1979

David W. Jensen v. Mountain States Telephone And Telegraph Company, A Corporation, And Jose F. Gonzales : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

APPEAL FROM THE ORDER OF
THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE
HONORABLE CHRISTINE M. DURHAM, JUDGE

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an action for damages for a personal injury sustained by appellant arising from a motor vehicle collision involving appellant and defendant Gonzales. Respondent Mountain States Telephone and Telegraph Company had a vehicle parked near the scene of the accident and was named as a co-defendant.

DISPOSITION IN THE LOWER COURT

Respondent Mountain States Telephone and Telegraph Company (hereinafter "Mountain Bell") moved for summary judgment in this matter alleging its actions, whether or not negligent, were not the proximate cause of plaintiff's injury. The lower court granted defendant's motion for summary judgment, no cause of action. The lower court certified the Order granting summary

judgment pursuant to Rule 54(b), Utah Rules of Civil Procedure, as a final judgment. Plaintiff and defendant Gonzales have reached a settlement in this matter and a stipulation and order of dismissal between them has been filed in the lower court.

RELIEF SOUGHT ON APPEAL

Respondent Mountain Bell requests that this Court affirm the summary judgment granted in its favor by the trial court and award its costs incurred.

STATEMENT OF FACTS

This is an action for damages as a result of an injury to appellant. On September 8, 1977, at approximately 2:00 p.m. appellant was traveling north on State Road 111 on a motorcycle going approximately 60 mph (Gonzales Depo., p.16). At the intersection of State Road 171, plaintiff collided with defendant Jose Gonzales who was executing a left-hand turn from Highway 111 to head east on Highway 171 (Gonzales Depo., p.13). At this intersection, State Road 111 consists of five lanes, two lanes running north and two running south, and a middle lane for left-hand turns (Gonzales Depo. p.9).

At 8:00 a.m. that morning, Mountain Bell began service work on underground lines located at the intersection of State Road 111 and State Road 171. To facilitate the needed repairs and for the protection of its employees, Mountain Bell parked its vehicle in the center of the intersection in line with the left turn lanes and separated and marked off the vehicle with cones

from all four directions. (Sciortino Depo., p.26). Additionally, in the north and south directions, at distances of approximately 500 ft. and again behind the truck were "Men Working" signs indicating the presence of Mountain Bell employees. (Sciortino Depo., p.12). They were placed in conformance with standard Mountain Bell policies and with the Uniform Manual on Uniform Traffic Control Devices adopted by the Utah Department of Transportation (§41-6-20, U.C.A., 1953, as amended; Sciortino Depo., p.71; and "Work Area Protection" pamphlet attached as Exhibit "A" to defendant's Memorandum in Support of its Motion for Summary Judgment).[1] The Mountain Bell vehicle, referred to as a "step van", had its 4-way flashers on, its headlights on, and two strobe lights flashing. (Sciortino depo., p.55) The weather

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[1]Appellant spends a considerable amount of time citing to a traffic manual that supposedly governs respondent's repair operations (Appellant's Brief at 6). However, as is clear by reading both appellant's statements and his attached rule, they are inapplicable for two reasons: (1) those rules were superceded by the Uniform Manual on Uniform Traffic Control Devices required by §41-6-20, U.C.A., 1953 as amended, which do not require Mt. Bell to provide flagmen and obtain department approval; and (2) Even if those provisions were in effect, they apply only where traffic in both directions is required to use a single lane of traffic. That is, flow of traffic in one direction at a time. Here, Mt. Bell's vehicle was placed in the center of the intersection containing five lanes of traffic. It was not obstructing thru traffic, but rather those vehicles making left-hand turns. Since traffic was not obstructed in the two directions and the motorists were not required to travel in single lanes, neither traffic flagmen nor traffic signals are required. Furthermore, appellant makes a bold statement to the effect that Mt. Bell obtained no approval from the Utah Department of Transportation for its work in the intersection. This statement has no support in the record and should be totally disregarded.

on that particular day was clear with high visibility and was a typical, early September day. (Gonzales Depo. p.6). The location of the vehicle's warning cones and signs are set forth in Exhibit "B" attached to defendant's Memorandum in Support of its Motion for Summary Judgment.

Appellant complains that the defendant Jose Gonzales was negligent in that Jose Gonzales was (a) traveling at an excessiv speed, (b) failed to maintain proper lookout, (c) failed to maintain proper control of his vehicle, (d) failed to yield the right of way to the plaintiff, and (e) made an improper left tur (Plaintiff's Complaint, ¶V).

