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IN THE SUPREME COURT OF THE STATE OF UTAH

ALBERT BRIDGES and DELEEN BRIDGES, his wife,

Plaintiffs and Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY,

Defendant and Respondent.

Case No. 12359

Brief of Defendant and Respondent

Appeal from Judgment of the Fourth Judicial District Court Utah County, State of Utah The Honorable Edward Sheya, Judge

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A. U. Miner
Union Pacific Building
600 South Main Street
Salt Lake City, Utah
Attorney for Defendant-Respondent

Jackson Howard, for
Howard and Lewis
Delphi Building
120 East 300 North
Provo, Utah
Attorneys for Plaintiffs-Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiffs and Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant and Respondent.

Case No. 12359

Brief of Defendant and Respondent

STATEMENT OF THE CASE

Respondent accepts as sufficient the STATEMENT OF THE NATURE OF THE CASE, the DISPOSITION IN LOWER COURT and the RELIEF SOUGHT ON APPEAL as set forth in appellants' brief.

Italics and emphasis ours unless otherwise indicated.

STATEMENT OF FACTS

Appellants have not seen fit to provide the court with a full transcript of the testimony nor any of the evidence introduced upon the trial of the case by specific testimony of witnesses and for that reason respondent will make a separate statement of facts and refer to such record as is available in support thereof.

In the original complaint and in all papers filed up to the time of trial the deceased was named as "Almon Joseph Bridges." Now in appellants' brief he is named as "Joseph Almon Bridges." Respondent will assume the original complaint to be correct.

The accident in which Almon Joseph Bridges met his death occurred at approximately 11:45 p.m. on October 26, 1968, at a point where a single Union Pacific Railroad track crosses a public highway west of Orem in Utah County. This roadway was originally designated in the complaint (R. 3) as 20th South Street in Orem, Utah. It extends from 20th South in Orem westerly towards the shores of Utah Lake, but it was found that at the point of the accident the roadway is some distance outside of the City limits of Orem City, and therefore at various points during the trial it was designated not only as 20th South Street in Orem but more often as 1600 North Street in Utah County, a Utah County highway (R. 45).

On the date and at the time of night stated, a Union Pacific Railroad train consisting of two switch engine units and thirty gondola or hopper type cars (R. 13)

was traveling in a southerly direction at a speed of approximately 18 miles per hour (R. 14), at which time the deceased, Almon Joseph Bridges, drove his automobile into collision with the seventeenth car back of the engine (R. 14). The collision occurred after the automobile had laid down approximately 165 feet of skid marks and was still of sufficient force to cause the damage to the automobile as shown in defendants Exhibit 46 and in the pictures as taken by the highway patrol as introduced in evidence at the trial as Exhibits 2, 3, 4 and 5. Exhibits 24 and 19, as also 23, as introduced by plaintiffs give a fair representation of the crossing as shown from an aerial view. Exhibit 33 shows a panoramic view of the crossing and the railroad track, together with the highway approach, taken from the roadway at a point approximately 160 feet east of the crossing. Exhibit 1 is an engineer's map made from an actual survey and drawn to scale showing the railroad track and the highways in the vicinity and all fixed objects existing at the time.

There was no flasher or automatic signaling device at the crossing and there was one single crossbuck on the west side of the railroad tracks, which crossbuck had been constructed and placed there new in July of 1968 (R. 15) and was a reflectorized type crossbuck. The deceased, although he approached the crossing from the east, was well acquainted with the crossing and the entire area. He had been raised in the vicinity and had lived his entire life at a point approximately three blocks north and three blocks east of the crossing (R. 27) and

for some time up to within a week or two of the accident had worked—his last job while he lived—at the Clegg Construction Company (R. 29, 30) located on this 20th South Street, shown on Exhibit 24, being the long building nearest where said 20th South roadway underpasses the interstate freeway as shown in Exhibit 24.

During the period of some few years prior to the accident, Interstate Highway No. 15 was being constructed through the area, and in connection with such construction a roadway which had been designated as 1350 North in Utah County was blocked off and made into a dead end roadway as it came against the west side of the freeway. This is shown in the extreme upper portion of Exhibit 24 referred to by appellants. Prior to the freeway construction there had been automatic flashing light signals at the intersection of both Union Pacific and Denver & Rio Grande tracks where this 1350 North Street crossed such tracks in an east-west direction. With the blocking of 1350 North and making it a dead end street there was no more public travel upon 1350 North. The flashers at the two railroad intersections on 1350 North no longer served any purpose, and on July 23, 1963, on behalf of Utah County, the County Surveyor, LaVern D. Green, filed an application with the Public Service Commission of Utah setting forth the facts with respect to the "dead ending" of Utah County Roadway 1350 North, and requested that the flasher signal on the Union Pacific tracks be moved to 1600 North where it would serve a more useful purpose for the public. The application in which Utah County was the ap-

plicant was handled on an ex parte basis and in it Utah County requested permission not only to move the signal but for authority to widen, replank and resurface the crossing. There was no statement, suggestion or even hint of any kind, in such application as filed, that 1600 North Street was in any way an extra hazardous crossing, but permission was merely asked on behalf of Utah County to make the improvements. The matter was docketed as Utah PSC No. 5317. An investigator was sent by the Public Service Commission to go to Utah County, contact the Utah County officials and make such investigation as was thought necessary. An engineer for Union Pacific joined in this investigation. Both of these "investigators" died prior to the time of the accident in question. If there was any written report of the investigation made by the Public Service Commission representative, none has ever been indicated; but after the investigation an ex parte report and order was issued by the PSCU dated February 14, 1964, which specifically stated that it was issued "*upon the application of Utah County for permission to widen and improve two existing railroad crossings over the Union Pacific Railroad . . . to remove the existing automatic electric railroad crossing warning signals at Utah County Road UC-1350 West Street, railroad mile post 755.83 of said railroad . . . and to install automatic electric railroad crossing warning signals at said UC-1600 North Street.*" The Commission's report and order indicates that no notice, public or otherwise, was given and no hearing was held for the purpose of producing evidence or taking

