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Maurine Elg v. Boyd Fitzgerald and valley View Riding Stables : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIGIAM YOUNG UNIVERSITY
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MAURINE ELG,

Plaintiff and Appellant,

vs.

BOYD FITZGERALD and VALLEY
VIEW RIDING STABLES,

Defendants and Respondents.

Case No. 14169

APPELLANT'S BRIEF ON APPEAL

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, HONORABLE G. HAL TAYLOR, JUDGE

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FILED

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Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	5
POINT I. THE COURT ABUSED ITS PREROGATIVES BY REFUSING TO ACCEPT UNCONTROVERTED CREDIBLE EVIDENCE AND IGNORING AND MISAPPLYING PROVEN FACTS AND ESTABLISHED LAW, TO WIT: THE DOCTRINE OF RES IPSA LOQUITUR	5
POINT II. THE COURT ERRED IN FAILING TO FIND THAT APPELLANT PROVED AND ESTABLISHED A PRIMA FACIE CASE OF NEGLIGENCE AGAINST RESPONDENT AND IN FAILING TO SHIFT THE BURDEN OF PROOF TO THE RESPONDENT TO SHOW THAT THE DRIVER OF THE HAYWAGON WAS NOT NEGLIGENT	12

Cases Cited

Hayward v. Downing, 189 P. 2d 442 (Sup. Ct. of Utah, 1948)	6, 10
Joseph v. W. H. Groves' Latter-Day Saints Hospital, 348 P. 2d 935, 10 Utah 2d 94 (1960)	6
Lund v. Phillips Petroleum Company, 351 P. 2d 952, 10 Utah 2d 276 (1960)	6
Paul v. Salt Lake City R. Co., 83 P. 563 (Sup. Ct. of Utah 1905)	6
Sanone v. J. C. Penney Company, 404 P. 2d 248, 17 Utah 2d 46 (1965)	6, 11
Shay v. Parkhurst, 229 P. 2d 510 (Sup. Ct. Wash., 1951)	6
Talbot v. Dr. W. H. Groves' Latter-Day Saints Hospital, 440 P. 2d 872, 21 Utah 2d 73 (1968)	6
Wightman v. Mountain Fuel Supply Company, 302 P. 2d 471, 5 Utah 2d 373 (1956)	6

MAURINE ELG,
Plaintiff and Appellant,
v.
BOYD FITZGERALD and VALLEY
VIEW RIDING STABLES,
Defendants and Respondents.

APPELLANT'S BRIEF ON APPEAL

The Plaintiff-Appellant, Maurine Elg, brought this action to recover damages for personal injuries from Defendant-Respondents, Boyd F. Fitzgerald and Valley View Riding Stables, and its partners, for their negligence in causing Appellant and some 25-30 other people to fall out of a haywagon on October 6, 1973, at about 8:00 p.m.

The Plaintiff-Appellant appeals to this Court from the decision of the trial court in favor of the Defendant-Respondents and against the Plaintiff-Appellant, no cause of action. Since the trial court did not allow any final argument at the conclusion of the case and because it had previously taken under advisement Defendant-Respondents' Motion for a

Directed Verdict, it is not clear as to whether the court found in favor of Defendant-Respondents on their Motion or on the trial as a whole. While this would make a difference in the manner in which the court must construe the evidence, it nonetheless found in favor of the Defendant-Respondents.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks reversal of the decision of the trial court and a remand to the district court for a new trial.

STATEMENT OF FACTS

On the night of October 6, 1973, the Appellant, Maurine Elg, severely and permanently injured her left leg when she and about 30 other people were caused to fall out of a wagon while they were on a hayride.

The dispute between the parties centers around what caused the people to fall out of the haywagon.