Appellant additionally alleges that Respondent Mountain Bel was negligent in that (a) it parked its vehicle within an intersection, (b) was illegally parked, (c) parked a vehicle in such manner so as to obstruct the view of on-coming traffic, and (d) failed to adequately warn (Plaintiff's Complaint ¶V).

It is not disputed that the Mountain Bell vehicle was stationary and that the appellant did not strike it. It is further undisputed that defendant Jose Gonzales, after realizing that his vision was obstructed, turned left in front of the appellant (Gonzales depo., p.10, 18 and 21) and then collided with the appellant. Furthermore, it is undisputed that the collision between appellant and Gonzales was the actual cause of Jensen's injury. Finally, it is undisputed that plaintiff has no recollection of the accident. (Jensen Depo. p. 6-19).

ARGUMENT

POINT I

THE CONDUCT OF MOUNTAIN BELL WAS NOT THE PROXIMATE CAUSE OF THE INJURIES SUSTAINED BY APPELLANT.

To place this case in proper perspective, and to render irrelevant the significant portion of appellant's brief devoted to the issue of Mountain Bell's negligence, we will concede, arguendo, for purposes of this appeal only, that the alleged negligence of Mountain Bell was not determinable by way of summary judgment. The same concession was made at the trial level for purposes of focusing on the key issue--proximate causation.

Thus narrowed, the case once again presents to this court the interesting, and oft-misunderstood policy question of the extent to which the negligence of a passive actor will result in the imposition of legal responsibility in the case of subsequent acts of negligence by the plaintiff or third parties.

A. The Issue is One of Law Not One for Jury Determination

Appellant's argument that these issues should be presented to a jury for determination perpetuates a common misunderstanding of what has come to be called the law of "proximate causation." Although scholars and courts differ as to how these concepts should be articulated, most authorities now seem to agree that in its classical application "proximate

causation" is not a factual determination but is a determination consisting of legal policy which determines, given a set of facts, the extent to which an actor's negligence exposes him to liability. A jury instruction committee comprised of judges and lawyers of the State of Utah articulated its agreement with this proposition in its report as follows:

> Note that the term "proximate cause" is not used or defined in the instruction. "Proximate cause," as distinguished from simple cause and effect, classically involves the question as to whether the plaintiff is in a class of persons protected from the risk of harm which occurred to him, or whether the harm occurred to him is a harm which he is protected against. The committee believes that in the vast majority of negligence cases, there will be no genuine issue as to "proximate cause," but only as to simple cause and effect. The committee is further of the opinion that "proximate cause" issues when they occur ordinarily are and should be ruled upon by the trial court as matters of law.[2] [Emphasis added].

A member of that committee, Professor E. Wayne Thode, has written an excellent and extensive analysis of this question.[3] Professor Thode, in advocating a "duty-risk" approach to the question as opposed to the "proximate causation" approach states:

> Under the duty-risk method of analysis the determination of the scope of the legal system's protection is entirely a court

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[2]This jury instruction report, approved by this court on July 28, 1976 has subsequently received the partial imprimatur of this court in Batty v. Mitchell, 575 P.2d 1040, 1044 (Utah 1978

[3]Thode, "Tort Analysis: Duty Risk vs. Proximate Cause and the Rational Allocation of Functions between Judge and Jury," 1977 Utah L. Rev. 1.

> function--the jury plays no part in this aspect of the case. The issue for the court is whether the risk to which the plaintiff has been subjected is within the scope of the defendant's duty. If the answer is in the affirmative, the court is then obligated as part of its duty function to set the standard with which the defendant must have complied to avoid liability. The jury has the burden of determining if the standard was breached.[4]

This court, although typically reluctant to grant summary relief in negligence cases or reverse jury determinations, has adopted the judge/jury allocation of function in this area by ruling as a matter of law on "proximate cause" issues frequently. In Toma v. Utah Power & Light Company, 12 Utah 2d 275, 365 P.2d 788 (1961), the court affirmed a ruling by the district court judge on a motion for directed verdict. This court there discussed the very issue which we now raise--that of judge/jury allocation:

> Strenuous efforts have been repeatedly made to have us reverse or at least modify the Hillyard case, particularly as it has to do with the determination of when proximate cause becomes a jury question. It has been vigorously argued that this case imposes a severe and unreasonable burden upon the plaintiff, and works a grave injustice upon an innocent injured person. The injured person is often stopped from holding responsible one joint tort feasor while prevailing against the other. Regardless of these many efforts we have consistently upheld our decision in the Hillyard case. (12 Utah 2d at 287).