testimony, but the Commission stated that the matter was one which "might be investigated and determined without formal hearing," and after "having investigated the facts and circumstances" *not with respect to any hazards at the crossing* but with respect to the "facts and circumstances pertinent to the application," the Commission, under date of February 14, 1964, among others, made the following findings:

"3. Applicant proposes (also) to remove the automatic electric crossing signals presently existing at County Road U.C. 1350 North Street . . . which now dead ends against the Interstate Highway 15. . . ."

"2. Applicant has widened the surfacing of . . . County Road 1600 North Street . . . *and to further improve* said crossing at U.C. 1600 North Street . . . *applicant* proposes to install, operate and maintain automatic electric crossing protection signals for the protection of the public."

The Commission then finds:

"4. . . . it appears to the Commission that the *proposal of applicant* is in the public interest."

The Commission then goes on to detail certain arrangements to be made by Utah County as "are necessary or required for the proposed construction, operation and maintenance of the said crossing."

There was no mention or even any hint of evidence developed and no finding of any kind as to any conditions—hazardous, extra hazardous, or otherwise—which

might exist at the crossing or at either of the two crossings mentioned.

Following the findings, the Commission concluded that "public convenience and necessity requires that the prayer of the applicant should be granted." The accompanying order merely provided "that the *proposals of Utah County* contained in the application herein *at the County's expense be and the same are hereby approved in accordance with the findings herein. . . .*"

THE FOREGOING FACTS WITH RESPECT TO THE APPLICATION AND PUBLIC SERVICE COMMISSION'S ORDER DO NOT APPEAR IN THE RECORD AS FURNISHED TO THIS COURT BY APPELLANTS, ALTHOUGH APPELLANTS HAVE SEEN FIT TO REFER TO SOME OF SUCH FACTS AND ON PAGE 12 OF THEIR BRIEF PURPORT TO QUOTE THE ORDERING PROVISION OF SUCH ORDER.

Counsel for respondent informed appellants' counsel that such application and order were not in the record and that unless they were properly in the record, could not properly be considered by this Honorable Court and suggested that appellants' counsel make some attempt to furnish such application and order for the court's consideration. As of the time of writing this brief counsel for appellants has not seen fit to do so.

Information with respect to the application to the Public Service Commission of Utah, and the order as

referred to, was discussed prior to the time of pre-trial. Counsel for respondent was advised that appellants' counsel intended to offer them in evidence; whereupon, respondent's counsel filed the Motion in Limine as appears at pages 58 and 59 of the record herein. The trial court heard arguments on the Motion in Limine prior to tht time of selecting the jury on the morning of trial, July 27, 1970, between the hours of 9:00 and 10:00 a.m. (R. 192, Pages 1 to 7, Inclusive). Counsel for respondent had made objections in full with respect to the matter prior to the morning of July 27 and such matters were reported in full in the pre-trial order, hearing on which was had on July 2, 1970, (R. 45, particularly Paragraph 4, Page 2 of such pretrial order).

The matter had been submitted to the trial court fully by brief prior to the time of the trial in line with the stipulated procedure, particularly Paragraph C 2, Page 3, (R. 46).

The trial court granted the Motion in Limine as presented on behalf of defendant and respondent.

The trial court held that if the PSCU order provided anything it would be nothing more than a conclusion without any evidentiary facts or findings as to the crossing or its conditions; that the conclusion was one which the jury was to draw from evidence which would have to be introduced to show actual conditions existing at the crossing.

The trial court held that he would not allow in evidence from any witness the mere statement of a conclu-

sion that such witness thought the crossing was hazardous, and held that such would usurp the function of the jury and that he did not think he should allow any witness to usurp the function of the jury. The court went on to state (R. 192, Page 5): "However, I have no objection to him telling the elements, if he says this, that that crossing has a lot of traffic on it, or if he says that because of any curvature in it it is hazardous or because of something. Now from observation, from his own observation." Again on Page 6 (R. 192), ". . . I think you understand. I want to give you every leeway, but I don't want these witnesses to give testimony on ultimate facts which the jury must determine." *"The elements, yes, they can certainly state all the elements that they deem from observation caused this to be an extra hazardous crossing or whatever they decide.* Does that cover it?"

In the discussion upon the Motion in Limine prior to calling of the jury the morning of trial, counsel for plaintiffs indicated that, among others, he would call Mr. LaVern D. Green, Utah County Engineer, as a witness. During the trial counsel for plaintiffs did call the witness LaVern D. Green (R. 175), but not only has counsel for appellants failed to furnish any transcript of the testimony given by Mr. Green when called on July 27, 1970, but what such transcript would show would be the fact that in spite of the last word given by the court in his ruling as above referred to, counsel for plaintiffs asked such County Engineer *not one single question* as to any condition or circumstance surrounding the crossing which might have in any way thrown

light upon any question of hazards existing at the crossing.

