

1980

Matthew C. Harris and Gary S. Harris v. Utah Transit Authority and Lester Lorenzo Loosemore : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MATTHEW C. HARRIS
and GARY S. HARRIS,

Plaintiffs-
Appellants,

vs.

THE UTAH TRANSIT
AUTHORITY and LESTER
LORENZO LOOSEMORE,

No. 17042

Defendants-
Respondents.

RESPONDENTS' BRIEF

APPEAL FROM JUDGMENT OF THE SECOND JUDICIAL
DISTRICT COURT OF WEBER COUNTY
HONORABLE RONALD O. HYDE

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and LESTER LORENZO LOOSEMORE,

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RESPONDENTS' BRIEF

- - - - -

NATURE OF THE CASE

This is an action brought by plaintiffs for personal injuries sustained as a result of a collision between a jeep in which Matthew Harris was a passenger and a Utah Transit Authority bus.

DISPOSITION IN THE LOWER COURT

A jury trial was commenced in the Second Judicial District Court of Weber County with the Honorable Ronald O. Hyde presiding. The jury returned a special verdict form in favor of defendants and against plaintiffs. A judgment was accordingly entered finding no cause of action against defendants. Plaintiffs' motion for a new trial was subsequently denied by the lower court.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the lower court judgment entered pursuant to the jury verdict.

STATEMENT OF FACTS

Appellants have raised several issues in this appeal including their claim that the trial court erred in finding the jeep driver negligent as a matter of law and in failing to find the bus driver negligent as a matter of law. Because both of these claims necessarily involve an extensive review of the record, it would serve no purpose to review in great detail the facts at this juncture. However, a brief overview of the accident and the trial may be helpful to this Court.

On March 7, 1977, the plaintiff Matthew Harris was riding in the passenger seat of a jeep driven by Rodney C. Talbot. (Tr. 547). Another boy, Kevin Della Lucia, was riding in the middle of the jeep in a special box designed for jeeps equipped with bucket seats. (Tr. 554). The boys were on an errand for their teacher at Weber High in Ogden and were en route to Bonneville High to deliver some papers. (Tr. 546). The jeep was proceeding south on Washington Boulevard. The weather was dry and clear. (Tr. 548).

Meanwhile, defendant Lester Loosemore was proceeding on his assigned route with the Utah Transit Authority. The route basically encompassed all of Washington Boulevard. (Tr. 609]. Mr. Loosemore had already made two trips that

morning and was proceeding south on Washington Boulevard on his third trip. (Tr. 613).

At approximately 1700 North and Washington Boulevard Mr. Loosemore saw a passenger waiting near a mailbox and bus stop. (Tr. 621). The area in which the passenger was standing had no curb and there was no designated stopping area. (Tr. 623). It is undisputed that the bus made a gradual and normal pullover in order to pick up the waiting passenger. (Tr. 640, 686, 663). The evidence adduced at trial was consistent in showing that the bus had stopped at the time of the accident, although the length of such stop varied from witness to witness.

At the place of the accident Washington Boulevard is 42 feet wide from the edge of the asphalt to the edge of the asphalt. (Tr. 513). There are two lanes in both the northbound and southbound direction. (Plaintiff's Exhibits 3-16). The bus was parked so that its left side was encroaching in approximately half of the outside traffic southbound lane. (Tr. 528). There was, therefore, approximately 15 feet of unobstructed southbound lanes still remaining. (Tr. 533). Although the bus driver stated that he felt unsafe in pulling off the road any further, the shoulder to the right of the bus was physically large enough to accommodate the entire bus. (Tr. 622, 625).

It was undisputed that the bus was approximately 10 feet wide and 12 feet high. (Tr. 647). The bus is equipped with

four large rear lights which are activated by the brake, turn signals, and flashers. (Tr. 703).

It is also undisputed that Washington Boulevard at the point of the accident is straight with no curves. This straightaway extends back approximately two miles from the site of the accident. (Tr. 761). The speed limit on Washington Boulevard in this section of the highway is 50 miles an hour.

