

1979

# David W. Jensen v. Mountain States Telephone And Telegraph Company, A Corporation, And Jose F. Gonzales : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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DAVID W. JENSEN, :  
 :  
 Plaintiff-Appellant, :  
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 -vs- : Case No. 16417  
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 MOUNTAIN STATES TELEPHONE :  
 AND TELEGRAPH COMPANY, a :  
 corporation, and JOSE F. :  
 GONZALES, :  
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 Defendants-Respondents. :

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APPELLANT'S BRIEF

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Appeal From the Order of the Third Judicial  
District Court for Salt Lake County

Honorable Christine M. Durham, Judge

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Clerk, Supreme Court, Utah

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STATEMENT OF THE CASE

This is an action for damages for personal injury sustained by Plaintiff arising from a motor vehicle collision involving Plaintiff and Defendants.

DISPOSITION IN LOWER COURT

Defendant Mountain States Telephone and Telegraph Company moved for summary judgment in this matter alleging it was not negligent and if it was, its actions were not the proximate cause of Plaintiff's injury. The lower court granted said Defendant's motion for summary judgment, no cause of action.

The lower court certified the order granting summary judgment under Rule 54(b), U.R.C.P. as a final judgment. Plaintiff and Defendant Gonzales have reached a settlement in this matter and a stipulation and order of dismissal between said parties has been filed in the lower court.

RELIEF SOUGHT ON APPEAL

Plaintiff requests that this Court reverse the summary judgment granted in favor of Defendant Mountain States Telephone and Telegraph Company and that the case be remanded to the trial court for the purposes of a trial on the merits in this matter.

## STATEMENT OF THE FACTS

On September 8, 1977 Plaintiff was traveling north on State Road 111 on a motorcycle and approaching the intersection of State Road 171. Plaintiff regularly passed through this intersection on his way to work for the past three years and it was Plaintiff's habit and custom to drive 50 miles per hour on the highway and slow to 30 miles per hour as he passed through the intersection (Jensen depo. pp. 8,59,60) At approximately the same time, Defendant Gonzales was in the process of executing a left hand turn from Highway 111 and attempting to proceed east on Highway 171, at which time Plaintiff collided with Defendant Gonzales' vehicle. On this particular occasion, Defendant Mountain States Telephone and Telegraph Company (Mountain Bell) had parked a van-type truck, 18 feet long by 8 feet wide directly in the center of the intersection. (Sortino depo. pp. 15,33,28) The employee of Defendant Mountain Bell who parked the truck was aware that a person making a left hand turn as Defendant Gonzales did would have his view obstructed. (Sortino depo. p. 30) Defendant Mountain Bell provided no signs, flagmen or other devices to warn Defendant Gonzales that he was approaching a hazardous situation. (Gonzales depo. pp. 8, 29) As Defendant Gonzales came to the intersection and moved into the left hand turn lane he was unable to see traffic approaching in the opposite direction because of Defendant Mountain Bell's truck being parked in the center of the intersection, although he would have been able to

see Plaintiff approaching had said truck not been so parked. (Gonzales depo. pp. 29,30) While proceeding slowly beyond Mountain Bell's truck far enough to see approaching traffic, Defendant Gonzales had moved his vehicle into the approaching path of Plaintiff and a collision between Plaintiff and Defendant Gonzales occurred. (Gonzales depo. p. 14)

ARGUMENT

POINT I

APPELLANT'S BURDEN ON APPEAL.

In order for the moving party to prevail on a motion for summary judgment, it must show that the evidence presented, when viewed in a light most favorable to the opposing party, does not present a material issue of fact, and that the evidence so viewed entitles the moving party to have his motion granted as a matter of law. This test is well settled in Utah and expressed in many cases including Controlled Receivables, Inc. vs. Harman, 17 Utah 2d, 420 (1966) 413 P.2d 807.

The Appellant's burden on appeal is to show that the evidence presented to the lower court, viewed most favorably for the Appellant, presents a material issue of fact which must be resolved to determine the liability of Mountain Bell.

POINT II

STATEMENT OF THE EVIDENCE RELATING TO THE  
NEGLIGENCE OF DEFENDANT MOUNTAIN BELL.