In absence of any evidence to show a hazardous condition at the crossing, with also complete absence of any evidence of negligence on the part of the defendant Railroad Company, and with overwhelming evidence as to negligence on behalf of plaintiffs' decedent, the court granted defendant's motion for a directed verdict (R. 179, Page 2).

STATEMENT OF POINTS

POINT I

THE COURT DID NOT ERR IN REFUSING TO ALLOW INTRODUCTION INTO EVIDENCE OF THE UTAH PUBLIC SERVICE COMMISSION ORDER (PSCU DOCKET NO. 5317) AND THE APPLICATION ON WHICH IT WAS BASED.

POINT II

THE COURT DID NOT ERR IN REFUSING TO SUBMIT TO THE JURY THE QUESTION OF COMPARATIVE NEGLIGENCE OR THE QUESTION OF DEFENDANTS NEGLIGENCE OR THE QUESTION OF DECEDENT'S CONTRIBUTORY NEGLIGENCE.

ARGUMENT

At the outset respondent feels that there is nothing before the court upon which the court could make any determination as to the issues posed by appellants and for that reason the appeal should be dismissed.

POINT 1

THE COURT DID NOT ERR IN REFUSING TO ALLOW INTRODUCTION INTO EVIDENCE OF THE UTAH PUBLIC SERVICE COMMISSION ORDER (PSCU DOCKET NO. 5317) AND THE APPLICATION ON WHICH IT WAS BASED.

Appellants argue that the order of the Public Service Commission should have been admitted in evidence to show some hazard at the crossing in question or to show that the crossing was not a "safe crossing." It is not understandable to respondent how appellants expect this Honorable Court to pass upon the admissibility of any documents which were purportedly offered in evidence without having the documents before this court for the court to read in order that the court may know the content of the documents themselves or what they could show were they available to the court for proper study.

Disregarding what respondent feels to be a fatal defect in appellants' procedure, respondent nevertheless strongly urges that upon a full consideration of the mat-

ters contained in said documents they could not be considered admissible upon any basis.

Appellants state that it was vital to plaintiffs' case that it be shown that the crossing was not a "safe crossing," or that it be shown to be a "hazardous crossing." *Respondent agrees with such statement*, and in spite of the fact that no record of evidence introduced at the trial has been placed before this Honorable Court for consideration, respondent emphatically represents to the court that there was not a scintilla of evidence introduced upon the trial which would in any way tend to show that the crossing was unsafe or that it was an extra hazardous crossing or that it was even an ordinarily hazardous crossing.

Plaintiffs at the trial sought and appellants here seek to prove that the crossing was an extra hazardous crossing purely by virtue of an ex parte order issued by the Public Service Commission of Utah authorizing or directing Utah County to change a flasher light from one roadway which had been dead ended by freeway construction to another roadway still in use where it could serve a better public purpose.

The order in question was issued without any notice or hearing, no evidence was taken, no witnesses were heard. An investigator from the State Public Service Commission and an engineer from the Union Pacific Railroad Company went down and looked the situation over. Both of such parties are now deceased. There is no evidence whatsoever of any written report of any kind

having been made to the Public Service Commission. There was no allegation in the original application and no finding by the PSCU that the crossing was an extra hazardous crossing in any way. There was no finding as to any condition surrounding the crossing which might in any way tend to show it to be hazardous. There was no suggestion of obstructions to view, no indication of any traffic count, no dust or atmospheric conditions that might have affected a view at the crossing, no noise, no curvatures nor inclining or declining approach to the crossing. There was no evidence of any other accidents at said crossing. There was not one item in the findings, nor anywhere else suggested, that would indicate that the Public Service Commission even considered the question of any hazards existing at the crossing. The only thing presented by the application and referred to in the PSCU order was that there had theretofore existed a flasher light at 1350 North Street which had now been dead ended against the freeway and that it would be in the public interest to move that flasher light to a street still in use by the public, and upon that basis the Commission found it would be in the public interest to move the flashing light and *gave permission* to *Utah County* to move the flashing signal at *Utah County's expense*. There was a provision included in the order that Utah County should notify and make arrangements with Union Pacific Railroad Company for working out the mechanics of the actual work to be performed so that the County would not be doing construction work around and affecting the railroad track and railroad operations

without the Railroad Company knowing what was being done and for what reasons and by what authority. This could not by any stretch of the imagination be an order of the Public Service Commission directed to the Railroad Company "to install the crossing control semaphore signals required by the order," and the very statement of the order itself completely refutes appellants' Point No. I where error is charged to the Court and negligence charged against the Railroad Company for *its* failure to install the signals required by the order.

OPINIONS FROM COUNTY OR STATE OFFICIALS, LETTERS FROM SUCH OFFICIALS OR REPORTS OF PUBLIC SERVICE COMMISSIONS, ETC., OR OPINIONS OF SUPPOSED EXPERTS GENERALLY ARE NOT COMPETENT AND ARE NOT ADMISSIBLE AS EVIDENCE OF A HAZARDOUS CROSSING NOR AS A BASIS FOR A CHARGE OF NEGLIGENCE.

The courts which have passed upon the subject have uniformly held that opinions and conclusions of officials and supposed experts while they may in some respect be relevant are not competent as evidence to prove existence of hazardous conditions at a crossing.

Bailey v. B. & O. R. Co., 227 F.2d 344

"Error is next assigned for the court's refusal to admit a letter from the Village Board of LeRoy to defendant asserting that the crossing was dangerous and requesting installation of safety

devices. If offered to prove the fact of the dangerous condition of the crossing, the letter was obviously mere opinion, and therefore incompetent. Plaintiffs contend, however, that the letter may be admitted to show that the railroad had notice of the alleged danger. But even if the crossing were dangerous and the railroad knew it, these facts would not suffice to furnish a basis for a finding of negligence."