On the one hand, the Appellant contends that the manner in which this accident occurred requires the application of the doctrine of *res ipsa loquitur*, an expression which literally translated means "the thing speaks for itself." The Appellant further contends that the Respondent was negligent. The Appellant and seven other witnesses, who were all on the haywagon, testified that the haywagon went down an incline and as it got toward the bottom it started to turn to get onto a road and during the turn either went over a bump or hit something which caused one of the wheels to drop and the wagon to tip, thus shifting the weight of the people in the wagon and causing a railing against which some of the people were leaning to break and all the people to slide downward and fall out of the wagon onto the road. (Tr. 53-55; 78; 97; 98; 108-109; 123; 127-129; 136-138; 142-144; 145-149; 150-152; 154-157; 158; 159)

On the other hand, the Respondents contend that the doctrine of res ipsa loquitur is not applicable to this case and that it is not the law in the State of Utah. The Respondents further contend that the driver of the haywagon was not negligent. The driver testified that he went down the incline and made the turn at the bottom onto the road. Then, all of a sudden, about 30 yards after the turn and while the wagon was on a flat, level road, traveling about two miles per hour, the people on the haywagon started falling out in some mysterious way. (Tr. 134: 8-25)

The haywagon was 18 feet long, about 8 feet wide and the bed was almost 4 feet off of the ground and had a railing around it for people to lean against. (Tr. 172: 26-30; 173: 16-20; 18; 52: 4-10; 82:2-3; 105:28) According to Ronald Burke, who observed the haywagon and the railing immediately after the accident, the railing "looked like bamboo" and was "about 1/2 inch in circumference" and there were two of them extending around the bed. (Tr. 85: 28-30; 86:1-29) However, according to Duane Day, the driver of the wagon, the railing consisted of a pine pole about 3 1/2 inches in circumference and there was only one extending around the bed. (Tr. 173: 24-25; 179: 21-23)

The driver of the wagon was able to observe the people get onto the haywagon and from where he was seated, he could see where the people were situating themselves, merely by turning around. (Tr. 82: 13-15; 131: 3-10) Some of the people, about 8-10 on each side (Tr. 162: 27-30; 163: 1), situated themselves around the outside of the haywagon with their backs against the railing for support and their knees up against their chests. The other people situated themselves in the middle of the haywagon with their backs against each other for support and their knees up against their chests.

(Tr. 53: 7-12) All were seated prior to starting and all remained seated up to the time of the accident, with the possible exception of a guitar player, who may have been standing immediately behind the driver. (Tr. 53: 13-16; 82: 26-30; 97: 2-3, 8-10; 131: 11-14; 138: 12-14; 150: 27-29; 154: 6-12; 157: 29-30; 158: 1-8; 159: 8-11; 175: 1-4; 182: 23-25; 187: 30; 188: 1)

The driver gave no instructions or warnings to any of the people prior to starting. (Tr. 53: 17-18; 81: 25-27; 83: 3-5; 96: 15-17, 28-30) He felt it was safe to start (Tr. 132: 1-3, 19-21) and he felt the way the people were situated and the way some 8-10 people on each side were leaning against the railing as a support was also safe. (Tr. 181: 29-30; 182: 1-7) The driver testified that the people did not do anything from the time he started the hayride up to the time of the accident which caused him any concern nor did anything happen which caused him to say anything to any of the people prior to the accident. (Tr. 182: 8-22) A short time prior to the accident, Rodney Elg and several other people felt that because of the way the haywagon was bouncing around that it was going too fast and so he and a couple of other people yelled at the driver to "slow down." At least four other witnesses confirmed his testimony. (Tr. 54: 5-8; 97: 18-26; 137: 18-21; 151: 15-17; 155: 8-12) The entire ride only lasted about 1 1/2-2 minutes and the haywagon only went about 200-250 feet prior to the accident. (Tr. 175: 4-7; 182: 13-1

The driver of the wagon, Duane Day, was a 1/3 owner and Boyd Fitzgerald the Respondent, was a 2/3 owner of Valley View Riding Stables, a partnership, which had contracted with Ronald Burke of the Midvale Eagles to take the people on the hayride for about \$30.00 or \$1.00 per person. (Tr. 130: 11-20; 161: 6-10; 171: 23-25) The Appellant, Maurine Elg, and her husband, Rodney Elg, had purchased a ticket for the hayride. (Ex. P. 2)

ARGUMENT

POINT I

THE COURT ABUSED ITS PREROGATIVES BY REFUSING TO ACCEPT UNCONTROVERTED CREDIBLE EVIDENCE AND IGNORING AND MISAPPLYING PROVEN FACTS AND ESTABLISHED LAW, TO WIT: THE DOCTRINE OF RES IPSA LOQUITUR.