Defendant Mountain Bell's motion for summary judgment was argued in the lower court without the presence of a court reporter. Therefore no transcript of the hearing exists although

the transcript of the subsequent hearing on Plaintiff's motion to alter or amend the summary judgment is a part of the record on appeal. At both hearings, it was conceded by the attorney for Defendant Mountain Bell, that for purposes of summary judgment, it was conceded that Mountain Bell was negligent and the arguments presented were solely related to the issue of proximate cause. (Tr. Plaintiff's Motion to Amend Judgment, p. 2, ln. 20-27)

Although the negligence of Defendant Mountain Bell was conceded for purposes of said Defendant's summary judgment motion, the alleged negligent acts of Mountain Bell will be briefly set out in this brief. Like any other individual or entity, Defendant Mountain Bell has a duty to exercise reasonable care for the safety of others during the conduct of its business as a public utility. The breach of that duty consists of Mountain Bell's action of placing its truck directly in the center of the intersection, blocking the view of Defendant Gonzales, Plaintiff and other traffic. In so parking its truck, Defendant Mountain Bell created a dangerous condition recognized by Utah law:

"The parking of a vehicle upon the paved or traveled portion of a highway is generally regarded as a hazard to traffic thereon."  
Hillyard v. Utah By-Products Co., 1 Utah  
2d 143, 147; 263 P.2d 287, 290 (1953)

In addition to the hazardous situation created, Defendant Mountain Bell failed to take the precautions required by law and its truck was therefore illegally parked. Defendant Mountain Bell provided no warning devices to advise Defendant Gonzales of the danger. Defendant Mountain Bell provided no flagmen to

control traffic at the intersection, although flagmen could have been so used and were, in fact, used at that location by Mountain Bell the following day.

Pursuant to the rule making power of the Utah State Road Commission, the Utah manual for Construction and Maintenance Traffic Control was adopted on July 14, 1972. The relevant portions of that manual are attached to Plaintiff's memorandum in opposition to Defendant's motion for summary judgment. Section 6-05.1 of the manual requires that all traffic control devices used on highway construction and maintenance work shall conform to the specifications in the manual. The portion of the manual entitled "Typical Applications" contains the required traffic control devices for utility operations. Defendant Mountain Bell did not provide the warning signs as required by the manual. The manual requires that operations which restrict vehicular movement, so that traffic in both directions must use a single lane, shall only be allowed while flagmen are on duty or when a temporary traffic signal is installed to assign right-of-way. Mountain Bell neither provided a flagman nor installed such a traffic signal, although vehicles in both directions were required to use a single lane due to the position of Mountain Bell's truck parked on the highway. (Sortino depo. p. 28,29)

The manual further provides that for operation within 50 feet of an intersection, traffic control plans shall be approved by the district engineer for the Department of Highways. (Sortino depo. p. 62,63) Defendant Mountain Bell obtained no

such approval.

Because of the foregoing acts and omissions of Defendant Mountain Bell, said Defendant breached its duty to Plaintiff creating a dangerous condition and by not taking the precautions required by law for the safety of those traveling upon a public highway. The deposition of Mountain Bell's employee, Terry A. Sortino, states that Mountain Bell's truck was in fact parked in the center of the intersection blocking the view of traffic. (pp. 15,28,30,33)

This evidence being before the lower court created an issue of fact as to the negligence of Mountain Bell.

#### POINT III

WHETHER OR NOT DEFENDANT MOUNTAIN BELL'S NEGLIGENCE WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURY IS A QUESTION OF FACT TO BE RESOLVED AT TRIAL.

Defendant Mountain Bell contends that because Defendant Gonzales made a left turn in front of Plaintiff, that the negligence of Defendant Gonzales was the intervening proximate cause of Plaintiff's injuries; and, therefore, the negligence of Mountain Bell was not a proximate cause of Plaintiff's injuries. However, the risk created by Mountain Bell in obstructing the intersection included the foreseeable negligence of Defendant Gonzales. The court in Watters v. Query, 588 P.2d 702 (1978) refused to uphold jury instruction which read, in pertinent part, as follows:

"If a driver creates a dangerous condition with a motor vehicle, but his condition is such that another driver, exercising reasonable care, should have observed and avoided

the dangerous condition, then the negligence of the latter driver is an independent intervening cause, and, therefore, the first driver cannot be a proximate cause of the collision."

