 Ut.2d 272, 399 P.2d 210 (1965). Defendant has failed in this burden and reasonable minds would not find otherwise. Defendants' evidence showed that its vehicle was traveling approximately thirty-five or forty miles per hour prior to impact and that speed was decreased to thirty miles per hour at the time of impact. (Tr. 74). Defendant, Christensen, further testifies that plaintiff's vehicle was going twenty-five miles per hour at the time of impact. (Tr. 94). From this evidence, defendant set up the defense of contributory negligence claiming that plaintiff was negligent in momentarily slowing his vehicle to warn a fellow truck driver of his danger, when the entire event was anticipated by the defendant driver.

Defendant has not placed substantial evidence before this court point to contributory negligence, and this court

has often said that if the finding of the jury is plainly unreasonable, demonstrating that the jury acted unfairly and unreasonably, then that finding of the jury is not supported by substantial evidence. *Seybold v. Union Pac. R. Co.,* 121 Ut. 61, 239 P2d 174 (1951), accord *Lemmon v. Denver* N *R.G.W.R. Co.,* 9 Ut. 2d 195, 341 P.2d 215 (1959). The only evidence defendant has is its claim that plaintiff stayed alongside of the Little Audrey truck for one or two minutes and this evidence is conflicting for plaintiff testified he was alongside of the Little Audrey truck for approximately ten seconds before he was hit. (Tr. 129, 130).

Under these circumstances plaintiff is held to the standard of reasonable or ordinary care and while exceptional foresight, caution or skill in avoiding injury are to be admired and encouraged, the law does not require them as a standard of conduct. *Hadley v. Wood,* 9 Ut.2d 366, 345 P.2d 197 (1959). Defendant anticipated plaintiff's action and plaintiff cannot be faulted for doing the act in a more cautious and less expedient manner than defendant claims he would have done it. The jury verdict is not supported by substantial evidence and it is the duty of this court to overturn that verdict. *Dairy Distributing Inc. v. Local Union 976 Joint Council 67, Western Confer. of Teamsters,* 8 Ut.2d 124, 329 P.2d 414 (1958).

Even if plaintiff stayed alongside the Little Audrey truck for as long as two minutes, he gave sufficient warning to justify this action. Plaintiff properly signaled a left turn before pulling into the left lane of traffic and then he eased on his brakes, momentarily, to slow to the speed of the Little Audrey Vehicle, (Tr. 120A), his brake lights

were functioning as a warning to all those behind him (Tr. 78), and the brakes on the Little Audrey truck were flashing and sparking in a manner sufficient to give defendants' driver notice of the danger. (Tr. 80). Reasonable minds could not find plaintiff contributorily negligent when the defendant anticipated the events exactly as they happened. Such a verdict should be overturned in accordance with 5 Am Jur 2d Appeal and Error, Section 834.

Some cases have held that if the verdict is contradicted by compelling physical facts, it should be set aside. *Johnson v. Mercantile Ins. Co. of America,* 47 N.M. 47, 133 P.2d 708 (1943). Plaintiff claims that he passed defendant at the top of Baker grade; that he saw defendants' truck in his rear view mirror when defendant was several hundred yards away (Tr. 120A); that he turned on his left turn signal and pulled into the left lane of traffic and was forcefully struck by defendants' vehicle. (Tr. 119, 120). Plaintiff testified that defendant was going sixty miles per hour and that the crash was of such force that it caused plaintiff's head to jerk back sharply and hit against the cab of the truck, knocking plaintiff unconscious. (Tr. 130, 204, 205). This testimony conflicts somewhat with the testimany of defendant who stated that his truck was traveling thirty miles per hour at the time of the accident and that plaintiff's vehicle was traveling twenty-five miles per hour.

The testimony of plaintiff is more consistant with the physical facts of this accident than the testimony of defendant. The physical facts of the accident reliably demonstrate a forceful collision sufficient to cause both trucks to travel beyond the Little Audrey truck. Defendants' truck

even traveled beyond plaintiff's vehicle and three to five hundred yards past the point of impact. (Tr. 104, 105). Defendant must have been traveling at a rapid rate if he was checking his truck at the top of Baker grade when plaintiff passed and was still able to overtake plaintiff before reaching the bottom of Baker grade. Defendant, Christensen, also testified that his brakes locked up at the point of impact although no one saw any skid marks in the area. (Tr. 89, 90).

