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Kenneth Friedman and Virginia E. Friedman v. Mountain Fuel Supply Company : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

KENNETH FRIEDMAN and VIR-
GINIA E. FRIEDMAN, his wife,
Plaintiffs and Respondents,

vs.

MOUNTAIN FUEL SUPPLY COM-
PANY, a corporation,
Defendant and Appellant,

and

C. LESLIE WHEELER, JOHN H.
TEMPEST and JOHN H. TEMPEST,
JR., d.b.a. WHEELER & TEMPEST,
et al.,

Defendants.

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Case No.
8236

BRIEF OF APPELLANT

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and B. Z. KASTLER,
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tain Fuel Supply Company.

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BRIEF OF APPELLANT

STATEMENT OF FACTS

The Complaint

The material allegations of plaintiffs' complaint are as follows:

On or about November 19, 1951, there occurred an explosion in plaintiffs' residence located at 3100 South

1640 East Street, Salt Lake County, Utah (R. 1, 2). The explosion produced extensive damage to said residence (R. 2). As a direct and proximate result of the explosion occurring, the plaintiff, Virginia E. Friedman, suffered fright and marked shock to her nervous system, which caused her continuing severe emotional and nervous upset in that she does not sleep well and is easily disturbed and upset (R. 4).

The complaint alleges further that plaintiffs' residence was built in the year 1948; that the defendant, Wheeler & Tempest, under a Salt Lake County permit, issued May 19, 1948, excavated near said residence for and on behalf of the defendant, Mountain Fuel Supply Company, and assisted the defendant, Mountain Fuel Supply Company, in the installation of the necessary pipes and mains to supply gas to plaintiffs' residence; that the defendant, Byron W. Lundberg, or the defendant, Barney A. Todd, or both of them, excavated and installed a water line in plaintiffs' residence under a Salt Lake County permit dated June 21, 1948, and that said excavation and waterline installation were made adjacent and against the gas line installed by the defendants, Mountain Fuel Supply Company and Wheeler & Tempest (R. 2). The complaint charges that the defendants are liable to plaintiffs for the damages resulting from the explosion on the grounds that the defendants and each of them performed the work of installing said gas and waterlines in a negligent manner so that natural gas was permitted to escape into plaintiffs' residence other than in the mains and lines intended for that purpose, and that said explosion was the result of gas hav-

ing seeped into the basement of said residence and being ignited by the flame of the pilot light of either the gas water heater or furnace (R. 2, 3). Plaintiffs also claim that Mountain Fuel Supply Company failed and neglected to maintain said gas line and main in a proper and safe condition so that gas could not escape therefrom and enter into the residence of plaintiffs other than in pipes installed and intended for that purpose (R. 3).

Facts Established by the Evidence

The material facts established by the evidence in this case are without substantial controversy. They are as follows:

On November 19, 1951, at a few minutes past 10:00 o'clock a. m. an explosion occurred in the basement of the house owned by plaintiffs, located at 3100 South 1640 East in Salt Lake County, Utah (R. 143, 144, 222). The explosion caused substantial damage to the house (R. 152). However, the explosion did not disturb the plaintiff, Mrs. Friedman, from the position in which she was sitting in the living room at the time of the explosion (R. 145). In support of Mrs. Friedman's claim for personal injuries, she testified to only nervousness, loss of appetite, inability to sleep well and putting on weight at the rate of about two pounds a day. She was able, however, to take care of her normal household duties and her children (R. 147, 148, 149).

An investigation to determine the cause of the explosion was made by employees of the defendant, Mountain Fuel Supply Company, who arrived at the Friedman resi-

dence within less than an hour after the explosion; and by W. L. Butler, mechanical engineer for Salt Lake City Corporation, who arrived there shortly following the arrival of the gas company employees (R. 222, 440).