The facts in Watters consisted of defendant's automobile stopping abruptly in front of the plaintiff, and although plaintiff was able to stop without colliding with that defendant, a vehicle following plaintiff was unable to stop and collided with the rear of plaintiff. The court in considering the defendant's liability for the collision with the rear of plaintiff's vehicle, rejected the above jury instruction and stated the following rule:

"The more fundamental test is whether under the particular circumstances he should have foreseen that his conduct would have exposed others to an unreasonable risk of harm; and this includes situations where negligence or other wrongful conduct of others should be reasonably anticipated."

Applied to the case at hand, the question becomes whether or not Defendant Mountain Bell should have foreseen that its conduct would have exposed Plaintiff to the unreasonable risk of Defendant Gonzales moving into the path of Plaintiff because his vision was obstructed.

Before the accident occurred, Defendant Mountain Bell's employee Sortino, during a 30 minute period, saw six vehicles traveling east and driving around the front of Defendant Mountain Bell's truck. (Sortino depo. p. 36) Defendant Mountain Bell was therefore fully aware that motorists proceeding easterly in the intersection were doing so even though said Defendant Moun-

tain Bell's truck obstructed their view of oncoming traffic. (Sortino depo. pp. 28-30) While it could be argued that every such motorist was negligent, it can not be said that the subsequent conduct of Defendant Gonzales in repeating what other drivers were doing was unforseen by Mountain Bell.

The case of Hillyard v. Utah By-Products Co., 1 Utah 2d 143, 263 P.2d 287 (1953) is in accord with Watters and the court at page 148,9 cites with approval the following rule of law:

"The earlier of the two wrongdoers, even though his wrong has merely set the stage on which the later wrongdoer acts to the plaintiff's injury, is in most jurisdictions no longer relieved from responsibility merely because the later act of the other wrongdoer has been a means by which his own misconduct was made harmful. The test has come to be whether the later act, which realized the harmful potentialities of the situation created by the defendant, was itself foreseeable."

The facts in Hillyard involved Defenant's truck being parked so that it protruded onto the highway. Plaintiff negligently failed to see the truck and Plaintiff's vehicle ran into the truck. The court in applying the above rule of law to the fact situation stated:

"If, however, the evidence is susceptible of any reasonable interpretation which would permit a finding that as [plaintiff] approached the scene, his view was so obstructed by the cars he was following and passing that at the time the third car turned to its left to miss the truck the latter loomed up before him as an emergent situation, then, even though he was negligent in getting into such a predicament, a jury question would exist as to whether the prior negligent parking of [defendants] truck was also a concurring cause." (emphasis added)

Applied to the case at hand, even though Defendant Gonzales was negligent in proceeding when his view was obstructed, a jury question exists as to whether Defendant Mountain Bell's prior negligent parking of its truck was a concurring cause of Plaintiff's injuries.

#### POINT IV

THE LOWER COURT COMMITTED REVERSABLE ERROR  
BY NOT VIEWING THE EVIDENCE BEFORE IT IN  
A LIGHT MOST FAVORABLE TO PLAINTIFF.

At the hearing of Plaintiff's motion to amend judgment, the court made the following comments concerning the granting of the summary judgment:

"I do have one concern, Mr. Roberts, and that is: In granting the summary judgment, I did so on the basis and the understanding that there were no material disputed issues of fact, and my determination of that was based upon my understanding of the evidence in the case, which was that the defendant Gonzales, knowing that he could not see around the truck, made an attempt to complete a left hand turn. If, in fact, he attempted to get a better view by inching out around the truck, my view of the facts would have been entirely different." (p. 12, ln. 5-14)

The court stated that its view of the case regarding the actions of Mountain Bell and the question of proximate cause depended on a determination of whether Defendant Gonzales attempted to complete a turn knowing he could not see around Mountain Bell's truck, or whether Defendant Gonzales attempted to get a better view by inching out around the truck. Such a slight distinction in the interpretation of the facts was not a proper determination for the trial court on a summary judgment motion. The evidence

before the court consisted of the deposition of Defendant Gonzales wherein he stated as follows:

"Q. After you stopped you told me a few minutes ago that you came to a full stop because there was some sort of traffic sign controlling you and that your vision was blocked. Then what did you do?