Phillips v. Erie Lackawanna R. Co., 259 A.2d 719 (N.J. Dec. 1969)

"There must be a reversal because of the erroneous admission in evidence, over defendant's objection, of the report of a hearing examiner of the Board of Public Utility Commissioners dated March 21, 1967, together with a confirmatory decision and order of the Board, based on evidence received at hearings duly conducted by the officer, wherein it was found that 'visibility (was) obstructed' at the crossing, that two accidents had occurred at the location, and that there should be installed at the crossing automatic flashing lights and bells with appropriate warning signs."

The appellate court further stated:

"As to the prejudicial effect of the admission of the documents there can be no doubt. The conclusions of the PUC concerned the very issue here being tried—i.e., the extra-hazardous nature of the crossing."

"We may add that we do not regard the stated objection of defendant to the PUC documents as irrelevant to the issues as meritorious. They were quite relevant, and in this lies their prejudicial effect, *since they were incompetent*."

Hughes v. Wabash R. Co., 95 N.E.2d 735

The witness in this case was the Assistant Chief Engineer for the Illinois Commerce Commission. He was allowed to testify that in his opinion the crossing was extra hazardous, as a result the Illinois Appellate Court reversed, saying:

> "Defendant was not liable to protect the crossing with safety devices unless it was extra hazardous. With the witness expressing the opinion that he did, he usurped the function of the jury. . . ."
>
> "The trial court erred in allowing the witness Thomas to express his opinion that the crossing was an extra hazardous crossing, and in our opinion this constitutes reversible error."

Russell v. Miss. Central R. Co., 125 So.2d 283

In this case the trial court refused to let a civil engineer give his opinion that the crossing was extra hazardous. In sustaining the trial court, the appellate court stated:

> "The question as to the opinion of a witness was sustained inferring that this was invading the province of the jury. The error assigned refusing the civil engineer and surveyor to testify as expert witnesses regarding whether or not the crossing involved was a dangerous crossing, and extrahazardous to the traveling public, especially at night, was clearly invading the province of the jury in seeking an opinion."

In *St. Louis Southwestern Ry. Co. v. Jackson*, 416 S.W.2d 273 (Ark.1967), a safety director for an Oklahoma company had certain hypothetical conditions stated to him and was then asked his opinion as an ex-

pert as to whether they would make a crossing extra hazardous. The trial court admitted the testimony and, in reversing, the appellate court stated:

> "Not a single one of the foregoing facts taken individually is beyond the comprehension of the average juror; nor can we find any reason to say that an average juror would not be competent to determine from the facts when considered together whether the crossing was abnormally dangerous. We have consistently held that it is prejudicial error to admit expert testimony on issues which could conveniently be demonstrated to the jury from which they could draw their own conclusions. See S & S Construction Co. v. Stacks, 241 Ark. 1096, 411 S.W.2d 508 (1967). Therefore we hold that the trial court committed reversible error in admitting the expert testimony on the abnormally dangerous crossing."

See also *Alabama Great Southern R. Co. v. Bishop*, 89 So.2d 738, *Hargadon v. Louisville and Nashville R. Co.*, 375 S.W.2d 834, and *Central Mfg. Co. & St. Louis-San Francisco Ry. Co.*, 394 F.2d 704.

PLAINTIFFS' CASES

On pages 6 to 15 of appellants' brief a number of cases are referred to and quoted from but *not one single case referred to on said pages is in point upon the question of admissibility of an opinion or order from a public official or public body to prove an unsafe crossing.* In the case of *Van v. Union Pacific Railroad Company*, 366 P.2d 837 (Idaho), P. 6) there was substantial

evidence introduced to go to the jury as to the nature of the crossing. The case is very similar to the case of *Pippy v. Oregon Short Line R .Co.*, 79 Utah 439, 11 P.2d 305. In the Van case there were five tracks to cross with railroad cars on the near tracks blocking the view. A train came around a bend in the track after it had moved in a switching movement in one direction and then reversed. The court concluded that a jury question was presented because reasonable men could differ on the facts and circumstances in evidence. In this Bridges case the plaintiffs did not introduce any of such "facts and circumstances" and the Public Service Commission order in question referred to no "facts and circumstances" existing at the crossing.

In the case of *Fleenor v. Oregon Short Line R. Co.*, 102 P. 897, (P. 6), a pedestrian was killed at a populous street crossing. There was evidence as to lack of whistles or bells, no headlight and a train operated at excess speed through a highly populated area. No such evidence appears in the Bridges case.

In *Finn v. Spokane P. & S. Ry. Company*, 214 P.2d 354 (Ore.) (P. 7), no question of official order was involved. The evidence showed the roadway to be an arterial highway over which heavy traffic moved. "It was a cold dark and foggy morning and plaintiff had visibility of only 30 to 40 feet."

On page 8 counsel quotes from the Finn case and refers to other Oregon cases.

In the case of *Fish v. Southern Pacific*, 143 P.2d

917, 145 P.2d 991, (P. 8), there was evidence that plaintiff's vision of the main line track was obstructed by boxcars on a switch track parallel thereto.

In the case of *Doty v. Southern Pacific Company*, 207 P.2d 131, (page 8) the plaintiff's vision was also likewise obstructed by boxcars.

