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The Mountain States Telephone & Telegraph Company v. Consolidated Freightways et al : Brief of Respondent The Mountain States Tel. & Tel. Company

Utah Supreme Court

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In the
Supreme Court of the State of Utah

THE MOUNTAIN STATES TELE-
 PHONE & TELEGRAPH COM-
 PANY, a corporation,
Plaintiff and Respondent,

vs.

CONSOLIDATED FREIGHTWAYS, a
 corporation,
Defendant and Respondent,
 and GORDON RAY, doing business
 under the name RAY TRANSPOR-
 TATION COMPANY,
Defendant and Appellant.

Case No.
 7755

**BRIEF OF RESPONDENT
 THE MOUNTAIN STATES
 TEL. & TEL. COMPANY**

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ARROW PRESS, SALT LAKE

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BRIEF OF RESPONDENT THE MOUNTAIN STATES TEL. & TEL. COMPANY

INTRODUCTORY STATEMENT

This is an action at law upon a theory of negligence
for the recovery of damages to the plaintiff's telephone

line. There is no dispute herein as to the manner of occurrence of plaintiff's damage. Appellant's gasoline truck and tank trailer ran twelve feet from the edge of State Highway 30 near Brigham City, Utah, and collided with a high transmission tower, breaking the concrete base of the tower and the electric wires on it and causing a gasoline explosion and fire which burned plaintiff's telephone pole and wires. The action was tried to the court without a jury, and the trial court made its findings of fact herein, finding that appellant was negligent in the manner of operation of its truck and trailer at the time and place of the said occurrence and that its negligence was the proximate cause of plaintiff's damage. The damage was stipulated in the amount of Four Hundred Sixty-one Dollars (\$461.00), and judgment was made and entered in favor of plaintiff and against appellant in that amount. Although appellant's statement of facts shows that the plaintiff's damage resulted in the manner set out above, it does not either fully or clearly set forth the evidence upon which the trial court's findings of negligence and proximate cause were made. The following statement of facts is therefore essential.

STATEMENT OF FACTS

Appellant's driver was operating a gasoline truck and tank trailer in a westerly direction on State Highway 30 en route from Salt Lake City, Utah, to Tremonton, Utah (R. 21). Appellant was carrying a cargo of 7200 gallons of explosive gasoline (R. 21). The occurrence took place at approximately 6 o'clock a. m. on the morning of Feb-

ruary 14, 1949, about three miles west of Brigham City, Utah (R. 21, 93).

The following evidence shows that the appellant's driver should reasonably have known of the dangerous and unsafe condition of the highway. It was a winter of extraordinarily heavy snow (R. 21). The said Highway 30 between Brigham City, Utah, and the point of accident was at a number of different places covered with ice and snow and there was small drifts of snow over the highway at different locations (R. 45, 55, 85, 103). Appellant's driver had been over the same stretch of road about six hours earlier en route from Tremonton, Utah, to Salt Lake City, Utah (R. 36, 37).

With full opportunity to have realized the dangerous conditions of the road, appellant's driver approached the point of the accident oblivious to the said conditions of the road. It was his belief that the road was dry between Brigham City, Utah, and the point of the accident (R. 21, 22, 32). The said driver had stopped in Brigham City, Utah, a few minutes before the accident for coffee because he was sleepy (R. 50). Despite the said conditions of the highway and the dangerous cargo which he was carrying, appellant's driver negligently and carelessly approached the point of the accident at a speed of probably 40 miles and not less than 30 miles an hour (R. 24, 40, 103).

Apart from any prior notice of the conditions of the highway as set out above, appellant's driver had actual forewarning of the condition of the road at and near the place of the accident as he approached said place. Appellant's

driver saw that there were snow banks and ice and snow on and about the highway at the place of the accident (R. 23). Appellant's driver saw that the width of the cleared portion of the road at the point of the accident was narrow (R. 24). Appellant's driver had this knowledge and an opportunity to act accordingly before he ever entered the drifted and snow covered area of the highway at the point of the accident (R. 24). Despite this knowledge of the conditions of the highway, appellant's driver either failed entirely to reduce the speed of his truck and trailer or reduced it only slightly (R. 24, 56).

As appellant's driver approached the drifted and snow covered area of the highway at the point of the accident and before he entered said area he could see a truck approaching from the opposite direction at least a mile off (R. 36). The approaching vehicle gave appellant's driver a one-flash light signal, which to truck drivers meant "caution" (R. 61, 62). In answer to this signal, appellant's driver responded with a two-flash light signal, which to truck drivers meant "okay, keep coming" (R. 38, 62). Appellant's driver negligently and unreasonably failed to heed the caution signal given to him by the approaching vehicle and negligently and carelessly failed to respond to the situation by giving the approaching vehicle a caution signal.