A. Then I proceeded slow until I cleared this utility truck enough so I could see what was coming from the south." (p. 11, ln. 25-p. 12 ln. 5)

The court in construing the statements of Defendant Gonzales made a determination that he attempted to complete a left hand turn as opposed to inching out around the truck, a determination which the court thought was central to its decision. If any such determination was proper for the court, a view of the facts allowing Plaintiff to go to trial would be the only way to resolve conflicts in the facts on summary judgment.

The lower court further made a determination that the actions of Defendant Gonzales were, as a matter of law, negligent and more over the type of negligence that Mountain Bell could not have foreseen under any circumstance. Plaintiff respectfully submits that a determination of the foreseeability of the actions of Defendant Gonzales is an issue of fact which should not have been determined by the trial court. At the hearing on Plaintiff's motion to amend judgment the court made the following statements:

"I agree with you, Mr. Dibblee, that the question in this case is whether or not Mountain Bell should have foreseen Gonzales' negligence is one of fact. I determined in the negative, i.e., it was a question of law based on the facts that were before me and the evidence that the kind of negligence that is engaged in by Gonzales in making that turn when he literally had no view and knew he had no view, in other words, he was

fully apprised of the hazard, was the kind of negligence that Mountain Bell could not have foreseen under any circumstance. In other words, they have no reason to believe that a driver who knows he doesn't have a view is going to attempt to cross two lanes of traffic in the absence of that view." (p. 13, ln. 7-19)

Plaintiff submits that the deposition of Mountain Bell employee Sortino is evidence that Defendant Gonzales' conduct was foreseeable. In that deposition Mr. Sortino stated:

"Q. The position that your truck was in, a person traveling intending to get in the left hand lane of traffic to make a left turn, their view would be obstructed, is that not true?

A. Partially.

Q. You were aware of that?

A. Yes." (p. 30 ln. 1 - 7)

"Q. How many cars drove around the front of your car while you were sitting there at lunch?

A. Around the front of the van?

Q. Yes, going east.

A. In 30 minutes I would probably say half a dozen." (p. 36 ln. 5 - 9)

The statements of Mountain Bell employee Sortino concern his observations and activities prior to the collision, and indicate that traffic was proceeding through the intersection in spite of the fact that Mountain Bell's van had created an obstruction of vision in the intersection. It could be argued that all such drivers proceeding through the intersection were negligent but even if so, Mountain Bell was aware that traffic was so proceeding and the action thereafter of Defendant Gonzales in pulling his vehicle just beyond Mountain Bell's van to get a better view, cannot be said to be an unforeseeable event. To rule that Defendant Gonzales' actions were unforeseeable as a matter of law

required the lower court to disregard or give no weight to the evidence presented in Mr. Sortino's deposition. Plaintiff respectfully submits that such a view or weighing of the evidence on summary judgment is an improper function of the trial court and reversible error.

#### CONCLUSION

Plaintiff received severe injuries as a result of the hazardous situation created. In a negligence action such as this, the issues of negligence and proximate cause must be determined by the trier of fact after each party has introduced and developed the evidence supporting his case. Plaintiff submits that to determine the issue of proximate cause by holding that the actions of Defendant Gonzales were not foreseeable as a matter of law, is an invasion of the province of the fact finder. Plaintiff has presented a prima facie case showing that Defendant Mountain Bell created a hazardous situation by blocking the view of traffic and Plaintiff has further demonstrated through the deposition of Mountain Bell employee Sortino that Mountain Bell was aware that traffic was proceeding through the intersection in spite of the hazard. Plaintiff respectfully submits that he is entitled to a trial on the issues of negligence and foreseeability and requests that the Court remand this case to the lower court for that purpose.

Respectfully submitted,

ROBERTS, BLACK & DIBBLEE

By JAMES R. SOPER

Attorneys for Plaintiff-Appellant

CERTIFICATE OF HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF was hand delivered to Gordon Roberts and Thomas T. Billings, of Parsons, Behle, Latimer, Suite 200, 79 South State Street, Salt Lake City, Utah 84111, this 26th day of July, 1979.

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