When the employees of the gas company arrived at the scene of the explosion, bubbles were coming up through a puddle of water at the side of the blacktop in the street in front of the Friedman residence (R. 222). Also, a strong odor of gas coming through the water meter box was noticeable (R. 223).

An excavation was made to uncover a portion of the gas main running north and south in the street in front and to the east of the Friedman residence (R. 224), which disclosed the following: The gas main had a kink in it; "It had been pulled to the east and upward—to the east about six inches—and upward about three or four inches out of the straight line" (R. 224). The gas main was located a foot above and about the same distance west of a parallel water main (R. 235-236). The gas main was cracked where it had been kinked and the kink was located just above where the water service line to the Friedman residence was connected to the water main in the street (R. 244, plaintiffs' Exhibit 33, which is a section of the gas main in question showing the kink and crack). At the point of the kink there were gouges which were made by the impact of a great force (R. 246-247 and plaintiffs' Exhibit 33).

The testimony as to the immediate cause of the explosion and the investigation made to determine the same was given by Mervin A. Cook, Professor of Metallurgy at the

University of Utah, D. J. Robison, Assistant Superintendent of Distribution for Mountain Fuel Supply Company, and W. L. Butler, Mechanical Engineer for Salt Lake City Corporation. Mervin A. Cook testified that, in the afternoon of the day following the explosion, he made a thorough investigation of the conditions that existed in the basement and around the house, and so forth, to determine what was the cause of the explosion (R. 174).

The investigation made by said witnesses disclosed that gas had escaped from a break in the gas main in the street in front of plaintiffs' residence and from there had migrated to and through the walls of plaintiffs' house into the basement thereof (R. 190-191, 249, 254, 444-446, 449, 450, 463, 464). The investigation made by said witnesses covered among other things, the gas furnace, gas water heater, gas service line, gas meter and gas regulator, none of which showed any damage or leakage (R. 199, 206, 208, 209, 240, 244, 254, 279-280, 417, 420, 422, 423, 435, 438, 451, 453, 455). The only conflict in the evidence, which conflict is immaterial, is whether the gas escaping from the break in the gas main entered the basement at the north end of the east basement wall as testified to by Butler and Robison, or entered at the south end of said wall through a crack in the cement near the gas service line as testified to by Cook (R. 175-176, 178, 188, 206-208, 223, 224, 237-238, 239, 240, 249, 450, 463).

The section of the gas main in which the break occurred (plaintiffs' Exhibit 33) was installed by the defendant, Wheeler & Tempest, during the month of February, 1948 (R. 140, 141, 287). It was a two-inch, new, wrapped,

steel pipe with an estimated life expectancy in service of about one hundred years and capable of holding a pressure of 600 to 800 pounds per square inch, but to be used to carry gas having a pressure of only 25 to 35 pounds per square inch. It was installed with the highest degree of care, in excellent condition and carefully tested for leakage before being covered (R. 366-370, 382-388, 399-403). The uncontradicted evidence shows that the gas main when installed by Wheeler & Tempest was "perfectly straight", "was laid in perfect condition", and was not kinked as shown by respondents' Exhibit 33 (R. 368, 370, 374, 379, 388, 402, 403). In view of the verdict in favor of the defendant, Wheeler & Tempest, it is conclusively established that the gas main was properly installed, and that the kink therein from which the break resulted cannot be attributed to any negligence on the part of either Wheeler & Tempest or Mountain Fuel Supply Company (R. 45, 101, 104, 105, 107, 108).

Under the evidence, it is indisputable that the break in the gas main resulted from a kink therein produced by a heavy blow which weakened the pipe and caused it to break open suddenly within a matter of hours prior to the explosion (R. 246, 247, 273, 274, 282, 304, 306, 308, 310-311, 313, 315, 446-447, 460, 467, 468, 469).