There was other evidence considered in both of these cases relevant to the danger of the railroad crossing but the obstruction of vision by the boxcars was the principal factor. In the Fish case the track approached on a curve. The street approached the crossing on a rising grade and vision was obstructed by buildings, trees and shrubbery, including a railroad tool house. Under these circumstances and not because of any Commission order or other official order, the court said that the question of "whether the crossing in question was extra hazardous or dangerous must be determined after consideration of all the facts and circumstances." In the Bridges case at bar there were no "facts and circumstances" presented at the trial from which a jury could make any consideration or draw any conclusion.

In the case of *Dimick v. Northern Pacific Railway*, 348 P.2d 786, (page 11), the roadway approached on an incline with lights ahead which were confusing to a highway traveler, particularly one not acquainted with the area. Young Bridges who was killed in the accident in the case at bar was not a stranger unacquainted with the area. He had lived near this crossing for his entire life (R. 27) and his most recent point of employment was

on the same roadway approximately 1000 feet easterly from the crossing in question (R. 29-30).

In the case of *Coffman v. St. Louis-San Francisco Ry. Co.*, 378 S.W.2d 583 (page 11) there was an incline in the highway with curves approaching the crossing and obstructions to view by buildings and trees in the area.

The case of *St. Louis-San Francisco R. Company v. Prince*, 291 P. 973, 71 ALR 369, is referred to on page 10 of appellants' brief. The quotation there given is not from the case itself but from the annotator's head notes, and in connection therewith we would admit that if there was evidence of "peculiar construction and situation" or the amount of traffic passing thereover, or any other evidence from which a jury could draw any conclusion as to the dangerous condition of the crossing, then submission to a jury might be proper. No such evidence was introduced in this Bridges case.

It is interesting to note that the annotation in 71 ALR 369 is the second annotation upon the subject. The first one appears in 16 ALR 1273. In both of these volumes the first case cited at the beginning of the annotation is the case of *Grand Trunk Railway Co. v. Ives*, 144 U.S. 408, 36 L.Ed. 485, 12 S.Ct. 679. That case as decided by the United States Supreme Court has been a landmark case for many years and is repeatedly cited in these railroad accident cases even today. In that case the United States Supreme Court stated:

> ". . . It seems, however, that before a jury will be warranted in saying, in the absence of any

statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous: as, for instance, that it is in a thickly populated portion of a town or city; or, that the view of the track is obstructed either by the company itself or by other objects proper in themselves; or, that the crossing is a much travelled one and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle and confusion incident to railway or other business; or, by reason of some such like cause: *and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country. . . .*"

There was no evidence whatsoever introduced upon the trial of the case at bar as to hazardous conditions existing at the crossing. The photographs and the map, Exhibit 1, show that the crossing is located in a wide open country district, not in a heavily populated area. The only evidence with respect to traffic upon the roadway was introduced by defendant not by plaintiff (Exhibits 52-54). There was no evidence of any obstructions, noise, adverse climatic conditions, curvatures or incline in the roadway. The exhibits show contrary. There was no evidence as to any other accident. The only evidence is to the contrary (R. 15). The pictures which were introduced on behalf of plaintiffs were taken by one Bryant Hanson, who was produced as a witness for plaintiffs (R. 179). Hanson's sole occupation is a private accident investigator. Yet, except for identify-

ing the pictures, he said not one word about any hazardous conditions existing at the crossing.

On page 14 appellants state, "That the order of the Public Service Commission was based upon sufficient evidence at a regularly held meeting was not disputed, and the document, therefore, speaks for itself." **RESPONDENT DOES NOT AGREE WITH THIS STATEMENT.** Such evidence as there is in the record does dispute the statement so made. There was no "regularly held meeting" or hearing held by the Commission, and as to "sufficient evidence," there is not one item of evidence shown anywhere in the record nor would any appear from the application and PSCU order were they before the court. We would agree partly with appellants that "the document . . . speaks for itself" if appellants had only seen fit to bring to and present the documents before this court for consideration so that they could speak for themselves.

On page 10 of their brief appellants quote a statement that "actual or constructive knowledge of the circircumstances" is "an essential element" to impose liability upon the Railroad Company. If plaintiffs in making proof on their case had produced any evidence sufficient for a jury's consideration with respect to any hazardous conditions existing at the crossing, then the question as to the railroad's knowledge, actual or constructive, might be of some materiality, but that does not assist appellants in this case because no evidence of circum-

stances existing at the crossing was introduced in evidence before the jury; and in spite thereof, at the pretrial it was stipulated that the defendant knew of and had received a copy of the Public Service Commission report and order "and had full knowledge of its contents shortly after its issue." (R. 45 P. 2 Para. 5a). There is nothing in such order, permitting Utah County to remove a flasher signal from a street dead ended by freeway construction to an open street, that would give the Railroad Company any knowledge either actual or constructive as to any hazards that may exist at the crossing.

Even had the flashing light actually been moved and relocated, this still would not have put the Railroad Company on notice of any claimed hazards at the crossing.

A case which has been cited almost as much as the case of Grand Trunk Railway Co. vs. Ives is the case of *Bledsoe v. Missouri, K. & T. R. Co.*, 90 P.2d 9 (Kans.). In that case the trial court allowed the question to go to the jury and the Supreme Court of Kansas reversed, saying:

> "Plaintiffs further contend that whether a railroad crossing is unusually dangerous is a question of fact for the jury . . . *This is true only when there is substantial competent evidence that the crossing is unusually dangerous. Unless such evidence is produced the question is one of law for the court.* The authorities on this point do not go so far as to authorize allegations to be made respecting any railroad crossing to the effect that

it is unusually dangerous, and because of such allegations to say that the question is one for the jury."