The force of the impact of appellant's truck with the electric high transmission tower and the length of the tire tracks left by appellant's truck and trailer in the snow clearly show the high and dangerous rate of speed at which appellant's truck and trailer must have been driven as

they approached the point of the accident. The tire tracks left by appellant's truck and trailer in the snow from the point where the truck left the highway to the point of collision with the electric tower were 200 feet in length (R. 87). The said tracks ran through snow 36 inches deep (R. 45, 87). The impact of appellant's truck with the said high transmission tower was sufficiently great to break a concrete pillar about 12 inches square at the base of the electric tower, causing the tower and its wires to fall (R. 46, 49).

The record does not indicate that any reasonable effort was made by the appellant's driver to control the movement of his truck and trailer after it left the highway. The point of the collision was located 12 feet from the edge of the hard surface of the highway (R. 82). The tracks in the snow left by the appellant's truck and trailer ran in a perfectly straight line veering gradually from the highway to the point of the collision (R. 87). Appellant's driver admitted to Highway Patrolman Sackett immediately after the accident that the cause of the occurrence was that he had gotten into the narrow area of the road and that the movement of his truck and trailer was such that when he tried to slow down he lost control of the truck and trailer and skidded off the road (R. 39, 99, 100).

No claim was made by appellant's driver after the accident that he had been crowded from the road (R. 39).

It appears clear from the record that the width of the road at the point of the accident was such that if appellant's driver had been operating his truck and trailer at a

reasonable rate of speed he could have passed vehicles approaching from the opposite direction without departing 12 feet from the highway (R. 47, 48, 61, 69, 99). The appellant's truck and the approaching truck in fact passed in the narrow area before appellant turned off the road (R. 56).

ARGUMENT

I.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING THAT APPELLANT WAS NEGLIGENT AT THE TIME AND PLACE OF THE ACCIDENT AND THAT HIS NEGLIGENCE PROXIMATELY CAUSED PLAINTIFF'S DAMAGE.

A. THE EVIDENCE SUPPORTS A FINDING OF NEGLIGENCE.

This is an action at law. The Court is here called upon to review certain findings of fact made by the trial court, sitting without a jury. No principle of law could be more clearly established than the one which this court has, time and time again, repeated with respect to this question. That principle is that it is not the function or the province of the ^{the}appellant court to determine what it or other reasonable minds would have concluded from the evidence, but rather to determine whether there is any competent evidence to support the trial court's findings.

Beagley v. United States Gypsum Company, ...
Utah ..., 235 P. (2d) 783.

The following pertinent statement was made by this Court in *Tuft v. Brotherson*, 106 Utah 499, 150 P. (2d) 384:

“This is an action at law and the court, having the witnesses before it and being able to observe their conduct and demeanor on the witness stand, was in a better position to pass upon the evidence than is the appellate court. Under such circumstances, where there is evidence to support the court’s findings, they will not be upset on appeal.”

The essential question on this appeal is, therefore, whether there is competent evidence from which the trial court could find, as it did, that appellant was negligent and his negligence the proximate cause of plaintiff’s damage. Plaintiff and respondent submits that there is sufficient competent evidence from which the trial court could find, as it did, that the appellant was negligent at and prior to the time and place of the said occurrence.

The evidence shows that it was a winter of bad snows and that the highway on which appellant’s driver was traveling was at different places covered with ice and snow (R. 54, 55, 85, 93, 103). Appellant’s driver had been over the same stretch of road about six hours prior to the occurrence (R. 36, 37). Appellant’s truck and trailer contained 7200 gallons of explosive gasoline (R. 21). Appellant’s driver was traveling 40 to 30 miles and hour as he approached the point of the accident (R. 24, 103). Certainly the trial court could reasonably find from this evidence that appellant’s truck and trailer were being driven at a rate of speed which was unreasonable and dangerous under the circumstances, those circumstances being the

nature of the cargo and the hazardous condition of the road.

As appellant's driver approached the point of the accident, he had forewarning of the general condition of the road, and he had particular notice of the narrow area in the road caused by snow drifts (R. 23, 24). With knowledge of this condition of the road, appellant's driver reduced his speed only slightly, if at all (R. 24, 56). Certainly the trial court could find that this constituted a failure to exercise reasonable care.