Prior to the commencement of trial, the court, in chambers, advised counsel that, based upon the Complaint, he could not see where the Respondent was negligent and that he would not apply the doctrine of res ipsa loquitur to this case since he did not believe that it was still the law in the State of Utah. Although such conference was not recorded, such facts were borne out in counsel for the Respondent's argument on his Motion to Dismiss at the conclusion of Appellant's case wherein he stated the following:

" . . . We admit it was an unfortunate accident, but res ipsa doesn't apply in this instance. The plaintiff has proved nothing except res ipsa"

The reason counsel said res ipsa did not apply is because that is what the court stated prior to trial. It is also interesting to note that counsel admitted that the Appellant did prove and establish a case of res ipsa loquitur against the Respondent.

Although Appellant's evidence established a prima facie case of negligence, the court refused to accept the uncontroverted credible evidence and chose to ignore and refused to apply the doctrine of res ipsa loquitur, apparently believing that it no longer exists in the State of Utah.

That the doctrine of res ipsa loquitur is alive and well in the State of Utah is an established fact, notwithstanding the opinion of the court to the contrary. The doctrine has most recently been recognized and applied by the Utah Supreme Court in the following cases: Talbot v. Dr. W. H. Groves'

Latter-Day Saints Hospital, 440 P. 2d 872, 21 Utah 2d 73 (1968); Sanone v. J. C. Penney Company, 404 P. 2d 248, 17 Utah 2d 46 (1965); Joseph v. W. H. Groves' Latter-Day Saints Hospital, 348 P. 2d 935, 10 Utah 2d 94 (1960); Lund v. Phillips Petroleum Company, 351 P. 2d 952, 10 Utah 2d 276 (1960); Wightman v. Mountain Fuel Supply Company, 302 P. 2d 471, 5 Utah 2d 373 (1956); Hayward v. Downing, 189 P. 2d 442, (Sup. Ct. of Utah, 1948); and Paul v. Salt Lake City R. Co., 83 P. 563 (Sup. Ct. of Utah, 1905).

In the Joseph case, supra, the Utah Supreme Court stated:

"The doctrine of res ipsa loquitur springs from the very practical process of drawing logical conclusions from circumstantial evidence. Its purpose is to permit one who suffers injury from something under the control of another, which ordinarily would not cause the injury except for the other's negligence, to present his grievance to a court or jury on the basis of the reasonable inferences to be drawn from such facts, even though he may be unable to present direct evidence of the other's negligence."

In the Lund case, supra, where the defendant argued that even if it was assumed that a substance or instrumentality over which it had control had caused damage to plaintiff, there was no evidence of negligence on its part, the Utah Supreme Court stated:

"This argument practically ignores the purpose of the doctrine of res ipsa loquitur, namely, to permit one who suffers injury from something under the control of another, which ordinarily would not cause the injury except for the other's negligence, to present his grievance to a court or jury on the basis of the reasonable inferences to be drawn from such facts; and cast the burden upon the other to make proof of what happened."
(Emphasis added)

The doctrine of res ipsa loquitur was applied and received a thorough analysis in the case of Shay v. Parkhurst, 229 P. 2d 510 (Sup. Ct. Wash., 1951), where one of four passengers in a taxi cab was caused to fall out when a door opened while the taxi cab was rounding a curve at a reasonable speed.

The court stated:

"We know from common observation and experience that taxicab doors do not fly open while rounding a curve at a reasonable speed if those who have control of the doors have used proper care."

The court shifted the burden of proof to the driver of the taxi cab to explain how the door happened to open. The court stated the law as follows:

"The doctrine of *res ipsa loquitur*, an expression which literally translated means 'the thing speaks for itself,' as applied in this state and most jurisdictions is as follows: When the agency or instrumentality which caused the injury complained of is shown to have been under the exclusive control and management of the defendant or his servants, and the accident, or injurious occurrence, is such as in the ordinary course of events does not happen if those who have the control and management of the agency or instrumentality use proper care, the injurious occurrence of itself, in the absence of explanation by the defendant, affords reasonable evidence, or a permissible inference, that such occurrence arose from or was caused by the defendant's want of care. * * *

"This doctrine constitutes a rule of evidence peculiar to the law of negligence and is an exception to, or perhaps more accurately a qualification of, the general rule that negligence is not to be presumed, but must be affirmatively proved. By virtue of the doctrine, the law recognizes that an accident, or injurious occurrence, may be of such nature, or may happen under such circumstances, that the occurrence is of itself sufficient to establish *prima facie* the fact of negligence on the part of the defendant, without further or direct proof thereof, thus casting upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part."