These physical facts, some concurred in and some admitted by defendants' are before this court in the light most favorable to them and are paradoxically apposed to the testimony of defendant, Christensen, that he was going thirty miles per hour at the point of impact, and that plaintiff was going twenty-five miles per hour at that time. Defendant, Christensen, was obviously doing more than thirty miles per hour at the time of collision or he would have been able to control his vehicle as he was warned of the danger and anticipated it well in advance of the accident.

The foregoing clearly demonstrates that reasonable minds would not have found plaintiff contributorily negligent, and that conclusion, under these facts, must necessarily be followed by the conclusion that reasonable minds would determine the defendant to be negligent. The mere fact that there was a rear end collision furnished some evidence of negligence. *Mercer v. Perez, 65 Cal.* Rptr. 315, 436 P.2d 315 (1968). "Negligence is the omission to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something

which a prudent person under like circumstances would not do." *Lasagna v. McCarthy,* 111 Utah 269, 177 P 2d 734 (1947). Defendant, Sherman Kay Christensen did not act prudently under the circumstances and reasonable minds could not differ on this proposition, as his testimony clearly shows, he anticipated the accident, but could not control his vehicle.

Defendant Christensen was born and raised in a small town known as Redmond, Utah, which is located a short distance from the place of trial. Defendant, Ira Nielson, was also brought up near the place of trial in a small town known as Centerfield, Utah, where said defendant still carries on a business. Defendant is a resident of the County of Clark, State of Nevada.

The testimony of both plaintiff and defendant, when coupled with the physical facts of the accident clearly demonstrate that reasonable minds would not have returned a verdict of no cause of action in this case. The jury was prejudiced toward the defendants and against the plaintiff and the verdict was based on passion, or a misconception of the law or a disregard therefor. If the verdict is against the weight of the evidence, it is the duty of the court to reverse that verdict.

POINT II

THE TRIAL COURT ERRED IN FAILING TO GIVE PLAINTIFF'S PROPOSED INSTRUCTIONS, NUMBERED 1, 6, AND 8.

The plaintiff requested the following instructions:

"Instruction No. 1

The Plaintiff Freal A. Stratton brings this

action against the Defendant, Ira Nielsen, d/b/a J & I Trucking Company, and alleges that on or about the 20th day of April, 1963, on Highway 91, near Baker, California, the agent of Defendant, Ira Nielson, d/b/a J & I Trucking Company, Sherman Kay Christensen, operated a large truck belonging to said Ira Nielsen, d/b/a J & I Trucking Company into the rear end of a semi-truck and trailer driven by said Plaintiff and the said Sherman Kay Christensen drove said truck in a negligent, careless and unlawful manner, thereby injuring said Plaintiff.

The Defendant, Ira Nielsen, d/b/a J & I Trucking Company, admits in his answer that Sherman Kay Christensen was employed by the said Ira Nielsen, d/b/a J & I Trucking Company, but denies any reckless or careless conduct on the part of said Sherman Kay Christensen.

"Instruction No. 6

Before you can return a verdict for the Plaintiff, you must find by a preponderance of the evidence that each of the following two propositions are true:

Proposition No. 1:

That the defendant's agent, Sherman Kay Christensen, was negligent in the operation of his truck before the elleged impact in *any* one of the following particulars:

(a) in driving too fast for existing conditions; or

(b) in failing to keep a proper lookout for other vehicles; or

(c) in following too close; or

(d) in leaving the right lane of traffic when it was not reasonably safe to do so; or

(e) in failing to keep his truck under reasonably safe and proper control; or

(f) in failing to use reasonable safety when attempting to pass another vehicle.

Proposition No. 2:

That the said negligence of the defendant, if any, was the proximate cause of the injury.

If you find that the two foregoing propositions are true, you should determine the damages sustained by the plaintiff according to the instructions hereinafter given to you on that subject.