While there was some dispute as to the exact speed the jeep was traveling, it was generally assumed by the various experts that it was traveling at a speed of approximately 50 miles an hour when the collision occurred. The driver of the jeep testified that he did not recall seeing the bus until some 10 to 50 feet prior to hitting it. (Tr. 562). The driver swerved to the left and glancingly struck the left portion of the rear of the bus. The jeep then proceeded to the side of the bus where it stopped. (Tr. 550). The plaintiff Matthew Harris was caught in between the jeep and the bus and pulled from the jeep onto the pavement. (Tr. 551).

The trial of this matter was commenced on December 4, 1979, and continued for three additional days. Extensive evidence was presented by both sides as to the circumstances and probable causes of this accident. The plaintiff called Police Chief Earl J. Carroll who arrived at the scene and took extensive pictures of the accident. (Tr. 494-506).

Officer Rex Cragun of the Riverdale City Police Department also testified on behalf of plaintiff as to the physical measurements and investigation he conducted. (Tr. 507-533). Sgt. Charles Beaman of the North Ogden City Police Department related his observations at the time of the accident and his subsequent visit to the scene for accident reconstruction. (Tr. 534-544).

Plaintiff called the driver of the jeep, Rodney Carl Talbot, who described his version of how the accident occurred. (Tr. 546-565). In addition, the passenger of the jeep Kevin Dela Lucia gave his recollection as to the circumstances of the accident. (Tr. 566-574). Helen Hollingshead, Robert Freston, and Gloria Myers were all driving separate vehicles behind the jeep and were also called by plaintiff to describe their various observations. (Tr. 575-600).

Plaintiff examined various employees and former employees of defendant Utah Transit Authority. The bus driver-defendant Lester Loosemore was examined as to his memory of the events occurring on the day of the accident. (Tr. 600-649). Russell Simonsen, a supervisor of the defendant, was interrogated as to his observations when he arrived at the accident site. (Tr. 650-656). Finally, Daniel Newland, defendant's shop foreman, was examined as to various mechanical aspects of plaintiffs' case, including their claim that the rear lights of the bus were not functioning correctly. (Tr. 689-717).

Plaintiffs also called Rex Child and Barbara Warner who were passengers on the bus at the time of the accident and who testified as to their recall of the accident. (Tr. 657-664; 686-688).

The plaintiff, Matthew Harris, testified as to his limited memory of the day of the accident and as to the damages he incurred because of the accident. (Tr. 665-686). Finally, plaintiffs called Robert Quinn as an expert witness to recreate plaintiffs' version of the circumstances surrounding the accident including plaintiffs' theory that the defendant driver was negligent in the location of the vehicle and in the maintenance of the bus. (Tr. 717-751).

At the conclusion of plaintiffs' case defendants moved for a directed verdict against the plaintiffs on the grounds that plaintiffs did not show that the actions of defendants were the proximate cause of Mr. Harris' injuries. After extensive argument the lower court denied defendants' motion. (Tr. 752-761).

Defendants called Diane Child and Linda Mark who were both passengers in the bus on the day of the accident. (Tr. 761-768; 806-808). In addition, defendants called Trina Farr, who observed the jeep as it was being driven down Washington Boulevard just prior to the accident. (Tr. 809-815).

Finally, defendants called their own reconstruction expert, Professor Rudolph Limpert, who related that in his

opinion the cause of the accident was the failure of the jeep driver to pay proper attention to the road in front of him. (Tr. 768-806).

Both plaintiff and defendants moved for a directed verdict at the conclusion of the case and both motions were denied by the trial court. (Tr. 816-817). The matter was submitted to the jury on special verdict after instructions by the court. The verdict returned by the jury found the defendants not negligent in either the maintenance of the bus or in the bus's operation. (Tr. 235). A judgment was entered in accordance with the special verdict form. (Tr. 405-406).

Plaintiffs moved for a new trial and a hearing was held on March 14, 1980, at which time the lower court denied plaintiffs' request. (Tr. 407, 475, 476). Plaintiffs appeal from the judgment entered by the lower court and from the order denying new trial. (Tr. 477).

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN INSTRUCTING THE JURY THAT RODNEY TALBOT WAS NEGLIGENT.