If the court in the subject case had considered the uncontroverted credible evidence in light of the doctrine of *res ipsa loquitur*, which it obviously failed to do, the court would have come to the following conclusions

1. The Appellant suffered an injury when she was caused to fall out of Respondent's haywagon.

2. The haywagon was under the exclusive control of the driver, whose negligence would be imputed to the Respondent.

3. Ordinarily, one would not expect to fall out of a haywagon and be injured in going on a hayride except for the negligence of the driver.

4. None of the people in the haywagon were negligent. In this regard, the driver of the haywagon testified as follows:

Q (By Mr. Morgan) But you knew based on the other hayrides you had taken that it was normal for people to sit with their backs against the railing and use the railing for support?

A They sat -- yes. Previously they sat with their backs against the railing.

Q And they used the railing for support, correct, to lean against?

A To lean against.

Q And this is what they had done on prior occasions, and based on the way they were seated on this occasion on October 6, based on what you observed before you started, they were situated on both sides with their backs against the railing, were they not?

A Yes, and down the center.

Q And you figured that railing was safe for them to lean against, did you not?

A Yes. I felt that it was safe to lean against.

Q And you didn't give them any warning that it was not safe to sit the way they were seated?

A Oh, no. No, sir.

Q And you knew they were sitting there with their backs against the railing using the railing as support, correct?

A Yes. I felt the railing was safe in normal use.

Q O.K. Now, did anything happen from the time that you started on this trip to the time of the accident that caused you to say anything to anyone of the members of that hayride on October 6, 1973?

A No.

Q Nothing happened during that entire time until -- well, until somebody advised you that they had fallen off and there was an accident and you stopped the rig?

A Yeah. The entire time was possibly a minute and a half or two minutes.

Q O.K. And nothing happened during that minute or minute and a half while you traversed the distance you did to cause you any concern as far as what those people were doing; is that correct?

A That's correct. At that point I am looking ahead.

Q And as far as you know they were all seated and not one was standing up other than maybe this guitar player?

A As far as I know, yes.

Q And you knew as well, did you not, that based on your past experience in taking hayrides that it was not unusual to go over a bump in the road?

A No. It is not unusual at all

* * * *

Q O.K. But it was not unusual for the haywagon to hit a bump, correct?

A Correct.

Q And if it hit a bump, it was not unusual for the people who were leaning against the railing to lean against the railing, was it?

A I imagine not, not that I can see. They are already leaning against it.

Q And if it was not unusual to hit a bump and have the people lean against the railing, you felt that railing was strong enough to support the people leaning against it even if you hit a bump?

A That's correct.

Q But in fact apparently it was not strong enough on this occasion to keep the people from falling out of the wagon and it breaking?

A The railing broke. As to why it broke, I don't know. But it was evidently not strong enough to take whatever happened to it.

5. The only reasonable inference to be drawn from the above facts is that the driver of the haywagon was negligent in doing something which caused the Appellant and some 30 other people to fall out of his haywagon.

6. The burden of proof as to what happened and to prove that he was not negligent should shift to the driver of the haywagon.

7. The driver of the haywagon offered no credible evidence as to what happened to cause the people to fall out of his haywagon. His only explanation was that he was going down a level road and "all of a sudden people started to fall off" of his haywagon. (Tr. 134: 18-22) Thus, the driver failed to meet his burden of proving that he was not negligent in causing the people to fall off of his haywagon.

In the Hayward case, supra, where a patron of a wrestling match at the State Fair Grounds in Salt Lake City was injured when a bleacher seat on which he was sitting collapsed, the Utah Supreme Court found as follows:

"Defendants further contend that even though plaintiffs were invitees, the judgment ought to be affirmed because there was no showing of negligence on the part of defendant. With this contention we cannot agree. Defendants having permitted plaintiffs to sit upon the platform, they were bound to exercise ordinary care to maintain it in a safe condition for the accommodation of spectators invited to sit there From the fact that the platform collapsed, and that it was in the exclusive possession and control of the defendants, it may be inferred that the defendants failed to exercise reasonable care to keep the platform in safe condition for the seating of spectators. Reversed and remanded for new trial. Costs to appellants."