"Instruction No. 8

It was the duty of Sherman Kay Christensen to use reasonable care under the circumstances in driving his truck to avoid danger to himself and others and to observe and be aware of the condition of the highway, the traffic thereon, and other existing conditions; in that regard, he was obliged to observe due care in respect to:

(A) To use reasonable care to keep a lookout for other vehicles, or other conditions reasonably to be anticipated;

(B) To keep his truck under reasonably safe and proper control;

(C) To drive at such a speed as was safe, reasonable and prudent under the circumstances, having due regard to the width, surface and condition of the highway, the traffic thereon, the visibility, and any actual or potential hazards then existing;

(D) Not to follow another vehicle more closely than is reasonable and prudent, having due regard for his own speed, the speed of such other vehicle, other traffic upon the highway, and all other conditions there existing and to keep at such a distance and maintain such control of his truck as is reasonable and prudent for the safety of himself and others;

(E) Not to attempt to pass another vehicle until he makes observation and ascretains that this can be done with reasonable safety under the circumstances;

(F) Upon a laned highway to drive as nearly as practicable entirely within a single lane and not to move from one lane to another until the driver has first ascertained that he can do so with reasonable safety.

Failure of Sherman Kay Christensen to operate his truck in accordance with any of the foregoing requirements of the law would constitute negligence on his part.

The instructions above set forth relate the party litigants to the facts of this law suit and correctly state law applicable to those facts. The instructions which were given, when examined in their entirety, do not set forth plaintiff's theory of this case. Instructions Nos. 4 & 5 are the only two instructions which talk about negligence and these two instructions do not come close to defining plaintiff's theory. Every instruction, 1 through 20, is content with stating a correct principal of the law and none of said instructions are specifically tied to these facts.

In *Wellman v. Noble,* 12 Ut.2d 350, 366 P.2d 701 (1961), this court said that the purpose of instructing the

jury is to correctly present facts necessary to be determined, together with applicable principles of law, in a clear and understandable manner. The issues should be presented in a fair and understandable manner. *Hales v. Peterson,* 11 Ut. 2d 411, 360 P.2d 822 (1961). The object of jury instructions is to enlighten the jury of its problems. *Johnson v. Cornwell Warehouse Co.,* 16 Ut.2d 186, 398 P.2d 24 (1965). The object is not to provide the jury with additional hurdles to overcome. The instructions given were general and not tied to the facts. Instructions of this type are inconsistant with the case of *Holmes v. Herdebracht,* 10 Ut.2d 74, 348 P.2d 565 (1960), where this court stated that it is better for an instruction to cover specific fact situation than to be universally applicable, and as stated in *Badger v. Clayson,* 18 Ut.2d 329, 422 P.2d 665 (1967), the instructions should explain to the jury, in a manner understandable to them, issues of fact and law applicable thereto with reasonable accuracy and with fairness to both sides.

Plaintiff's proposed instruction number 1 clearly describes the parties to this litigation and the position they filled. The instructions given, as a whole, do not define either the plaintiff or the defendant, thereby leaving that question to the speculation of the jury. This was confusing to the jury and made the instructions hard to understand.

Plaintiff's requested instructions numbered 6 and 8 related the party litigant, Christensen, to the facts of this suit and correctly stated law which was applicable to those facts. Instructions number 6 and 8 also set forth plaintiff's theory of this case, and in a negligence action, plaintiffs

are entitled to have their case submitted upon their theory. *Lund v. Phillips Petroleum Co.,* 10 Ut.2d 276, 351 P.2d 952 (1960).

The trial court has a duty to cover the theories of both parties in its instructions. *Startin v. Madsen,* 120 Utah 631, 237 P.2d 834 (1951).

The instructions as given, numbered 1 through 20 do not contain plaintiff's theory of this law suit. One has to look carefully to find negligence mentioned at all. But if one does look carefully, he will find instructions 4 and 5 purporting to define negligence. Neither instruction clearly defines negligence or sets forth the duties of defendants' and it is obvious that instructions 4 and 5 are not related to the facts.

All of the instructions are content with stating correct principles of law. None are specifically tied to any of the facts of this case. Plaintiff's theory of this law suit cannot be found in the instructions. Prejudicial error has been committed and this case should be reversed.

POINT III

THE TRIAL COURT ERRED BY GIVING UNBALANCED INSTRUCTIONS IN DEFENDANTS' FAVOR.

The instructions, as given, were unbalanced in defendants' favor. Instructions 4 and 5 deal vaguely with negligence. After a careful reading of these two instructions, it is hard to find how they point up plaintiff's theory concerning the duties of defendant. The ambiguous nature

of these two instructions confused the jury and did not relate applicable law to the facts.

