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Somchay Bansasine v. Lucas Bodell and Lang Rajsavong : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

SOMCHAY BANSASINE, guardian for SUSAN PHONEPRELAI KIERSTAD, a minor, Plaintiff/Appellant, v. LUCAS BODELL, and LANG RAJSAVONG, Defendants/Appellees.	APPELLANT'S REPLY BRIEF Appeal No. 960077-CA Argument Priority No. 15

REPLY BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

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SUMMARY OF ARGUMENT

No reasonably prudent person would drive like Rajsavong did, for fear of causing a dangerous confrontation like the one which occurred. The intervening criminal act of Bodell in brandishing a gun does not rise to the level of a superseding cause, simply due to its criminal nature. Despite the wrongfulness of such an act, if the intervening act of Bodell was itself a foreseeable result of the initial negligence, a jury can find proximate causation.

Generally, questions of proximate causation are properly matters of fact to be determined by a jury, not by summary judgment. This is particulary true where, as in this case, reasonable minds could differ as to the proximate cause of an injury.

ARGUMENTS

I. INTERVENING CRIMINAL ACTS DO NOT SUPERSEDE PROXIMATE CAUSATION WHERE SUCH ACTS ARE FORESEEABLE.

Throughout his Brief, Rajsavong equates criminal or socially undesirable conduct--such as Bodell's brandishing a gun in response to Rajsavong's provocation--with unforeseeable conduct. While such conduct may on occasion rise to the level of superseding cause, the Utah Supreme Court has repeatedly stated that criminal conduct, if foreseeable, will not preclude a finding of proximate causation:

> An intervening, independent, and efficient cause ordinarily severs whatever connection there may be between the defendant's negligence and the plaintiff's injuries, *unless* the intervening cause was foreseeable (citation omitted; emphasis in original). Thus, the fact that the instrumentality that produced the Cruzes' injuries was the criminal conduct of a third person "would not preclude a finding of proximate cause if the intervening agency was itself a foreseeable act (citations

> omitted)." In this case, the thief's criminal acts, though intervening, do not preclude a finding of proximate cause if the acts were foreseeable. The alleged facts of this case, if proved, may have made the theft of the car and the thief's subsequent negligent and injurious driving foreseeable.

Cruz v. Middlekauf Lincoln-Mercury, Inc., 909 P.2d 1252, 1257 (Utah 1996) (car dealer's negligence in leaving keys in car was proximate cause of injury; theft of car and resultant injury was foreseeable and not superseding). See also *Mitchell v. Pearson Enterprises*, 697 P.2d 240, 246 (Utah 1985) ("The fact that the instrumentality which produced the injury and subsequent death was the criminal conduct of a third person would not preclude a finding of proximate cause if the intervening agency was itself a foreseeable act"); *Steffensen v. Smith's Management Corp.*, 862 P.2d 1342, 1346 (Utah 1993). The Supreme Court's approach follows the same general approach outlined in the Restatement (Second) of Torts, §§ 448, 449.[1]

A. A dependent intervening force is set in motion by the actor's negligence, and as such, is more likely to be reasonably foreseeable.

The Restatement also makes the distinction between independent and dependent intervening forces. It defines a dependent intervening force as "one which operates in response to or is a

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[1] Restatement (Second) of Torts, § 448 states:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime (emphasis added).

reaction to the stimulus of a situation for which the actor has made himself responsible by his negligent conduct[,]" while an independent intervening force "is one the operation of which is not stimulated by a situation created by the actor's conduct." § 441, Comment c. Between the two, a dependent intervening force is more likely to be a foreseeable one since, being a response to the actor's negligence or recklessness, it is part of the chain of causation initiated by the actor, and its resultant injury would not have occurred but for actor's conduct and the response such conduct stimulated. Even if Bodell's response in shooting was intentional, and not accidental, it was a dependent, foreseeable intervening force, since it was in response to Rajsavong's provocation, and would not have occurred but for such provocation. Thus, if Bodell's response--no matter how criminal or socially unacceptable--to Defendant's aggressive driving was reasonably foreseeable, such response, though intervening, would not preclude a finding of proximate causation.