The above case is strikingly similar to the case at bar, where the Respondent also contends that there was no showing of negligence. Nevertheless, as in the above case, since the Respondent permitted the Appellant and the other 30 people to sit in the haywagon and for 8-10 people on each side to lean against the railing for support, the Respondent was bound to exercise at least, ordinary care to maintain the railing in a safe condition for the accommodation of the riders invited to use it for support. Also, from the

fact that the railing broke, causing people to fall out of the haywagon onto the road and that it was in the exclusive control of the Respondent, it may be inferred that the Respondent failed to exercise reasonable care to keep the railing in safe condition for the use of the people going on the hayride. Therefore, as in the above case, the Supreme Court should reverse the decision of the district court and remand the same for a new trial.

Another interesting case is Sanone v. J. C. Penney Company, supra, where the doctrine of res ipsa loquitur was held applicable when a child suffered injuries on defendant's escalator since it was under the exclusive control of the defendant. The Utah Supreme Court stated:

"It is common knowledge that escalators are widely used in public buildings, particularly in department stores, and that thousands of people, including children, use them daily without injury. It is certainly not unreasonable for one to assume that it is safe to use them in the manner and for the purpose for which they were intended. Nor does it depart from reason to draw the inference that if an escalator is so used and an injury occurs there was something wrong in either the construction, maintenance, or operation of the escalator."

In the case at bar, the Appellant submits that it is common knowledge that people do not ordinarily subject themselves to the possibility of serious injury by simply going on a hayride. It is certainly not unreasonable for one to assume that the haywagon is safe for them to use in the manner and for the purpose for which it was intended. It is also certainly not unreasonable to draw the inference that if the haywagon is so used and someone is injured, such as the Appellant, then either there was something wrong in the way the driver operated the haywagon in that he dumped all of his passengers out of the haywagon and onto the road or there was something wrong with the construction

or maintenance of the haywagon, especially as it related to the railing around the haywagon which broke.

POINT II

THE COURT ERRED IN FAILING TO FIND THAT APPELLANT PROVED AND ESTABLISHED A PRIMA FACIE CASE OF NEGLIGENCE AGAINST RESPONDENT AND IN FAILING TO SHIFT THE BURDEN OF PROOF TO THE RESPONDENT TO SHOW THAT THE DRIVER OF THE HAYWAGON WAS NOT NEGLIGENT.

The Appellant proved and established that the driver of the haywagon either was traveling too fast, made too sharp a turn or hit a bump or something else which caused the haywagon to tip, thus shifting the weight of the people and putting greater pressure on the railing against which some people were leaning for support which caused the railing to break and all the people to slide downward and fall out of the wagon onto the road. In this regard, the witnesses testified as follows:

1. Dennis Brown stated:

"It was going down the incline and as it got toward the bottom it started to turn to get on the road. And it either went over a bump or the wheel dropped, and the wagon tipped quite a bit and that's when the rail broke and people along the rail fell out and most of the people in the center, just from the angle, slid out and it straightened up after it slid out. And I yelled a couple of times, at the driver to stop after they had all fallen out. And he stopped." (Tr. 154: 27-30; 155: 1-4)

2. Sandra Burke stated:

" . . . And when we were turning to get on the road it raised one side, or lowered one side. All the weight shifted as the straw slid and the rail gave way and we went out. And we went out onto the road." (Tr. 158: 12-16)

3. Hugh Brown stated:

" . . . The wagon started and I just remember bouncing around. It was kind of rough. And it seems to me like we hit kind of an angle or something, but it felt like the weight shifted on the wagon and the rail broke and I went out backwards." (Tr. 146: 19-23)

4. The Appellant, Maurine Elg, stated:

"It seemed like it was kind of went into a bump or something, a hole or something. It kind of seemed to go down and then it tipped up and the railing broke." (Tr. 78: 26-28)

5. Barbara Brown stated:

" . . . we got on the wagon and we was all crowded in and I felt like we was going over a clearing and then starting down an incline. And then I don't know what we hit, but it felt like the wagon went up on one side and I had the feeling when I fell off the wagon was coming over on top of me. . . ." (Tr. 151: 5-10)