As noted previously, the lower court declined to direct a verdict in favor of the defendants and against the plaintiffs. At the conclusion of the trial the lower court did, however, instruct the jury "that the driver of the jeep, Rodney Talbot, was negligent as a matter of law."

(Tr. 253). Appellant complains that the trial court

committed error in making this determination. (Appellants' brief, pp. 4-8). This argument is without merit.

Rodney Talbot was not a party in this lawsuit. Because of the "guest statute", plaintiff was unable to sue Mr. Talbot for his injuries. Likewise, defendants were unable to bring any third party complaint against Mr. Talbot since to do so would circumvent the guest statute. Denver & Rio Grande Western Railroad v. DeWayne Construction Company, 552 P.2d 117 (Utah 1976). Defendants did maintain, however, that the conduct of Mr. Talbot was the sole proximate cause of the accident and, therefore, even if the bus driver Loosemore had been negligent his negligence did not cause the accident.

The lower court instructed the jury that Mr. Talbot was negligent as a matter of law in the operation of the jeep. He did not, however, instruct the jury that Talbot's conduct was the proximate cause of the accident. The question of proximate cause was left to the jury to decide as stated in Instruction 14 given by the Court. (Tr. 253). Similarly, the Court did not instruct the jury as to the negligence of the bus driver or the proximate cause of his conduct. This too was left for a jury determination.

Thus, the only issue which was decided as a matter of law by the Court was that of the negligence of the jeep driver. A review of the record most favorable to plaintiffs clearly shows that the Court was correct in this ruling in that

reasonable minds could not differ as to whether Mr. Talbot was negligent.

Plaintiffs called Rodney Carl Talbot as a witness. Mr. Talbot was extremely candid and truth in his answers, both on direct examination and cross-examination. He stated that on the day of the accident he arrived at Weber High School and was asked by one of his teachers to deliver papers to Bonneville High School. (Tr. 546). At that time he conferred with both Matthew Harris and Kevin Lucia and it was decided that they should also accompany him on the trip after they obtained permission from their teacher. (Tr. 547).

Mr. Talbot testified that his jeep was in excellent condition and that the brakes had been completely redone. Upon leaving the school, Mr. Talbot drove, Matthew Harris was in the passenger seat, and Kevin Lucia was in a specially designed box between the two seats. (Tr. 547, 554).

Mr. Talbot stated that the weather was dry and clear as he proceeded south on Washington Boulevard. (Tr. 548). He stated he was proceeding between 40 and 50 miles an hour with the normal flow of traffic. (Tr. 549). He had traveled approximately a mile in the right inside lane before the accident occurred. (Tr. 549).

On direct examination he stated that there came a time when he suddenly saw the bus in front of him. He said he looked up, saw the bus and glanced in his mirror to the left to make sure the left lane was clear, and then began

to turn and brake to go around the bus. The jeep grazed the left side of the stopped bus and finally halted in front of the bus. (Tr. 550).

Counsel for defendants on cross-examination extensively examined Mr. Talbot as to the details concerning his testimony on direct. He stated, for example, that the visibility on that day was good. (Tr. 553). He could not recall what the three boys were doing prior to the accident although he stated that they could have been talking among themselves. (Tr. 555).

Defendants' counsel then engaged in the following dialogue with Mr. Talbot.

Q Now you indicated on direct examination that you looked up and saw the bus ahead of you?

A Yes, uh-huh.

Q Was your attention directed to the floor? I don't understand. Did you actually physically look up and see the bus?

A I don't know where my attention was. I did just look up or look.

Q But your attention was not directed to the front of your vehicle, though; was it? I mean, you weren't looking out the window and seeing what was in front of you, were you?

A Not at that second, I must not have been.

Q So you didn't see the bus the second before though, did you? You didn't see the bus at any time until you swerved to miss it, did you?

A

I may have seen it before.

Q You're indicating to me that you saw the bus a number of -- hundreds of yards in front of you, and then continued to drive toward it, though?

A No, I'm saying I may have seen it before, but I don't recall seeing it before.

Q The first time you recalled seeing the bus on this occasion, though, was when you looked up and saw it there in front of you, and you swerved to try to miss it?