The reasonableness of finding proximate causation in this case is illustrated by contrasting it with the Utah appellate cases involving foreseeable independent intervening causes. Bodell brandished a gun in direct response to Rajsavong's actions. However, the car dealer in *Cruz* did not provoke the thief to steal a car and drive recklessly away. The hotel owner in *Mitchell* did not provoke the unknown assailant to commit murder on a patron. The grocery store in *Steffensen* did not provoke the shoplifter to steal and flee. Bodell's conduct was much more foreseeable than the actions of the criminals in these other cases.

However, the Utah Supreme Court felt that a car dealer should foresee that leaving keys in a car might lead to a thief causing an accident while fleeing. *Cruz,* supra, at 1257. A hotel owner

should foresee that a lack of decent locks on a hotel room might lead to a burglary or robbery upon a patron. *Mitchell*, supra, at 246. A store owner should foresee that a shoplifter might injure someone while fleeing. *Steffensen*, supra, at 1346. The risk of injury in each of these situations is less foreseeable than that Rajsavong's driving might provoke a deadly response.

B. Bodell's response and the resultant injury were foreseeable both specifically and generally.

Rajsavong concedes the crucial point that "it may have been foreseeable that *some* harm could have befallen Decedent [Kierstad] as a result of Rajsavong's negligence". Rajsavong's Brief at p. 10. Rajsavong argues that negligent injury, such as by collision, may be a proximate result, while intentional injury is unforeseeable. Rajsavong forgets that Bodell always maintained that the gun went off accidentally. Bansasine alleged in the alternative in her complaint that the gun which Bodell brandished in self-defense went off accidentally. Thus, Rajsavong's distinction between intentional and accidental injury supports rather than refutes Bansasine's appeal.

Having conceded that Rajsavong created a risk of harm to Kierstad, Rajsavong then argues that he could not foresee the specific way it came about, by a brandished firearm. He only admits that he could foresee an accidental collision might result from his actions. This overlooks the hornbook law that the precise manner of injury need not be foreseeable, "only the general nature of the injury need be foreseeable." *Steffensen*, supra at 1342.

Alternatively, Rajsavong tries to classify the potential injuries arising from Defendant's threatening driving as either: (1) injuries arising from the driving of two vehicles traveling at high

speed, such as collision (foreseeable), or (2) injuries arising from the non-driving act of one of the drivers (unforeseeable). Rajsavong Brief at 9-10. This is a meaningless and artificial distinction.

Rajsavong encountered the Bodell vehicle late at night on the freeway, circumstances which allowed the drivers a certain amount of anonymity. Bodell's vehicle was a four-wheel drive pickup which Bodell was driving erratically, in an intimidating manner, and at a high speed. Rajsavong chose to purposely antagonize this vehicle under these circumstances. Given the above fact scenario, it is not an unreasonable observation that, in willingly antagonizing such a vehicle, being shot at from the vehicle would be just as likely as colliding with or being run off the road by the same vehicle.

While brandishing a loaded weapon at an antagonistic or aggressive driver is outside the realm of civilized behavior, it is not beyond the realm of common experience. Reasonably prudent persons anticipate and avoid situations that foreseeably result in uncivilized, dangerous behavior. At the least, reasonable minds could disagree as to whether Bodell's response was foreseeable or unforeseeable. The foreseeability of such behavior is properly a question for the jury, not the court.

II. PROXIMATE CAUSATION IS A MATTER OF FACT PROPERLY DETERMINED BY A JURY.

The Utah Supreme Court has stated that, "Generally, proximate cause is an issue for the jury to decide." *McCorvey v. Utah State Dep't of Transp.*, 868 P.2d 41, 45 (Utah 1993). See also *Godesky v. Provo City Corp.*, 690 P.2d 541, 544 (Utah 1984); *Watters v. Querry*, 626 P.2d 455, 458 (Utah 1981) (issue as to foreseeability of driver immediately behind plaintiff being inattentive was

jury question). The jury is the appropriate forum for the determination of proximate cause questions due to the inherently fact-specific nature of such questions. As such, a court should exercise summary judgment in questions of proximate causation only in those extremely rare instances where reasonable minds could not disagree as to the facts. *Jensen v. Dolen*, 397 P.2d 191, 192 (Utah 1962); *Steffensen* at 1346. In particular, questions of foreseeability and superseding causation, being fact-intensive, will almost always have to be resolved by the jury. See *Jensen v. Mountain States Tel. and Tel. Co.*, 611 P.2d 363, 365 (Utah 1980); *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1293 (Utah App. 1996); *Steffensen* at 1346.