Since the installation of the gas main was completed and until the investigation following the explosion, Mountain Fuel Supply Company had had no occasion to excavate said gas main (R. 248) and it is established by stipulation that since the installation of the gas line until the time of the explosion, the only excavation in the vicinity of said

line was made by the defendants, Byron W. Lundberg and Barney A. Todd in laying a water service line to plaintiffs' house between June 21, 1940, and July 8, 1948 (R. 288, 317). All the evidence points directly to the fact that the gas main was struck and kinked by a mechanical digger, known as a back-hoe, while digging the trench for said water service line (R. 246-248, 294, 297, 298, 311, 313, 325, 333, 490, 494). The defendants, Lundberg and Todd and the witnesses produced by them were evasive and never directly denied that such was the fact (R. 294, 319, 320, 322, 327, 504-506, 511, 512, 517).

The evidence is conclusive that Mountain Fuel Supply Company had no notice of any leak in its line nor any opportunity to have learned of the same prior to the explosion (R. 176, 192, 199, 270, 282, 283, 308, 310, 460, 467, 468). Mrs. Friedman testified that she had never detected the odor of gas prior to the explosion (R. 149). All the witnesses, including those sponsored by plaintiffs, testified that the break in the line occurred suddenly and within a matter of hours prior to the explosion (R. 270, 282, 283, 460, 467, 468). It is apparent from plaintiffs' Exhibit 33 that a large quantity of gas was escaping from the broken main. Professor Cook, plaintiffs' witness, testified that the gas accumulated in the basement of said house rapidly—within less than a half hour—before the occurrence of the explosion (R. 176, 192, 199).

Proceedings Following Close of Evidence

At the close of all of the evidence, the defendant, Mountain Fuel Supply Company, moved for a directed verdict

(R. 519). The case was submitted to the jury which returned a verdict against Mountain Fuel Supply Company for general and special damages and for damages to Mrs. Friedman. The jury returned separate verdicts in favor of the other defendants (R. 43-50). Following the reception of the verdict, the defendant, Mountain Fuel Supply Company, pursuant to Rule 50 (b) of the Utah Rules of Civil Procedure, moved to have the verdict against it and judgment entered thereon set aside and to have judgment entered in accordance with its motion for a directed verdict, or, in the alternative, for a new trial (R. 120-121). The trial court denied each of said motions (R. 128). Thereafter, the appellant duly perfected an appeal from the judgment entered in this case (R. 130-136).

STATEMENT OF POINTS

1. The verdict of the jury and the judgment entered thereon against appellant is not supported by the record in this case or any substantial evidence therein, and the trial court erred in denying the motion of the defendant, Mountain Fuel Supply Company, for judgment notwithstanding the verdict.

2. The trial court erred in denying appellant's motion for a new trial.

(a) The trial court erred in instructing the jury to the prejudice of the appellant.

(b) The trial court erred in precluding appellant from proving its second defense to respondents' complaint.

ARGUMENT

POINT NO. 1

THE VERDICT OF THE JURY AND THE JUDGMENT ENTERED THEREON AGAINST APPELLANT IS NOT SUPPORTED BY THE RECORD IN THIS CASE OR ANY SUBSTANTIAL EVIDENCE THEREIN AND THE TRIAL COURT ERRED IN DENYING THE MOTION OF THE DEFENDANT, MOUNTAIN FUEL SUPPLY COMPANY, FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The controlling principles of law in ruling on a motion for judgment notwithstanding the verdict have been stated in the following cases recently decided by this court:

In *Jackson v. Colston et al.*, 116 Utah 288, 209 P. 2d 566, the court states the law as follows:

“The only question here to be decided is whether the court erred in directing a verdict for the defendants. It is fundamental that the burden rests upon the plaintiff to establish the causal connection between the injury and the alleged negligence of the defendant: *Tremelling v. Southern Pac. Co.*, 51 Utah 189, 170 P. 80; that the court may not permit the jury to speculate concerning defendants’ liability; *Dern Inv. Co. v. Carbon County Land Co.*, 94 Utah 76, 75 P. 2d 660; and that the court is required to direct a verdict unless there is evidence from which the jury could reasonably find in favor of the plaintiff.”