As appellant's driver approached the point of the accident and saw the condition of the road, he could see a vehicle approaching from the opposite direction a distance of about one mile off (R. 36). The approaching vehicle gave a "caution" signal to which appellant's driver responded with an "okay, come ahead" signal (R. 37, 61, 62). Certainly the trial court could find from this evidence that appellant's driver, knowing said condition of the highway, was negligent in giving the approaching vehicle a "come ahead" signal and in failing at that time, with knowledge of the conditions of the road, to give the approaching vehicle a caution signal.

There is evidence that as appellant's driver finally attempted to reduce his speed, the tank trailer turned sideways, and that the said movement of the tank trailer pulled appellant's truck and trailer off the road and into the high transmission tower (R. 39, 99, 100). Certainly the Court could reasonably find from that evidence that the truck and trailer were being operated at a rate of speed which

was unreasonable under the circumstances because it did not allow appellant's driver to control the movement of the truck and trailer.

Appellant's truck and trailer moved 200 feet through snow 36 inches deep and finally came to rest upon impact with a concrete pillar ten or twelve inches square, which concrete pillar was broken by the impact (R. 45, 46, 49, 87). Certainly the Court could find from that evidence that the truck was being operated as it approached the point of the accident at an unreasonable and dangerous rate of speed?

The evidence is that the appellant's driver was entirely unaware that there was snow and ice on the road at different places between Brigham City and the point of the accident, in face of the testimony of all other witnesses that there was ice and snow on the highway (R. 21, 22). Appellant's driver had stopped in Brigham City for coffee because he was sleepy, according to his own admission (R. 50). The trial court could reasonably find from that evidence that appellant's driver failed to possess the alertness and failed to maintain the lookout of a reasonably prudent truck driver?

The tracks left by appellant's truck and trailer in the snow indicated no movement or attempt by appellant's driver to turn back toward the road (R. 87). The trial court could reasonably find from that evidence that the appellant's driver used poor and unreasonable judgment in turning from the road and failed to make a reasonable effort to control the movement of his truck and trailer

after leaving the road, even if it believed that the driver turned from the highway intentionally.

Viewing the evidence as a whole, apart from any specific part of it, there was certainly sufficient competent evidence from which the trial court could reasonably find that appellant was negligent in the manner of operation of its truck and trailer at and prior to the time and place of the occurrence.

The foregoing discussion has been made upon the assumption that the standard of care required of appellant in transporting gasoline over the highways was ordinary care. There is considerable authority for the proposition, however, that the standard of care imposed under such circumstances is of the highest degree.

Burnhardt v. American Glycerine Co., 113 Kan. 136, 213 Pac. 663;

Ladlie v. American Glycerine Co., . . . Kan. . . ., 223 Pac. 272;

Annotation, 31 A. L. R. 725;

Annotation, 44 A. L. R. 124.

B. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING OF PROXIMATE CAUSE.

The essential question with respect to proximate cause is whether there is competent evidence upon which the trial court could find that appellant's driver should reasonably have foreseen that his aforesaid conduct constituted a risk of harm to persons and property on and about the highway. There can be no question but that plaintiff's damage was a direct result of the operation of appellant's truck. Surely

a reasonably prudent driver operating a truck and trailer containing 7200 gallons of gasoline on an ice and snow covered highway could and would foresee that a high rate of speed and failure to maintain a lookout would endanger property on and about the highway. Both the risk of harm to plaintiff's property and the damage itself were a probable and foreseeable result of appellant's negligence. It is well settled in this jurisdiction, as well as in most other jurisdictions, that negligence is the proximate cause of damage even though the actor was not able to foresee the injury in the precise form in which it occurred or to anticipate the precise damage which flowed from his negligence.

Shafer v. Keeley Ice Cream Co., 65 Utah 46,
234 Pac. 300.

Furkovich v. Bingham Coal & Lumber Co., 45
Utah 89, 143 Pac. 121.

38 Am. Jur., Negligence, Sec. 62.

Restatement, Law of Torts, Volume 2, Section
435.

It is clear from the decisions of this Court that the driver of a truck transporting and handling gasoline is charged with knowledge that gasoline is highly volatile and will ignite readily causing damage to person and property in the area.

Vadner v. Rozzelle, 88 Utah 162, 45 P. 2d 561.

This principle would seem to make it clear that appellant should reasonably have foreseen that his conduct constituted a risk of harm to plaintiff's property and other property in the area.