Even in instances where the facts are not in dispute, as in this case, if the inferences derived from those facts could reasonably be in dispute, the issue of proximate cause should be submitted to the jury. *Harris v. Utah Transit Authority*, 671 P.2d 217, 220 (Utah 1983); *Butterfield v. Okubo*, 831 P.2d 97, 106 (Utah 1982).

Rajsavong argues that summary judgment, as was exercised by the trial court in this case, "is appropriate where the evidence fails to establish a direct causal relationship between the alleged negligence and the injury." Rajsavong Brief at 5. However, the facts in this case have established that Rajsavong's negligence was the direct cause-in-fact of Kierstad's death: but for Rajsavong's taking exception to the manner in which Bodell passed him on the road, and Rajsavong's willfully escalating the chance encounter between the two vehicles by deciding to catch up to Bodell, and engage in antagonistic, cat-and-mouse driving, Kierstad would not have been shot by Bodell.

The only possible questionable element of causation in this case is that of proximate

causation: did Bodell's intervening act supersede Rajsavong's cause-in-fact negligence? As discussed above, reasonable minds could differ as to whether Bodell's act was a either a foreseeable or unforeseeable result of Rajsavong's aggressive driving.

In this particular instance, summary judgment was improper because: (1) facts in evidence did establish a **direct**, "but-for" causal relationship between Rajsavong's driving and Kierstad's death; (2) to the extent that proximate causation is an issue, reasonable minds could disagree as to whether Bodell's actions were foreseeable or superseding; and (3) to the extent reasonable minds could differ on the issue of foreseeability, the question of foreseeability is an issue of fact properly to be considered by a jury rather than summarily dismissed by the court.

CONCLUSION

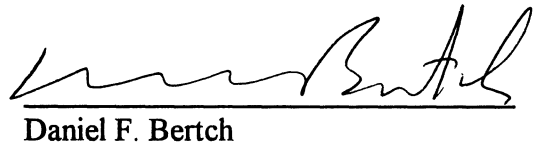
Lawyers and judges can debate abstract principles of legal causation to the point where it resembles medieval theology. See supra. Jurors and the parties live in a real world, where one's safety depends on recognizing situations that lead to violence, and then avoiding them. The foreseeability of violence is dependent on each individual fact pattern, and jurors use their common sense to draw the dividing lines. Consider the following fact patterns:

A. A housewife/mother driving an Astrovan with eight children, on her hurried way to Sunday School accidently and inadvertently cuts off another driver in an upper-middle class, suburban east side Salt Lake County neighborhood with relatively little violence. The other driver, who is mentally unstable and on drugs, pulls out a gun and starts shooting. Probable jury conclusion: unforeseeable.

B. Two white teenagers in a Ford 4X4 with shaved (skin) heads, and a bumpersticker stating that the driver is insured by Smith & Wesson, drive down North Temple west of I-15 at midnight on a Saturday night, and flip off a car full of minority youths, after high-beaming them, and chasing them through the northwest neighborhoods of Salt Lake City. Something metallic in appearance flashes (a beer can or a handgun?). Someone in the other car pulls a gun and which goes off, either accidentally or intentionally. Probable jury finding: Not only foreseeable, but a foregone conclusion.

The violence in situation A is random, unpredictable and unforeseeable. It could happen to anyone without warning. The violence in situation B is a virtual certainty. The only question is not whether, but when it will happen. Does the Bodell/Rajsavong/Bansasine drama most resemble situation A or B? Bansasine has faith that, given the chance, eight randomly selected laypersons can give the correct answer.

DATED this 26 day of August, 1996.



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CERTIFICATE OF MAILING

I hereby certify that on the 26 day of August, 1996, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF upon the following, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

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