In *Seybold v. Union Pac. R. Co.*, (Utah), 239 P. 2d 174, the court held:

“We have no disagreement with the time-honored rule that if there is substantial evidence to support the conclusion of the trier of the fact it will not be disturbed on review. But that means more than a mere scintilla of evidence. See 9 Wigmore, 3d Ed., Sec. 2494, for a discussion of the test to be applied to the quantum of evidence necessary to support a finding by the trier of facts. In that section, at page 296, he says, ‘There was an old phrase that a mere scintilla of evidence was sufficient; but this has been abandoned by most courts.’ Citing a plethora of cases. After referring to a variety of methods of phrasing the rule and a great many authorities, he concludes the section with this: ‘Perhaps the best statement of the test is: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain.’ We approve the rule thus stated by Mr. Wigmore. If there is any substantial competent evidence upon which a jury acting fairly and reasonably could make the finding, it should stand. But if the finding is so plainly unreasonable as to convince the court that no jury acting fairly and reasonably could make the finding, it cannot be said to be supported by substantial evidence. See also 20 Am. Jur. 1033.”

In *Boskovich v. Utah Const. Co.*, (Utah), 259 P. 2d 885, this court held:

“It is fundamental that where there is no evidence upon a material part of the plaintiff’s claim, it is the court’s duty to direct a verdict.”

The claims stated in the complaint upon which plaintiffs seek relief from the Mountain Fuel Supply Company

are that the work of installing the gas line in question was performed in a negligent manner so that natural gas was permitted to escape into plaintiffs' residence and also that Mountain Fuel Supply Company failed and neglected to maintain said gas line and main in proper and safe condition so that gas could not escape therefrom and enter into the residence of plaintiffs. In support of said claims, plaintiffs introduced into evidence a section of the gas main in front of plaintiffs' residence which showed a kink and break therein as the same existed at the time of the explosion (Exhibit 33). The gas line in question was installed for Mountain Fuel Supply Company by Wheeler & Tempest who were independent contractors with many years of experience in the installation of gas and other utility lines. Although it be conceded that any negligence of Wheeler & Tempest in making such installation would be imputable to Mountain Fuel Supply Company, it is now conclusively established in this case by the verdict in favor of Wheeler & Tempest that the gas line was not negligently installed. It is also established by the record in this case that the kink and resulting crack in the main, as shown by Exhibit 33, which permitted gas to escape and seep into plaintiffs' basement were caused by a heavy blow inflicted subsequent to its installation by persons other than the defendant, Mountain Fuel Supply Company.

As pointed out under the statement of facts, the pipeline in question was new pipe which was installed by Wheeler & Tempest with the highest degree of care. It is undisputed that, but for the damage inflicted to the pipe by a person or persons other than Mountain Fuel Supply

Company, it would not have ruptured and permitted the escape of gas. Professor Mervin B. Hogan, head of the Department of Mechanical Engineering at the University of Utah, who was sponsored by and testified in behalf of plaintiffs, stated that in his judgment the break in the pipe was caused by the impact of some metallic body which made the kink in the pipe (R. 315). He testified:

“Q. Now, the situation which you describe as to the traffic over the street, and so forth, that has relation to the fact that this pipe has been damaged by some blow; is that correct?

“A. Oh, yes, sir; yes, without that damage, there would be no stress concentration.

“Q. Yes; and, if—you have examined the pipe?

“A. Yes, sir.

“Q. And, if the pipe hadn't been damaged, you wouldn't expect that to have happened?

“A. I am sure it wouldn't” (R. 310-311).