In Anderson vs. Parson Red-E-Mix Paving Company, 24 Utah 2d 128, 467 P.2d 45 (1970), this court affirmed a ruling as a

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[4] Id. at 26.

matter of law by the trial court on proximate causation on a motion for directed verdict. See also Velasquez v. Greyhound Lines, Inc., 12 Utah 2d 379, 366 P.2d 989 (1961) wherein an n.o.v. on a proximate cause issue was affirmed by the court.

We conclude that a determination, as a matter of law, of the extent to which Mountain Bell's conduct in the instant case imposes legal responsibility is entirely appropriate under the circumstances.

B. Mountain Bell, Under Utah Law, is Not Legally Responsible For the Injuries Incurred by Plaintiff.

To set the stage for an analysis of the legal responsibility of Mountain Bell under the circumstances of the instant case, it must be recognized that there were three basic actors involved--Mountain Bell, Jensen, and Gonzales.

As to Mountain Bell, its conduct, at worst, was that of a stage hand in arranging the props around which the subsequent collision would occur. Simply stated, at 8:00 a.m. on September 8, 1977 (some six hours before the accident) Mountain Bell parked its repair truck at the intersection in question, placed warning cones in all four directions, and in the north/south directions placed "Men Working" signs behind and ahead of the truck. The truck had its four-way flashers on, its headlights on and two strobe lights flashing. At the time of the accident, several hours later, the sole Mountain Bell employee in the area was in a manhole in the intersection and, therefore, did not witness the accident.

The next actor, in chronological sequence, was Gonzales. He approached the intersection from the north with the intention of turning left to the east. Whatever else may be clear or unclear about Gonzales' testimony, it is certain that he saw the Mountain Bell truck, that he recognized it obstructed his vision of oncoming traffic from the south, and that he sat and pondered the situation for two minutes prior to the time that he commenced his left turn into the intersection. The turn was almost immediately followed by the collision with plaintiff on this motorcycle--Gonzales having estimated plaintiff's speed at approximately 60 miles per hour.[5]

Counsel for the plaintiff, in examining Gonzales by leading questions, made it perfectly clear that Gonzales saw and appreciated the dangerous character of the situation:

QUESTION: [by Mr. Dibblee] It was kind of dangerous, the fact that you couldn't see everything; isn't that right?

ANSWER: Yes.

[Gonzales deposition at p.33]

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[5]See for example the Gonzales testimony at page 10 of his deposition wherein when asked what he did after he arrived at the intersection and stopped, he said "I wait there. I couldn't see, you know, in front of me. There was a utility truck working there. I couldn't see nothing." With respect to the time that Gonzales had to absorb and digest the situation, he testified that he waited in the left turn lane for "about a couple of minutes." [Gonzales depo. at p.18].

The final actor, the plaintiff Jensen, suffers from complete amnesia of the accident and immediately preceding events. In the absence of any testimony from Jensen, or any other evidence suggesting that he did not see and appreciate the conditions of the intersection as he approached it, Jensen is subject to the applicable legal presumptions under the circumstances--specifically, he is charged with the knowledge of those things which he either saw or which, in the exercise of reasonable care, he could not help but have seen. See, e.g., Nymen v. Cedar City, 12 Utah 45, 361 P.2d 1114 (1961).

Against this straightforward and relatively simple factual background, we now consider the applicable law as previously articulated by this court. The seminal decision was Hillyard v. Utah By-Products Co., 1 Utah 2d 143, 263 P.2d 287 (1953). It will be recalled that in Hillyard the static negligence was that of parking a truck so that its rear end obstructed the traveled portion of the highway. Subsequently, driver Vaughn Aston and passenger Robert Reif, plaintiffs deceased, collided with the rear end of the truck with Aston claiming he had not seen the truck, because of other traffic, until immediately before the collision. In a lengthy discussion as to whether the negligence of Aston was an intervening cause, hence exculpating the staticly negligent defendant, this court drew the following critical distinction:

> In applying the test of foreseeability to situations where a negligently created pre-existing condition combines with a later act of negligence causing an injury, the courts have drawn a clear-cut distinction between two classes of cases. The first situation is where one has negligently created a dangerous condition [such as parking the truck] and a later actor observed, or circumstances are such that he could not fail to observe, but negligently failed to avoid it. The second situation involves conduct of a later intervening actor who negligently failed to observe the dangerous condition until it is too late to avoid it. In regard to the first situation it is held as a matter of law that the later intervening act does interrupt the natural sequence of events and cut off the legal effect of the negligence of the initial actor. This is based upon the reasoning that it is not reasonably to be foreseen nor expected that one who actually becomes cognizant of a dangerous condition in ample time to avert injury will fail to do so. On the other hand, with respect to the second situation, where the second actor fails to see the danger in time to avoid it, it is held that a jury question exists, based on the rationale that it can reasonably be anticipated that circumstances may arise wherein others may not observe the dangerous condition until too late to escape it. The distinction is basically one between a situation in which the second actor has sufficient time, after being charged with knowledge of the hazard, to avoid it, and one in which the second actor negligently becomes confronted with an emergency situation. 1 Utah 2d at 151 (emphasis in original).