6. Rodney Elg stated:

" . . . As it was going down the hill and it made the turn onto the road I think that's what made it tip to throw the weight against the railing." (Tr. 123: 5-7)

7. Carl Brown stated:

"And the wagon sort of tipped when we went down the hill. The weight sort of shifted to the one side." (Tr. 143: 28-29)

8. Gilbert Burke stated:

" . . . I do remember going down the hill and then making the turn and the rail broke." (Tr. 159: 15-16)

9. All of the above witnesses also stated that because of the way the haywagon was bouncing around that it was going too fast and that they each heard someone yell at the driver to "slow down." (Tr. 54: 5-8; 97: 18-26; 137: 18-21; 151: 15-17; 155: 8-12) In this regard, Rodney Elg testified as follows:

"Well, we started going down the hill and seemed to be bouncing around a lot. And how fast we was going, I do not know. But it seemed like it was going too fast.

It was bouncing, so I know I yelled and a couple of other people yelled to slow down. I wouldn't say that the horses were running, but it was just kind of bouncing around on the road." (Tr. 97: 20-26)

The Court's comment on the above evidence concerning a request or plea by the riders for the driver to "slow down", which certainly indicates a real concern on the riders' part for their safety, was as follows:

"THE COURT: What evidence is there in the record of any speed?

MR. MORGAN: Well, Your Honor, we are not talking about a speed in excess of the speed limit.

THE COURT: Other than some unknown person, some of the witnesses thought they heard some unknown person say, 'Slow down.' He may want to be getting off." (Tr. 167: 10-16)

The above comment is indicative of the fact that the court had already made its decision on this case against the Appellant prior to trial and that it had failed to listen carefully to the evidence offered by the Appellant to prove her prima facie case of negligence against the Respondent.

This opinion is further evidenced by the fact that the court, after the parties had rested, did not want to hear nor did he even allow counsel for Appellant to argue his case as to the law or as to the damages suffered by the Appellant. The court merely assumed that Appellant's argument would be the same as presented in response to Respondent's Motion to Dismiss. (Tr. 195: 25-30; 196: 1-6)

Such unfairness is tantamount to an abuse of process and resulted in a miscarriage of justice.

The only evidence offered by the Respondent as an explanation as to what happened was that of Eva Gains, who was a close personal friend of both

the driver of the haywagon and the Respondent. (Tr. 193: 29-30; 194: 1-6)
She was seated next to the driver, whom she had worked for before. She testified that the guitarist, who was standing up behind her, lost his balance and fell into a group of people and then they all started falling off the wagon. (Tr. 189: 11-26; 192: 1-3)

On cross-examination, Mr. Gains testified as follows:

Q (By Mr. Morgan) This one man lost his balance and started to fall off the wagon and is that what you believe caused everybody else to fall off the wagon?

A I cannot say that. I just know he fell off and everybody started falling off.

Q Was the wagon that unstable that if one man lost his balance that it would cause everybody else to fall to one side and fall off?

A I couldn't make that kind of a statement, no, sir.

Q Certainly one man falling wouldn't have any effect on the wagon, would it?

A I'd say so, if you fell into a bunch of people with the pressure. I would say it would.

* * * *

Q And what happened when he fell into those people?

A The next thing I knew they was all falling off.

It is submitted that if the haywagon was so unstable that if one man lost his balance and fell that it would cause everyone else to fall off of the haywagon that the Respondent was negligent in inviting people to use his haywagon for a hayride when it was not safe to be used for such a purpose. It is also submitted that if there was some danger in allowing the man to stand that the driver of the haywagon, who was sitting almost next to the man, had a duty to warn him of the instability of the haywagon and the reasonable consequences of what might foreseeably happen if he fell. No such warning was given. (Tr. 193: 14-29)

The Appellant established a prima facie case of negligence against the Respondent and the Respondent failed to offer a satisfactory explanation as to

what happened to rebut such proof and inference of negligence. Thus, the court should have found that Respondent failed to meet his burden of proof and ruled in favor of the Appellant.

CONCLUSION

Based upon the above facts and law, it is respectfully submitted that the decision of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted,

MORGAN, SCALLEY, LUNT & KIMBLE

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