A That's the first time I remember seeing it.

Q Okay. No other times prior to that few moments prior to the accident did you recall seeing the bus?

A I don't remember seeing it. (Tr. 558-559).
(Emphasis added).

Subsequent to this dialogue additional testimony was given by the witness which also illustrates the correctness of the lower court's ruling.

Q You weren't paying any attention as to whether the bus was moving?

A I couldn't tell if it was stopped or stopping when I hit it -- when I seen it.

Q So it could have been either one?

A Right.

Q All right. And prior to the time that you glanced up and saw this bus and made these maneuvers to avoid the rear end of the bus, you didn't know what the bus was doing, do you? I mean, you didn't see it slow down and stop, or you didn't see the passengers that they were picking up there; did you?

A No.

Q So you don't know whether the bus stopped gradually or whether it stopped quickly, or what, because you didn't see it? It's true, you didn't see the bus prior to the time you glanced up that you recall?

A No.

Q And you can give us no estimate in car lengths or anything how far you were away when you first saw that bus?

A I would just be a guess. I couldn't give you an exact answer.

Q You can't give us any type of a reasonable estimate?

A It would be just a guess, anywhere from 10 to 50 feet. It would be a guess.

Q You didn't have any trouble seeing the bus as you looked up and saw it, did you?

A No.

Q It was right there as big as life, wasn't it?

A Right.

* * *

Q When you looked up and saw this bus, there as big as life as we discussed, you didn't really make any observations, any detailed observation, of the rear of the bus other than to see that it was there and then decide that you had to do something or else you were going to run into the back of it; isn't that true? You didn't make any detailed observation of the color. You already told us you don't know what color it was. You didn't make any detailed observation of the light, did you?

A No. I just seen the bus and tried to avoid it.

* * *

Q I guess the thing is, Rod, would it be fair to say that for some reason you just didn't see the bus until you were too close to miss it, and so you collided with the bus, is that a fair statement?

A Yes. (Tr. 565). (Emphasis added).

Likewise, Kevin Lucia, the other passenger in the jeep, stated that he did not see the bus until some 30 or 40 feet from the back of the bus. At that time he stated he knew the bus was stopped and had no difficulty in seeing it since visability was good that day. He also could not recall where he was looking prior to seeing the bus. (Tr. 571-573).

Regardless of the question of proximate causation, it cannot be doubted that the driver of the jeep was negligent as a matter of law in failing to see a stopped bus which was 10 feet wide and 12 feet high on a clear dry morning with no obstacles in front of the jeep and with a two mile straightaway preceding the location of the bus. Obviously, for whatever reason, the occupants in the jeep were preoccupied with some activity for a considerable length of time since the driver of the jeep did not recall ever seeing the bus in front of him prior to impact.

Defendants argued that the question of proximate cause was also clear in that the driver of the jeep caused the accident. The trial court, however, rejected this argument and submitted the question of proximate causation to the jury, even though this Court on previous occasions has affirmed a lower court's holding, as a matter of law, to both the issue of negligence and proximate cause in factual situations similar to the instant case.

In Valasquez v. Greyhound Lines, Inc., 366 P.2d 989 (Utah 1961) this Court affirmed a lower court's judgment n.o.v. in favor of a stopped truck where a Greyhound bus ran into the truck on a clear night with no obstacles in the way.

Likewise, in Anderson v. Parsons Red-E-Mix Paving Company, 467 P.2d 45 (Utah 1970), this Court affirmed a lower court's dismissal of plaintiff's complaint as a matter of law on the basis that the plaintiff's conduct in running into a parked Red-E-Mix truck was both negligent and was the proximate cause of the accident. As this Court stated:

In the instant case the collision occurred in the middle of the afternoon in broad daylight on a clear day; and there was nothing either to obstruct the vision or distract the attention of the host driver Kim Mortenson between Main Street and this large Red-E-Mix truck standing there "as big as life and twice as natural" on the street. Id. at 47.

In the instant case, Mr. Talbot also testified that the bus was "there as big as life" and was standing there "like a sore thumb." (Tr. 562, 565). Certainly, the testimony of the driver and the passenger of the jeep clearly establish as a matter of law that the driver negligently failed to maintain a proper lookout for hazards in front of him and the lower court was correct in so instructing the jury.