The record, without conflict, shows that Mountain Fuel Supply Company had no notice of the leak in or of the damaged condition of the gas main until its investigation following the explosion. Mrs. Friedman testified that she had not at any time prior to this explosion detected the odor of gas (R. 149). Both plaintiffs' and defendants' witnesses testified, without conflict, that the rupture in the gas main which permitted gas to escape occurred suddenly and within a few hours prior to the time of the explosion; thus, no opportunity was afforded the gas company to have discovered and repaired the damage to the ruptured pipe. According to Professor Hogan, the blow and resulting kink

in the pipe resulted in an area of stress which eventually caused it to suddenly rupture or "flip open" (R. 308-310). Mr. Robison and Mr. Butler, who testified on the subject, stated that the break in the pipe would have occurred within a matter of hours prior to the explosion (R. 270, 467, 468).

Howsoever the evidence may be viewed, the record in this case is conclusive that the gas line in question was properly installed, and that the break in the line which permitted gas to escape into plaintiffs' residence was caused by damage to the same inflicted subsequent to its installation by the negligent acts of a person or persons other than the Mountain Fuel Supply Company. The evidence all points to the fact that the kink in the line that eventually resulted in the break was caused by the impact of a mechanical digger which, subsequent to the installation of the gas main, was used to excavate a trench for the installation of the water service line to plaintiffs' residence.

The record shows, therefore, that plaintiff not only failed to produce any substantial evidence of an act or omission on the part of Mountain Fuel Supply Company which proximately caused the injuries complained of, but that such injuries were proximately caused by the negligent act of some third party or parties.

Appellant's motion for a directed verdict specifically called the trial court's attention to the proposition that the plaintiff, Virginia E. Friedman, could not recover upon her claim set forth in the third count of the complaint, because the evidence showed that her alleged damages were based solely on fright and mental disturbances unaccompanied or preceded by physical injury (R. 519).

The testimony of Mrs. Friedman with respect to her claimed damages is as follows: That she was sitting in the living room at the time of the explosion (R. 144-145); that the explosion did not disturb her from the position in which she was sitting (R. 145); that after the explosion she became extremely nervous, was not able to eat very well, couldn't sleep, and started putting on weight at about the rate of 2 pounds per day (R. 147). She testified that this condition continued for about three weeks (R. 148).

The applicable rule is concisely stated in 15 Am. Jur., Section 189, at Page 608, as follows:

"Generally, however, no recovery can be had for fright alone caused by a negligent act which is neither accompanied nor followed by physical injury. In other words, mere fright alone cannot be made the basis of an action for damages, unless caused by the willful wrong of another."

In *State v. Baltimore Transit Company*, 80 A. 2d 13, 28 A. L. R. 1061, the court held that damages for mental distress in connection with an injury to property is not recoverable in an action for the property tort. Following this case is an exhaustive annotation on the subject of "Recovery for mental shock or distress in connection with injury to or interference with tangible property". 28 A. L. R. 2d 1070-1104.

POINT NO. 2

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

Our principal point is that the judgment entered on the verdict against Mountain Fuel Supply Company is not

supported by the record in this case or any substantial evidence therein, and that the trial court erred in denying appellant's motion for judgment notwithstanding the verdict. However, as provided by Rule 50 (a) of the Utah Rules of Civil Procedure, appellant prayed that, if its motion for judgment notwithstanding the verdict be denied, appellant be granted a new trial. The argument which follows is directed at the court's denial of said motion.

(a) *The trial court erred in instructing the jury to the prejudice of appellant.*

The trial court gave certain instructions to the jury under which they were required to make findings as to facts which were not in issue, nor supported by any substantial evidence. It is well settled that to so instruct is prejudicial error as it permits a jury to return a verdict based on speculation. The instructions complained of are the following:

Instructions 13, 19 and 20 present to the jury an issue of fact as to whether Mountain Fuel Supply Company had furnished defective pipe for installation by Wheeler & Tempest (R. 99, 105, 106). The complaint makes no such claim. The negligence charged under the complaint is:

"That the defendants and each of them performed the work of installing said services in a careless and negligent manner, so that natural gas was permitted to escape into plaintiffs' residence * * * and that the negligent and careless manner in which defendants and all of them caused said line to be installed was the direct and proximate cause of said explosion and the resultant damage" (R. 2, 3).