In Hillyard, of course, because of the immediacy of Aston's discovery of the truck, the matter was considered to be a proper question for the jury. However, this court made it eminently clear that when the subsequent actor (in this case, either Gonzales, or Jensen or both) actually becomes cognizant

of the dangerous condition in ample time to avert it, his conduct becomes "intervening" in the legal sense and exculpates the static tortfeasor. It should be noted that in the instant case Mountain Bell's conduct is legally even more remote from the accident than in most of these static condition proximate cause cases. Its remoteness is accentuated by the fact that we have the intervening conduct of not one but two subsequent actors--Jensen and Gonzales. Gonzales clearly apprehended the dangerous situation, digested it, and proceeded notwithstanding it--precisely that conduct described by this court in Hillyard as being sufficient to "cut off" prior static negligence. Jensen, likewise, according to the undisputed evidence, must be charged with having seen the condition and yet proceeded unsafely into the intersection.

Hillyard has several progeny which have consistently upheld the basic Hillyard analysis. The decision which is factually most analogous to the instant case is Velasquez v. Greyhound Lines, Inc., 12 Utah 2d 379, 366 P.2d 989 (1961). In that case, a truck was parked to the side of the road protruding into the driven portion of the road. An oncoming bus (in which plaintiff was a passenger) approached the truck and the driver conceded that he saw the truck well in advance of the ultimate collision. However, he had some sort of mental blackout for a few moments and thereby was unable to avoid colliding with the truck when he finally

became conscious again. This court sustained that trial court's finding that the conduct of the bus driver was not "legally foreseeable" by the static tortfeasor and, therefore, that the latter's negligence was not the proximate cause of the injury. The following statement of conclusion of that case is indicative of its similarity to the instant matter:

> Applying the foregoing test to our situation: we think it is not reasonably to be foreseen that an oncoming driver (Greyhound) would see (or fail to see) this large, well-lighted truck so parked upon the highway, and with at least one and one-half usable traffic lanes to his left nevertheless run into it. The trial court was correct in concluding and entered judgment in favor of Interstate Motor Lines as a matter of law on the ground that the negligence of Greyhound was the sole proximate cause of the collision. (Utah 12 2d at 383).

The recent case of Watters v. Querry, 588 P.2d 702 (Utah 1978) which appellant relies upon heavily in his brief, further supports the emergency/non-emergency distinction enunciated in Hillyard and Velasquez. In Watters, this court rejected the following jury instruction as incorrect when applied to the fact situation present in that case:

> If a driver creates a dangerous condition with a motor vehicle, but this condition is such that another driver, exercising reasonable care, should have observed and avoided a dangerous condition, then the negligence of the later driver is an independent intervening cause and, therefore the first driver cannot be the proximate cause of the collision.

But, in rejecting the instruction, this court was quick to point out that the instruction was not necessarily incorrect as a general statement of the law if applied in appropriate circumstances, citing Hillyard. The clear import of the citation to Hillyard was that the emergency/non-emergency distinction was affirmed by this court. While the above instruction was not appropriate in an emergency situation such as existed in Watters, it is still an accurate statement of the law as to non-emergency situations, such as here where there is an intervening act of negligence that "cuts off" the static negligence of Mountain Bell. Unlike Watters Mountain Bell did not slam on its brakes to create an emergency situation for which it can be held liable. Unlike Hillyard, defendant Gonzales and the appellant were not weaving in and out of traffic so that they were suddenly confronted with the parked Mountain Bell truck after which they could not avoid it. Both Jensen and Gonzales knew or should have known that the truck was there. There was nothing obstructing their view, nothing to prevent them from taking appropriate precautions. In short, there was no emergency situation and therefore, Gonzales' independent intervening act, rather than Mountain Bell's parking of the truck, was the sole proximate cause of appellant's injury.

Numerous decisions in other jurisdictions have consistently held in similar situations that the later act of an

intervening tortfeasor, and not the parking of the vehicle, is the proximate cause of the resulting injury.