The question of automatic signals became an issue on the appeal in that case because after the accident, by the time of trial, the State Highway Department had installed automatic electric signals and mention was made of this at the trial; however, the Kansas Supreme Court said:

> "By the time of the trial an electrical wig-wag and lights had been installed at this crossing. Plaintiffs made much of that in the trial court and here. The evidence in the record makes it clear that these devices were not installed at the expense of the railroad company by reason of an order of the state highway commission made in pursuance of G.S. 135, 68-414. . . ."
>
> "On the other hand, the devices were installed by the state highway commission under a written agreement with defendant here that its men would install the devices and the state highway commission pay the cost thereof, which was done. *In other words, this was done by the state as a highway improvement project, at its own expense.* Obviously, the state highway commission did not regard the crossing as being so unusually dangerous that it would be justified in making an order requiring defendant to install additional safety devices or warning signals at its expense."

We earnestly insist with respect to the case at bar that it is obvious that the Public Service Commission of Utah did not think that the crossing in question was extra hazardous or dangerous enough to require the Railroad Company to install the flasher lights in ques-

tion, but upon request of the County merely granted permission to the County to make improvements at this and other crossings and to move the existing signals at the *County's expense* and only added that the Railroad Company should be notified in order to properly coordinate operations with both highway and railroad traffic.

A finding "that the proposal of the applicant is in the public interest" could not possibly be considered as improper in any view of the circumstances; but this cannot by any stretch of the imagination be considered as any sort of a finding by the Public Service Commission that the crossing in question or either of the two crossings were in any way hazardous or extra hazardous. It was merely an ex parte approval by the PSCU of a request by the County to move at its expense a flasher signal from a street which had been "dead ended" by freeway construction, and where clearly it would serve no further public purpose, to a nearby highway crossing still in use where it could serve a useful purpose and thus be in the interest of the public to do so.

The case of *Baltimore and Ohio Railroad v. Felgenhauer*, 168 F.2d 12, cited at page 15 of appellants' brief is typical of the "several cases" which have been cited "in support of appellants' position" and is the only case which makes any reference to any order of a public service commission or other public body. That case, however, is entirely contra to plaintiffs' position in this case and holds that such order is not admissible to show any

hazardous condition or any negligence or "violation of duty" on the part of the Railroad Company. In that case, about two months prior to the accident, the Illinois Commerce Commission had made a traffic survey and found that during a ten hour period 2810 vehicles moved over the crossing, which was a busy crossing in a "built up part of the city." The Commission did issue an order and the order was admitted into evidence but the finding as to the "extra hazardous nature of the crossing" was not based thereon. At page 14 of 168 F.2d the court stated that a decision "requires a brief statement of the facts developed upon the trial," and the court then proceeds for approximately two pages to "briefly" state such facts which had been testified to by witnesses, finally concluding that the evidence was sufficient for the jury's consideration and decision. The facts introduced by testimony, in addition to showing the traffic count over a busy city street, showed that there were three railroad tracks in the vicinity with substantial switching back and forth in the area. Within 150 feet of the crossing the "railway curves to the south" and there were buildings and structures, including standing railroad rolling equipment, which "restricted the view." In addition to switching movements "noises in the neighborhood rendered it difficult to hear signals." Within a short period of time prior to the accident in question there had been twelve reportable accidents at the crossing, and within a period of nine years prior thereto there had been eleven fatal accidents at the crossing. These facts and conditions surrounding the crossing and the testimony with respect

thereto as stated above took nearly two pages for the court to "briefly" state.

With respect to the order which had been issued by the Illinois Commission, the trial court gave an instruction which the Eighth Circuit Court of Appeals approved, stating: "*This order does not show any violation of duty by the defendant*, the Baltimore and Ohio Railroad Company, *and it was not received in evidence for that purpose.*" Other overwhelming evidence as to the conditions of the crossing was introduced and the order was "received in evidence for the limited purpose only of showing that the extra hazardous condition of those crossings was brought to the attention of the defendant at that time by the Illinois Commerce Commission."

In the case at bar had there been evidence of any hazardous conditions at the crossing, it would not have been necessary to introduce the PSCU order to show notice to the defendant herein. Knowledge on the part of the respondent of the PSCU order in question was not only early admitted to but stipulated to (R. 45, Page 2, 5 a).

The Felgenhauer case, as well as most of the other cases cited by appellants, referred to and many of them quoted from the case of Grand Trunk Railroad Co. v. Ives, supra.

A more recent decision of the Eighth Circuit Court of Appeals is the case of *Gant v. Chicago & Northwestern Ry. Co.*, 434 F.2d 1255 (Iowa 1970), wherein the court in referring to various bases or principles which

must be considered in such cases, stated: "Our duty is not to decide whether the crossing in question was in fact extra-ordinarily hazardous so that some warning beyond the statutory requirements was called for, but only to say whether there was substantial evidence from which a jury might so find. . . ." The court referred to and quoted the matter hereinabove quoted from the case of Grand Trunk Railroad Co. v. Ives, and after referring to other cases cited by plaintiffs in that case concluded: "In each of the cases relied upon by plaintiff some physical factor or some type of evidence was present which is conspicuously absent in the instant case." In the Bridges case at bar there is a conspicuous absence of evidence which would in any way tend to show physical factors surrounding the crossing. In fact, as shown by the picture exhibits and maps in evidence, the statement of the Eighth Circuit Court in the Gant case is very applicable: "Indeed, it is established that all four quadrants of the intersection just west of the crossing are open fields, and there are no obstructions or buildings within 500 feet of the crossing."