Plaintiffs' arguments as to the operation of the tail-lights and the location of the bus do not affect a finding

of negligence on the part of the jeep driver. Even if it is assumed arguendo that the lights on the bus were not working properly and that the bus had been negligently parked in the right inside lane, this would still not eliminate a finding of negligence on the part of the jeep driver in failing to observe the stopped vehicle.

The negligence of the bus driver and the maintenance of the vehicle goes solely to the question of proximate causation. This issue, however, was submitted to the jury for their determination.

Even plaintiffs' counsel in arguing against a motion for directed verdict acknowledged that the driver of the jeep may have been negligent in not observing the situation but was still entitled to a jury question as to proximate causation. (Tr. 758-759). The trial court refused to grant defendants' motion for directed verdict and instead submitted the question of proximate causation to the jury. Based upon the evidence, plaintiffs were entitled to no more than this opportunity and arguably were not entitled to any opportunity before a jury.

Finally, the Stapley v. Salt Lake City Lines case, cited by appellants, is not contrary to the position of defendants. (Appellants' brief, p. 8). In that case, a factual issue existed as to the proximate causation of the accident. In addition, there was obviously no clear evidence that the automobile following the bus was negligent as a matter of law. For this reason both the question

of negligence and proximate causation were submitted to the jury. Even in that case, however, Justice Crockett in a dissent stated that he could see no conduct on the part of the bus which proximately caused the injury since the driver drove into the rear of the bus in broad daylight and was therefore the sole proximate cause of the collision. 414 P.2d at 89.

For these reasons, the trial court was correct in instructing the jury that the jeep driver was negligent as a matter of law.

POINT II.

THE COURT CORRECTLY SUBMITTED THE ISSUE OF DEFENDANT LOOSEMORE'S NEGLIGENCE TO THE JURY.

Appellant argues that the evidence of Loosemore's negligence was at least as strong as Talbot's and that therefore the Court should have also ruled Loosemore negligent (Appellants' brief, p. 9).

A review of the issues presented at trial together with the evidence adduced at trial shows that appellants' claim lacks any validity.

Plaintiffs asserted that Loosemore or defendant UTA was negligent in three respects. First, that Loosemore violated Section 41-6-101, U.C.A., relating to parking on a highway; second, that the lights of the bus were not functioning correctly and therefore failed to warn the jeep driver; and third, Loosemore failed to keep a proper lookout.

None of these contentions, however, were undenied as was the negligence of the jeep.

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of the conflicting evidence clearly shows this.

Section 41-6-101, U.C.A., provides that no person should park or leave a vehicle on a paved or traveled highway if it is "practical to stop, park, or to leave such vehicle off such part of said highway." The statute then continues that in any event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle must be available from a distance of 200 feet in each direction upon the highway.

As noted earlier, the total width of the road from asphalt to asphalt was 42 feet. (Tr. 513). The bus was partially on the shoulder of the road and partially on the lane adjoining the road. There still remained 15 feet of unobstructed southbound lanes available to passing motorists. The visibility of the bus was clearly in excess of 200 feet in each direction and, in fact, was several miles.

While plaintiffs maintained there was no reason for the bus driver to fail to pull entirely over to the shoulder of the highway, Mr. Loosemore testified that he felt unsafe in pulling any further into such area because of a large ditch which adjoined the shoulder of the road. (Tr. 623-624). He stated further that it would have been unsafe for him to have gone any closer towards the awaiting

passenger since he would have had to drive directly toward her rather than pulling up to the side of her. (Tr. 644-645).

Loosemore further testified that upon seeing the passenger some 300 or 400 feet back on the road that he activated his right turn signal and maintained the signal while he was stopped. (Tr. 640-641). He stated further that during the stop he kept his foot on the brake which would activate the rear brake lights as well as the turn signal light which was already on. (Tr. 640-641).

Thus, there was first a jury question as to whether the statute itself was violated. The jury certainly could have believed that it was, under the circumstances, "impractical" to pull over any further on the shoulder of the road in light of the position of the passengers.