Instruction number 4 is a general statement of the duties of every driver and could apply to either defendant or plaintiff. Instruction number 5 is set forth as follows:

> Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person under such circumstances would not have done. The fault may lie in acting or in omitting to act.
>
> You will note that the person whose conduct is set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as general standard of conduct.

This is the only instruction purporting to propound plaintiff's theory of this cause and is negated to some extent by the second paragraph. The said instruction does not clearly point to the duties of defendant, but is a general statement of law set forth in a negative way to the detriment of plaintiff.

Instruction number 6 pertaining to contributory negligence follows:

> Contributory negligence is negligence on the part of a person injured which, cooperating with the negligence of another, assists in proximately causing his own injury.
>
> One who is guilty of contributory negligence may not recover from another for any injury suf-

fered because if both parties were at fault in negligently causing the injury the degree of negligence cannot be weighed by the jury.

The trial court also gave instruction number 12 as follows:

> Before contributory negligence would preclude plaintiff's recovery, you must find from a preponderance of the evidence that each of the two following propositions are true:
>
> Proposition No. 1:
>
> That the plaintiff was negligent in the following particulars:
>
> (a) that he failed to keep a proper lookout;
>
> (b) that he pulled out to pass another vehicle and then reduced his speed without giving an adequate signal;
>
> (c) that he reduced his speed when passing another vehicle when it was unsafe to do so.
>
> Proposition No. 2:
>
> That the said negligence of plaintiff, if any, was a proximate and contributing cause of the injury.
>
> If you find those two propositions against the plaintiff, he cannot recover even though you found the defendants were negligent.

These two instructions, when viewed in the light of the instructions as a whole, prejudicially accentuated the theory of contributory negligence. This is especially true when the said instructions do not place the theory of plaintiff before the jury and only vague, ambiguous abstract principles of law are the guide posts for the jury verdict.

Overaccentuation of the defense of contributory negligence, the positive delineation of the duties of the plaintiff, as contrasted with qualified negative statements of the duties of the defendants was cause for reversal in the case of *Devine v. Cook,* 3 Ut.2d 134, 279 P.2d 107 (1955). In that case the court stated that such instructions influenced the jury in bringing in its verdict of no cause of action and constituted prejudicial error. A careful look at the *Devine* case leads one to the conclusion that it is directly in point with the instant case. The court concluded that certain instructions, 4, 6, and 8, pertaining to the standard of care required of the plaintiff on contributory negligence, were positive and premptory, and that certain instructions, 8 and 9, pertaining to the standard of care required of the defendant, were negative and nugatory. In this case instruction 5 does not delineate the duties of defendant but places a general statement of the law before this jury in a negative way. Instruction number 6 and 11 are written in a positive manner and accentuate the theory of contributory negligence.

In the case of *Taylor v. Johnson, 15* Ut.2d *342,* 393 P.2d 382 (1964), the court held that the instructions contained no direct concise statement of the main determinative issues of fact in that case, and that the instructions were misleading as to what would constitute negligence, and were unbalanced in favor of the defendant and against the plaintiff. The same trend can be seen in this case; the law has not been applied to the facts; the defense of contributory negligence has been emphasised and the duties of plaintiff positively delineated to the detriment of plantiff's case; the instructions are misleading as

to what would constitute negligence. The jury has been mislead and confused and prejudiced in defendants' favor by the instructions as given. This is reversible error and the duty of the court is clear under the *Devine* and *Taylor* cases, supra.

POINT IV

THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 12.

The only evidence on which defendant relies to support his claim of contributory negligence is the fact that plaintiff stayed alongside of the Little Audrey truck for one or two minutes. The trial court gave instruction number 12, which is fully set forth in Point III of this brief. Under that instruction, the jury could find contributory negligence on one or more of three grounds. They might return a verdict of no cause of action by determining that plaintiff failed to keep a proper lookout, or that he pulled out to pass another vehicle and reduced his speed without giving a signal or that he reduced his speed when it was unsafe to do so.

There is no evidence to support the proposition that plaintiff failed to keep a proper lookout, or that he pulled out to pass another vehicle and reduced his speed without giving a signal.