In the offer of plaintiffs' counsel he stated (R. 192, Page 2) that Mr. Hanks would testify "they had numerous hearings" where "citizenry came into their chambers to complain" about conditions at the crossing. If there had been numerous citizens who had so complained, it is inconceivable that plaintiffs could not have produced just one or two as witnesses who could have testified before the jury at the trial as to actual conditions at the crossing of which they had theretofore com-

plained to the County Commission. Testimony from Mr. Hanks as to the content of any actual complaints would be hearsay and testimony that there had been complaints would not be competent or probative evidence as to any existing hazardous condition if such there might have been.

The order of the Public Service Commission either with or without any accompanying supporting documents as tendered by plaintiffs was cleary inadmissible and incompetent as evidence to prove any issue in the case, and the court did not err in granting the Motion in Limine and in refusing to admit the proffered evidence.

POINT II

THE COURT DID NOT ERR IN REFUSING TO SUBMIT TO THE JURY THE QUESTION OF COMPARATIVE NEGLIGENCE OR THE QUESTION OF DEFENDANT'S NEGLIGENCE OR THE QUESTION OF DECEDENT'S CONTRIBUTORY NEGLIGENCE.

In restating their Point II for purposes of argument on Page 18, appellants neglected to include in such restatement the question of submitting this case to a jury on the basis of comparative negligence and restate their Point II as including anly defendant's negligence or decedent's contributory negligence. However, except for a few lines on the bottom of Page 18 and top of Page 19, the entire remainder of the brief includes argument on the question of comparative negligence.

With respect to the question of defendant's negligence or decedent's contributory negligence, respondent will only state that there is nothing before the court which can be considered by the court at this time on the question of defendant's negligence or the question of decedent's contributory negligence. Without a transcript of the testimony or evidence introduced before the jury sufficient to show some basis for a finding of negligence, either way, there is absolutely no basis upon which this court could decide whether or in what way defendant was negligent or whether or in what way the decedent was contributorily negligent, and in the face of such record there is no possible basis upon which this Honorable Court could question or overturn the ruling of the trial court with respect to such matters.

Even upon the theory of comparative negligence, where there is no evidence and no transcript showing what might have been before the jury, there is no way that this court could conclude whether or not there was any evidence on the part of either the deceased or the defendant which could in any way *be compared* even should there be an attempt to apply the doctrine of comparative negligence.

COMPARATIVE NEGLIGENCE

In the last four plus pages of their brief appellants have argued and cited a numer of law review articles and theoretical discussions with respect to the comparative negligence doctrine. Respondent will not attempt

to answer or argue any of such theories, treatises or discussions of such doctrine and will only state that regardless of what may or may not be some sort of a trend as indicated by various theses of these liberal law school professors and others, respondent prefers to follow what has been accepted and followed as general American doctrine by the majority of the courts in the United States.

At the beginning of statehood, the State of Utah in the Revised Statutes of 1898 stated in Section 2488, Page 559:

> "The common law of England, so far as it is not repugnant to, or in conflict with the constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state."

This adoption of the "common law" is in effect a statutory enactment which by statute makes such common law the law of the State of Utah to be followed by its courts. Although it is stated in the statute as "the common law of England," the courts have interpreted and considered this to be an adoption of that "common law" as it has been developed and recognized and followed in the various states of the United States rather than the old common law as it had been developed in England prior to the date of this statutory enactment. However, considering such to be the case, such common law as it has been adopted and followed in the United States has continued in the large majority of all of the states of the Union to recognize that the above quoted

statute has the effect to make that general common law the enforceable law until and unless it has been changed by the legislative representatives of the various states which might be involved. There have been a few of the states in the United States that have changed this doctrine—less than 20 percent—and in none of them has such a change in this law with respect to comparative negligence been adopted except by act of the people's chosen representatives in the state legislatures—in spite of any theories that have been advanced over the years by the various liberal law professors and writers on the subject.

In the recent case of *Bates v. Donnafield*, 481 P.2d 347 (Feb. 1971), the Supreme Court of the State of Wyoming had a similar question before it. It did not involve a question of railroad or intersectional accidents but it did involve urging on the part of the plaintiffs to have the courts change a provision of the common law. It was argued in that case that "the common law rule long prevailing in the United States is for various reasons unwarranted and that this court should follow what plaintiffs contend to be a definite trend to overrule it." In affirming a trial court's decision against plaintiffs on such theory, the Wyoming Supreme Court stated:

> "We do not . . . agree that an ancient doctrine firmly imbedded in that great body of Anglo-Saxon law which we inclusively refer to as the 'Common law,' and which became that law through early usage and custom, can be judicially abrogated any more than courts are authorized to abolish statutory law because in their opin-

ion the reason for the legislative enactment no longer justified the continuance of the law."

"We think it far more salutory and in the overall more equitable that the common law which we have adopted in this jurisdiction be changed by legislative enactment, which would admit of some certainty as to the state of the law rather than speculation as to what trends might be adopted."