The record contains no evidence that the pipeline, as originally furnished to Wheeler & Tempest, was defective.

The uncontradicted evidence is to the contrary (R. 228, 230, 244-246, 347, 348, 366-370, 382-388, 399-403). Moreover, it is established by plaintiffs' own witness, who had examined the pipe in question, that the sole cause of the break in the main was its obvious damaged condition resulting subsequent to its installation and without which it would not have ruptured and permitted the escape of gas (R. 310-311).

Instructions 12, 14 and 20 directed that the jury return a verdict against Mountain Fuel Supply Company if said Company had failed to use ordinary care in inspecting and maintaining its gas line prior to the explosion. This instruction is unsupported by any evidence in the record. The undisputed evidence is to the contrary: As hereinabove pointed out, the sole cause of the break in the pipe was a kink made in it by the impact of a heavy force occurring subsequent to its installation by the act of a person or persons other than appellant, and, undoubtedly, by the operator of a mechanical digger who was digging a trench for the installation of water service line to plaintiffs' residence.

Respondents' witness, Professor Hogan testified:

"Q. I understood you to say, Doctor, that the blow could cause the kink right at the place where the break is?

"A. Yes, sir.

"Q. And there is evidence of marks that, that might have come from a tooth on a power shovel, is that right?

"A. It would be my opinion, that is true, yes sir" (R. 313).

Respondents' complaint does not claim that appellant had notice of said damage done to its pipe or the leak thereafter resulting therefrom. It is uncontradicted that appellant had no such notice. Furthermore, under the evidence it is clear that no reasonable care on appellant's part could have prevented the escape of gas from its main and the resulting explosion because, as testified to by both respondents' and appellant's witnesses, the rupture in the pipe occurred suddenly and within a very short time prior to the explosion.

Mr. W. L. Butler, an independent witness, who for many years has been the mechanical engineer for Salt Lake City Corporation, testified concerning this subject as follows:

"Q. For the Gas Company. You have an opinion as to how soon before the explosion this break occurred?

"A. Yes, I have an opinion. I couldn't—I don't think anyone could be definite on their opinion.

"Q. I understand, of course, we are surmising in all things, that is; how soon before the explosion occurred would you estimate this break was present—occurred?

"A. I would think within, safely, within 24 hours.

"Q. 24 hours?

"A. Yes.

"Q. You think it would take 24 hours for gas, under 25-pound pressure, to force its way up through three feet of concrete sufficient to create a bubbling and a pool of water?

"A. It wasn't concrete.

"Q. Through ground, I am sorry. No evidence of concrete, of course.

"A. No, it wouldn't take that long to force it up there. It probably would be apparent there, depending on the soil, the condition of the soil, maybe in an hour or less.

"Q. You think it would take an hour?

"A. But that wasn't my opinion. My opinion was, how long maximum time elapsed between the break and the explosion.

"Q. Well, that is what I asked you; you said 24 hours, didn't you?

"A. I would say within 24 hours would be my opinion.

"Q. Is it possible, in your opinion, that this break, as it is now indicated and as you saw it when it was excavated, could have been open to that degree and it would take 24 hours for that explosion to occur—

"A. Yes, what—

"Q. (Continued)—before—

"A. I don't say it was 24 hours. I say within 24 hours. It could have been within an hour—the maximum time would be.

"Q. Yes, I understand you don't think this is a gradual process; you don't think this pipe opened just a tiny bit, and within 24 hours, expanded to its present position?

"A. I think the straining was a gradual process and it finally reached the maximum that that side of the pipe could be strained and opened.

"Q. You mean causing the ultimate break?

"A. Yes" (R. 467-468).