The trial court can commit reversible error by giving an instruction on an issue which is not supported by the evidence. 5 Am Jur 2d, Appeal and Error, Section 891. Evidence pointing toward plaintiff's failure to keep a proper lookout or give a proper signal is not in the record.

Plaintiff testified that he checked his rear view mirror and signaled before pulling into the left lane of traffic and defendants' admit seeing plaintiff pull into the left lane of traffic and do not deny that plaintiff gave a signal. Defendants' admit seeing the brake light warning of plaintiff at a distance of five or six hundred yards.

In the case of *Hadley v. Wood*, supra, the court states the necessity for properly providing the jury with guidelines in the determination of a suit:

> It is not the function of the court to recite to the jury propositions of law in the abstract, however accurate or even interesting they may be. It is worse then idle to do so. By including irrelevancies the process could go on interminably with the result not only of boring but likely of confusing the jury."

The court should not submit an issue to the jury where the evidence will not support it. *Morrison v. Perry,* 104 Utah 307, 105 P.2d 347 (1940). Did the jury correctly determine whether there was evidence to support the three propositions above set forth or did they find that all three propositions were supported by the evidence simply because the trial court included them in the instructions?

This court has held that matters extraneous to the evidence should not be submitted to the jury even when such instructions are correct statements of the law. *Griffin v. Prudential Ins. Co. of America,* 102 Utah 563, 133 P.2d 333 (1943). The instructions did not relate law applicable to the evidence and the trial court sufficiently confused the

jury concerning the issue of contributory negligence to warrant a reversal under the facts of this case.

POINT V

THE TRIAL COURT ERRED IN FAILING TO DIRECT THE BAILIFF TO TAKE PLAINTIFF'S EXHIBITS INTO THE JURY ROOM.

At the close of the arguments, the trial court admonished the jury, but failed to direct the jury to take certain exhibits to the jury room. These exhibits consisted of Plaintiff's Exhibit 1, received Tr. 126; Plaintiff's Exhibit 2, received Tr. 148 and Plaintiff's Exhibit 3, received Tr. 153. All of said exhibits were properly received in evidence and were not of a technical nature beyond the comprehension of the jury.

Plaintiff's attorney, in the chambers of the District Judge, requested the court to direct the bailiff to take the exhibits to the jury in the deliberation room and the court did so.

However, the prejudicial effect was not cured by this subsequent action. Plaintiff's case was prejudiced by the fact that the exhibits did not go with the jury to the jury room because the importance of said exhibits and plaintiff's entire case was diminished. The jury may have felt that the delivery of said exhibits as an after-thought and after deliberation had begun, was only a procedural matter and that said exhibits were incidental or of no importance.

All of the exhibits were plaintiff's and the exhibits were directly connected to the cause of the accident or the

damage of plaintiff, and plaintiff personally testified as to each exhibit.

The jury may have concluded that plaintiff's entire case was without merit if the exhibits were not important enough to take to the jury room.

The Utah Rules of Civic Procedure, 47 (m) provide that:

> "Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits and all papers which have been received as evidence in the cause . . ."

That rule was certainly applicable at the time of this trial and it was the duty of the court to see that the jury was properly situated in the jury room with all necessary exhibits before deliberations began. A failure to do so was prejudicial error on the part of the trial court.

Prejudicial error on this particular point is emphasized when viewed in the light of the instructions as given, which, as set forth previously in this brief, accentuated the duties of plaintiff and negated the duties of defendant.

CONCLUSION

The evidence submitted clearly points up the proposition that reasonable minds would not have found as this jury did. Defendants' only claim to contributory negligence was their contention that plaintiff stayed alongside the Little Audrey driver too long.

The jury was moved by passion in favor of the defendant, which was aided by the fact that the instructions did not contain plaintiff's theory of this cause; that the

instructions were unbalanced in defendants' favor; that law was contained in the instruction which was not substantiated by the evidence; and that the trial court failed to direct the bailiff to take the plaintiff's exhibits to the jury room.

All of the above taken together clearly demonstrate a conglomerate of errors adding to a verdict based on passion and a complete disregard of the law. The judgment of the trial court should be reversed and judgment entered in appellant's favor. The least this court should do in order to correct this miscarriage of justice is to grant appellant a new trial.

Respectfully submitted,

BURNS and PARK

by

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Attorney for Appellant