Upon urging similar to that of appellants in the case at bar, the State of Idaho in ***Whiffin v. Union Pac. R. Co.***, 89 P.2d 540, at 551, stated:

"Until the law-making power repeals the rule of contributory negligence, it is for the courts to enforce it as it stands. They are not at liberty to amend it in the interest of auto drivers, even though the latter now form a very numerous portion of the community. The rule is based upon the idea that under all situations of danger, it is for every rational person to exercise due care for his own safety. Whether such care has been exercised is a question of fact, ordinarily for solution by a jury. But occasionally it is so clear that a plaintiff has omitted an obvious precaution for his own safety, required by any measure of due care however lax, that it becomes the duty of the court to deny him recovery. This is such a case."

The doctrine of comparative negligence has been expressly rejected by this Utah Supreme Court in a case that was decided in 1911. Although it is an old case, it has never been overruled on that particular point. See ***Myers v. San Pedro, L.A. & S.L.R. Co.***, 39 Utah 198, 116 P. 1119. In that case this court said: @ 39 Utah 203

". . . The doctrine does not and never did prevail in this jurisdiction."

Volume 65 A, C.J.S., at Page 258, states that the doctrine of comparative negligence "is not recognized in any state, except where statutes establish the doctrine."

The State of Nevada has refused to adopt the doctrine in absence of legislative action. See *Cox v. Los Angeles and S.L.R. Co.*, 58 P.2d 373.

The case of *Maki v. Frelk*, 229 N.E.2d 284 (Ill.), is the only case from any court cited by appellants, and this is a case upon which appellants relied in the trial court. Counsel on page 20 admits that this lower court decision has now been overruled and reversed by the Illinois Supreme Court. The trial court in that case refused to adopt or follow the theory of comparative negligence. The matter went first from the trial court to the Illinois Appellate Court of the Second District, which court reviewed the history of contributory negligence, pointing out the fact that it had its origin in England in 1809, but that in spite of that English doctrine, Illinois had adopted the doctrine of comparative negligence as early as 1858. After 1858 the compartive negligence doctrine was followed in Illinois for many years until towards the end of the century. Even the State of Illinois, however, veered away from the doctrine during that period. That intermediate appellate court referred to the fact that at the time of such hearing "in seven states a form of comparative negligence has been adopted." The court neglected to state that in all of those

seven states the doctrine of comparative negligence had been adopted by the legislature and not by the courts. Nevertheless, that intermediate appellate court adopted and applied such comparative negligence theory. The matter then went directly by appeal to the Supreme Court of the State of Illinois, 239 N.E.2d 445, which court reversed the appellate court (July 1968) and held the matter to be one for the legislature to decide, saying:

> "After full consideration we think, however, that such a far-reaching change, if desirable, should be made by the legislature rather than by the court. The General Assembly is the department of government to which the constitution has entrusted the power of changing the laws."
>
> ". . . when a rule of law has once been settled, contravening no statute or constitutional principle, such rule ought to be followed unless it can be shown that serious detriment is thereby likely to arise prejudicial to public interests . . . The rule of stare decisis is founded upon sound principles in the administration of justice, and rules long recognized as the law should not be departed from merely because the court is of the opinion that it might decide otherwise were the question a new one."
>
> "Counsel on both sides have argued this case at length, supplying the court with a comprehensive review of many authorities. But we believe that on the whole the considerations advanced in support of a change in the rule might better be addressed to the legislature. As amici have pointed out, the General Assembly has incorporated the present doctrine of contributory negligence as an integral part of statutes dealing with a num-

> ber of particular subjects . . . and the legislative branch is manifestly in a better position than is this court to consider the numerous problems involved."
>
> "The judgment of the appellate court will therefore be reversed, the order of the circuit court affirmed. . . ."

We think this court is aware of the fact that in the 1971 regular session of the Utah Legislature the theory was presented to the Utah Legislature both by House Bill 7 and Senate Bill 25, and after consideration by both Houses of the Utah Legislature, each of the two bills was defeated, with the provision however that the matter be referred to the Utah Legislative Council for interim study. In the face of such prospective action, it is inconceivable that this court against all precedents that have appeared to date in the various states of the United States, would by court decree make any change in the long established and followed principles of law within the State of Utah, at least until after the legislative representatives have, pursuant to legislative direction, made a full study and report of the matter.

CONCLUSION

As stated at the outset of this brief, respondent earnestly insists that there is nothing properly before this court in the record as produced herein by appellants

which would justify the court in doing anything but dismissing the appeal for lack of proper record and proper presentation of facts which could and of necessity would have to be considered by this court.

Regardless of the record or any lack of proper matters in the record presented to the court, even upon a full consideration thereof upon any basis of merit, there is no escape from the conclusion that the order of the Public Service Commission of Utah and any documents accompanying it or tendered in connection therewith were incompetent and not sufficient as probative evidence to in any way suffice for submission to and for a jury to make any determination upon the issue as to whether or not any hazards or extra hazardous conditions existed at the crossing in question at the time of the accident.

Upon the same basis and for the same reason—an entire lack of record, testimony or evidence showing or even tending to show any basis for either negligence on the part of the defendant or contributory negligence on the part of plaintiffs—this court can do nothing except to affirm the action of the trial court. Upon the basis of any argument with respect to comparative negligence, both law and precedent, as well as reason, would compel the conclusion that this is a matter that must be addressed to the discretion of and action by the legislature of the State of Utah rather than action by this court as requested.

The judgment of the lower court should be affirmed in full.

Respectfully submitted,

A. U. Miner
S. A. Goodsell
J. C. Williams

Attorneys for Respondent
Union Pacific Railroad Company

600 Union Pacific Building
Salt Lake City, Utah 84101