Appellant would appear to argue in his brief that despite his conduct at and near the time and place of the

accident the real cause of plaintiff's damage was conduct on the part of the driver of an approaching truck; appellant's argument is that his truck was the first in the narrow and drifted stretch of the highway and that he was forced from the road. This argument completely ignores the evidence upon which the trial court based its findings. That evidence is as follows: Appellant's driver saw the truck approaching from the opposite direction when the latter was about a mile away. Appellant's truck had not then entered the snow covered and drifted part of the highway. Appellant's driver gave the approaching truck an "Okay, come ahead" signal. Appellant's driver made no claim whatsoever after the collision that he had been crowded from the highway. The said driver admitted to the patrolman Sackett that the cause of the accident was that when he attempted to slow down his truck skidded and pulled him off the road.

Apart from the foregoing evidence which disproves appellant's argument as to the facts, appellant's contention is incorrect as a matter of law. Negligence on the part of a third party concurring with appellant's negligence to produce plaintiff's damage does not relieve appellant of liability.

Mass. Bonding & Ins. Co. v. Cudahy Packing Co.,
61 Utah 116, 211 Pac. 706.

Whether the conduct of the driver of the approaching truck was negligent or not, it was conduct which appellant's driver could reasonably foresee. Certainly appellant's driver could not reasonably assume that the approaching vehicle would stop and allow him to speed through the snow

covered and drifted area on the highway. A reasonably prudent driver should foresee that approaching vehicles will make use of the highway. The negligence, if any, on the part of the driver of the approaching truck was reasonably foreseeable and did not constitute an independent superseding cause of plaintiff's damage. The applicable principle of law followed by this and a great majority of jurisdictions is stated in Section 447 of the Restatement of the Law of Torts, Vol. II, as follows:

"The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

- "(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
- "(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
- "(c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent."

Plaintiff submits, therefore, that there is sufficient competent evidence from which the trial court could find as it did that appellant's negligence was the proximate cause of plaintiff's damage. Appellant cannot absolve himself from liability as to this plaintiff by claiming that as between him and a third party, both negligent, he had the right of way.

II.

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN OVERRULING APPELLANT'S MOTION TO STRIKE TESTIMONY OF WITNESS SACKETT REGARDING THE SPEED OF APPELLANT'S TRUCK.

At the trial of this action a witness, Highway Patrolman Sackett, who had arrived at the point of the accident a short time after its occurrence and who had conversation with appellant's driver at said time and place, testified that his best recollection was that appellant's driver had told him he was traveling about forty miles an hour at and near the time and place of the accident. Appellant's attorney objected to this testimony and asked that it be stricken on the ground that it was not the best evidence. Appellant's request that the evidence be stricken was denied by the court. The argument is now made by appellant that the witness's testimony regarding the speed of forty miles an hour was made on the basis of his inspection of a copy of the accident report and that the evidence was therefore incompetent.

Neither the objection made by appellant at the trial of this action nor the objection now raised for the first time on appeal has any merit.

The objection made by appellant at the trial that the officer's recollection was not the best evidence twists and distorts well settled rules of evidence. Of course, the best evidence as to a matter or occurrence is a witness's recollections as to his personal observations; this rule is axiomatic and has never been questioned. What has been questioned

by some courts is whether a witness may refresh his recollection by referring to written reports. Appellant would change the rule to exclude evidence as to the independent recollection of a witness and admit only evidence in the form of a written report. This view is clearly erroneous.

Appellant's argument on appeal is that the testimony of the officer relating to the speed of appellant's truck was improperly admitted because it was based upon the officer's examination of a copy of the accident report. This, it will appear, is an objection which was not made during the trial. Furthermore, appellant's contention is not supported by the evidence.

Although the witness Sackett had access to the copy of the accident report the evidence referred to by appellant at pages 12 and 13 of his brief does not disclose that the said witness based his recollections on said copy of the report. At most appellant's objection could go only to the weight of the evidence and not its competency—the weight to be given to the evidence was a matter for determination by the trial court.

CONCLUSION

It is Respondent and Plaintiff's position that there is sufficient competent evidence in the record from which the trial court, sitting as the trier of facts and observing at first hand the conduct and demeanor of witnesses could find that appellant was negligent and his negligence the proximate cause of plaintiff's damage. Appellant is in effect asking this Court to retry the facts of this action

and substitute its judgment as to the facts in place of findings of the trial court. The testimony of the witness Sackett with respect to appellant's driver's admission as to his speed was competent evidence and the court did not err in refusing to strike it. There is, however, evidence apart from that which is sufficient to support the trial court's findings. Respondent and Plaintiff submits that the judgment of the trial court should be affirmed.

Respectfully submitted,

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