Instruction 19 is clearly erroneous because it directs that the jury may return a verdict in favor of the plaintiff, Virginia E. Friedman, for "personal injury damage * * *" and "for such mental suffering which said plaintiff has endured". There was no claim or evidence whatever of any physical injury to Mrs. Friedman. She testified to only fright and mental disturbance. As hereinabove pointed out, this was no basis for recovery in this action.

(b) *The trial court erred in precluding appellant from proving its second defense to respondents' complaint.*

Appellant's answer pleads the following defense to respondents' complaint:

"Second Defense

"This defendant is informed and believes, and therefore alleges, that the Westchester Fire Insurance Company of Illinois was prior to the institution of this action and now is the owner of the claim and cause of action sued upon herein jointly by the plaintiffs, Kenneth Friedman and Virginia E. Friedman and that said Westchester Fire Insurance Company is the real party in interest to prosecute such claim and action and is an indispensable party thereto" (R. 12).

Said defense is based on Rule 17 (a) of the Utah Rules of Civil Procedure which reads as follows:

"Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name with-

out joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Utah."

Prior to the trial of this case, respondents moved to strike said defense as follows:

"Come now the plaintiffs above named and move the court for an order striking the Second Defense appearing in the answer of the defendant, Mountain Fuel Supply Company, on the ground and for the reason that said Second Defense is immaterial and upon the further ground that facts are not stated therein sufficient to constitute a defense to plaintiffs' action" (R. 24).

Said motion was argued before the Honorable A. H. Ellett, one of the judges of the District Court of Salt Lake County, who ordered that said motion to strike be denied (R. 28). At the trial of this cause before the Honorable Martin M. Larson, the following proceedings occurred:

"MR. HENDERSON: The defendant, Mountain Fuel Supply Company, makes proffer of proof of its second defense, which is based on Rule 17A of the Utah Rules of Civil Procedure, which provides that every action shall be prosecuted in the name of the real party in interest, and would make such proof except as otherwise precluded by the ruling of this court. And do I understand, your Honor, that you would sustain objection to that?"

"THE COURT: Yes.

"MR. HENDERSON: To such proof?"

"THE COURT: Yes.

"MR. HANSON: We object to it, of course.

“THE COURT: The offer of proof made by the Mountain Fuel Supply Company, defendant, with regard to its second defense, as set up in its answer, is denied, and refused by the court, the objection thereto sustained, the court taking the view that the Westchester Fire Insurance Company of Illinois, while it may be a proper or allowable party in the action—that is, could have been made a party to the action—is not a necessary or indispensable party to the action, and the matters involved in the second defense are not, in the court’s view, a proper and effective defense to the action, and such matters would be irrelevant and immaterial” (R. 139).

In *National Union Fire Ins. Co. v. Denver & R. G. R. Co.*, 44 Utah 26, 137 Pacific 653, the court pointed out that the former code section from which Rule 17 (a) was taken differed from the codes of several other states, and that said provision is most sweeping in its terms. The court held in discussing the remedies of a defendant in raising the defense provided for under said rule that, if it does not appear upon the face of the complaint that there is another party interested in the subject of the action, the objection may be taken by answer. The ruling in said case was approved in the case of *Bank of American Fork v. Smith*, 44 Utah 284, 140 P. 122.

We submit that the ruling of the trial court in precluding appellant from proving said defense in effect abrogates Rule 17 (a) of the Utah Rules of Civil Procedure.

CONCLUSION

The jury's verdict and the judgment entered thereon are not supported by the record made in this case. If the judgment against appellant is permitted to stand, the appellant will be required to respond in damages caused from no fault on its part, but from the acts committed by a person or persons other than appellant.

We also have assigned as error the court's denial of appellant's alternate motion for a new trial on the grounds that the trial court committed prejudicial error in instructing the jury and in precluding appellant from proof of its second defense to respondents' complaint.

It is respectfully submitted, therefore, that justice in this case requires the judgment entered on the verdict against appellant be set aside and judgment be entered in favor of appellant.

Respectfully submitted,

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