For example, in Shephard v. Azzarelli Construction Co., 294 So.2d 667 (Fla. 1974), the appellate court upheld a summary judgment entered against a plaintiff in a fact situation similar to the case at bar. The plaintiff was injured when, while attempting to make a left-hand turn on a green light on a busy street, her vehicle was struck by a car proceeding in a direct course from the opposite direction. In that action, she sued not the driver of the vehicle that hit her, but rather the construction company, the owner of the two trucks, one of which was broken down and both of which were stopped, unmoving, in the left turn lane, opposite and across the intersection from her. Plaintiff contended that these vehicles blocked her vision of the intersection and specifically the car into which she turned and with which she collided. The Florida court, with a comparative negligence statute similar to Utah's, affirmed the summary judgment on the ground that:

> The arguably negligent act of permitting a truck to fall into disrepair [and negligently being in the intersection obstructing her vision,] had nothing whatever, 'proximate' or otherwise to do with the occurrence of the accident, which would have occurred in precisely the same way had the trucks merely been stopped waiting to make a left turn from their proper location in the intersection.

In Sims v. Apperson Chemicals, Inc., 185 So.2d 179 (Fla. 1966) the plaintiff brought action for injuries sustained by his children in a collision with the defendant's automobile. The plaintiff joined the chemical company which placed the vehicle in the roadway at night in violation of municipal ordinances as a defendant for creating the condition. The trial court held that even if defendant's truck had been parked on the paved road at night by defendant's employee in violation of the ordinance, the truck was an immobile instrumentality that presented a patent situation and was not an operating, efficient or proximate cause of the plaintiff's injuries.

The Florida appellate court affirmed the decision citing numerous cases from jurisdictions such as New Jersey, North Carolina and Louisiana and held:

> In the case at bar it was unimportant whether the defendant's car rested legally or illegally upon the street, since its obstruction to the vision of the crossing pedestrian, or to the driver of a moving car upon the roadway, would, under the testimony, be equally effective. In either event its impotence for harm or damage, as an innocuous, immobile instrumentality must be manifest, since in both situations it simply presented a patent condition, and not an operating, efficient or proximate cause, which can be said to contain by its activity, that potentiality for harm or damage, which furnishes the test upon which the rule of liability in this character of tort-feasance is predicated. at 182.

Walker v. Illinois Commercial Telephone Co., 43 N.E. 2d 412 (Ill. 1942) is the seminal case in the area. The Walker

case involved the parking of a telephone company truck with a pull trailer so as to obstruct the vision of drivers approaching an intersection. A collision occurred and Walker sued the other driver and the phone company and obtained a judgment against both. The court in that case held that although the initial act of negligence may be the occasion for an intervening cause which intervenes and produces the injury, the intervening cause will be held to be the proximate cause of the injury unless the intervening act is within the control of the party responsible for the responsible act. The court dismissed the action against the phone company holding:

> . . . that the truck being there, at that particular time, did nothing more than furnish a condition by which the injury to the plaintiff was made possible. The proximate cause of the injuries and damages complained of, was the contributing negligence of plaintiffs and the negligence of the defendant Norriss. (at 416)

Further, the court found that the intervening act was not within the control of the phone company.

In Fultz v. Myers, 282 N.E. 2d 488 (Ill. 1971) with a similar fact situation, the Illinois Appellate Court reiterated the holding in Walker that an obstruction only furnished a condition for the later intervening negligence of others and held that:

> As to the cross-appeal of the Plaintiff against Defendant Folks, [a co-defendant who had placed a vehicle in the intersection but who did not collide

> with either the plaintiff or defendant] the question becomes one of whether there was an intervening cause or in other terms whether the parking of the Folks automobile was the proximate cause of the accident here in question. It is to be noted that if the act complained of does nothing more than create a condition that makes the injury possible by some subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury. at 490 (Emphasis supplied)
>
> Its position upon the street was obvious to all persons and a condition necessary to be reckoned with by the traveling public. Under the above rule, we are not of the opinion that it can be considered an operating, efficient or proximate cause of appellant's injuries. (at 491)

As has been consistently held by the above-cited cases and supported by the Utah decisions in Hillyard; Velasquez; Toma; Anderson, respondent Mountain Bell's negligent act was not the proximate cause of appellant's injury; that act was cut off by later intervening acts of Jensen and Gonzales which became the proximate cause of appellant's injury.

CONCLUSION

Based upon the foregoing legal authorities and the facts of this case, it is clear that Mountain States Telephone & Telegraph Company was not and is not the proximate cause of

appellant's injuries. This court should affirm the judgment of the lower court.

DATED this 29th day of October, 1979.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, to James R. Soper and Richard C. Dibble 400 Ten Broadway Building, Salt Lake City, Utah, this 29th day of October, 1979.