

1996

# Community Motors Inc. v. Bradley T. Johnson and Stewart Johnson dba The Johnson Cattle Company, and John Does 1-5 : Reply Brief

Utah Court of Appeals

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DOCKET NO. 960586-CA

UTAH COURT OF APPEALS

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COMMUNITY MOTORS INC.,	)	
	)	Appellant's Reply Brief
	)	
Plaintiff and	)	
Appellant,	)	
vs.	)	
BRADLEY T. JOHNSON AND	)	
STEWART JOHNSON dba The	)	
JOHNSON CATTLE COMPANY, and	)	
JOHN DOES 1-5	)	Appellate Court No.
	)	960586-CA
Defendants and	)	
Appellees.	)	

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Appeal from a Summary Judgment in the Sixth Judicial District Court in and for Sevier County, State of Utah, the honorable David L. Mowr Presiding.

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**COURT OF APPEALS**

UTAH COURT OF APPEALS

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	)	Appellant's Reply Brief
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UTAH COURT OF APPEALS

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ARGUMENT

I. Is the Issue of causation raised for the first  
time on Appeal ?

It is the law in Utah that issues cannot be decided for the first time on appeal. Farmers Ins. Co. v. Hubbard, 869 F.565, 570 (10th Cir. 1989) "[F]or an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that the trial judgment can consider it." State v. Brown, 856 P.2d 358 (Utah App. 1993).

The issue presented by the appellees of the "sufficiency of evidence of causation" is not a proper issue in this appeal. There is no mention of this issue in the Court's Order, Judgment, Findings of Fact or Conclusions of Law and thus it should not be considered at this time.

## II. Causation

In the event the court determines that it wishes to discuss the issue of causation, appellant provides the following argument to appellee's brief.

Negligence in Utah requires "(1) a duty of reasonable care extending to the plaintiff; (2) breach of that duty; (3) proximate and actual causation of the injury; and (4) damages suffered by plaintiff." Clark v. Farmers Ins. Exchange, 893 P.2d 598 (Utah App. 1995); Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah App. 1991)

Proximate cause is defined as "that cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause-the one that necessarily sets in operation the factors

that accomplish the injury.'" Clark v. Farmers Ins. Exchange, 893 P.2d 598 (Utah App. 1995); Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985).

The question of proximate cause is a factual issue that generally cannot be resolved as a matter of law and is generally reserved for the jury or trier of fact. Clark v. Farmers Ins. Exchange, 893 P.2d 598 (Utah App. 1995); Butterfield v. Okubo, 831 P.2d 97 (Utah 1992)

The trial court may rule as a matter of law on the issue of proximate cause only if: "(1) there is no evidence to establish a causal connection, thus leaving causation to jury speculation, or (2) where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation.'" Steffensen v. Smith's Management Corporation, 820 P.2d 482 (Utah App. 1991).

The facts in this matter do show evidence of causation which distinguishes this matter from Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985). The undisputed facts show that appellees were in actual control of and herding their livestock on the date of the accident in question in



the area where the accident occurred. The appellees' cow escaped from the appellees' control or possession at some time. The appellees' were the owners the cow that was involved in the accident in question. The appellees' cow strayed and remained unaccompanied upon a highway. The appellees did not provide or use a sufficient number of men to control 800-1000 head of cattle or to prevent them from straying upon a highway. The appellees' did not properly look for the cow that had escaped after being informed. These facts, with the others found in the pleadings clearly show that the actions or omissions by the appellees were the efficient cause, the one which set in operation the factors that accomplished the injury to the appellant.

The speculation by the appellees in their brief of an intervening cause by third parties is not sufficient. The statement of unknown actions by third parties is clearly unreasonable to be assumed in this matter.

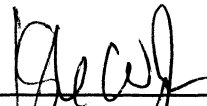
A reasonable person would not differ on the evidence of causation in this matter as it clearly shows that appellees' acts and omissions to act was the proximate cause

if not the direct cause this accident and the undisputed injuries suffered by the appellant.

#### CONCLUSION

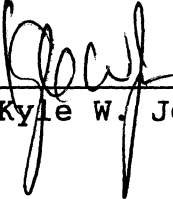
The question of causation should not be considered for the first time on appeal. If this court determines it is necessary to look at the question of proximate causation, there is sufficient evidence to support appellant's claims under its Motion for Summary Judgment or at the very least to allow this matter to go to trial and to let the trier of fact determine if there is sufficient evidence of proximate causation.

DATED: October 7, 1996.

  
\_\_\_\_\_  
Kyle W. Jones  
Attorney for  
Plaintiff/Appellant

**CERTIFICATE OF DELIVERY**

I hereby verify that two copies of Appellants Reply Brief have been delivered to Stephen G. Morgan & Joseph E. Minnock at the Eighth Floor, Kearns, Building, 136 South Main Street, Salt Lake City, Utah 84101 this 7th day of October, 1996.

  
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