In any event, even if the driver was guilty of violating the parking statute such violation is still only prima facie evidence of negligence and is subject to justification or excuse. In Intermountain Farmers Association v. Fitzgerald, 574 P.2d 1162 (Utah 1978), it was said:

This court has long held that the violation of a statute does not necessarily constitute negligence per se and may be considered only as evidence of negligence

This rule was established in Thompson v. Ford Motor Company, 395 P.2d 62 (Utah 1964) where this Court stated that the violation of a safety standard is subject to justification

or excuse if the evidence is such that it reasonably could be found that the conduct was nevertheless within the standard of reasonable care under the circumstances.

Thus, the jury was clearly presented with two factual issues on this first contention alone: first, was the statute violation; second, if so, was the conduct of the defendant nevertheless reasonable. The Court could not rule defendant's conduct in parking to be negligence as a matter of law.

Plaintiffs also claimed that defendants were negligent in the maintenance of the bus in that the rear lights improperly functioned. Again, there was conflicting evidence as to the operability of these lights which clearly presented a jury question.

Plaintiffs called several witnesses who stated they could not recall seeing the lights either preceding or subsequent to the accident. Defendants, on the other hand, produced several other witnesses who stated the contrary. Exhibits 7, 8 and 5 show lights on the bus immediately following the accident. Sgt. Charles Beaman testified that he recalled seeing flashing lights on the bus when he arrived at the scene. (Tr. 543). Mr. Loosemore testified that the lights on the dashboard indicate each time a turn signal and a brake light is working and if the lights on the dashboard do not come on it indicates that the outside lights are not functioning. (Tr. 635). At the time of the stop he testified that the dashboard lights were on showing

operating. (Tr. 640-641).

Mr. Russell Simonsen, a supervisor of UTA, stated that when he arrived some 10 minutes after the accident he observed the front hazard lights flashing and the rear right side hazard light flashing. The left light had been damaged in the accident. (Tr. 650-654). Mr. Daniel Newland, the shop foreman of UTA, stated that it would not be possible for the panel lights of the bus to come on if the outside lights were not functioning. (Tr. 707).

Diane Child testified that as she was sitting on the bus at the time of the accident she heard the clicking of the signal light inside the bus just shortly prior to the collision. (Tr. 765). Finally, Linda Mark testified that she had been picked up by the bus just prior to the accident and that she directly passed the back of the bus at such time and saw both the brake lights and the turn signal light functioning. (Tr. 806-808).

The preceding is illustrative of the conflicting testimony which existed at the trial. Concededly, plaintiffs produced witnesses who stated the lights were not functioning at the time of the accident, attempted to show that an intermittent short was present in the system which could not be normally detected, and otherwise attempted to impeach all of the witnesses previously listed. Nevertheless, the credibility of this evidence was a question for the jury to decide.

should never have been submitted to the jury since Mr. Talbot clearly stated on cross-examination that he had not seen the bus prior to the time it was immediately in front of him and that he had no difficulty in realizing it was stopped. (Tr. 562). Defendants contended therefore that even if the company was negligent in the maintenance of the lights that, as a matter of law, there was no proximate causation between the lights and the actions of the jeep driver.

This contention is borne out in Jilka v. National Mutual Casualty Company of Tulsa, 106 P.2d 665 (Kan. 1940), where it was stated that where the absence of lights or warning signals do not prevent motorists from seeing a vehicle in time to avoid colliding with it, their absence is not the proximate cause of the resulting collision. Likewise, in Stoddard v. Nelson, 581 P.2d 339 (Ida. 1978), the court stated that the failure to have operating headlights on a motor vehicle does not create liability unless the absence of such lights is a proximate cause of the collision.

Finally, this Court in Valasquez v. Greyhound Lines, Inc., 366 P.2d 989 (Utah 1961), discussed an argument raised by a defendant that a truckdriver had failed to put out warning flares in back of his stopped vehicle. In rejecting such argument, this Court stated, "If there had been flares out, or even if the truck had been aflame, it could have given him no more information." Id. at 990.

Similarly, in this case the presence of warning lights, a flagman, or any other attention-getting device would have had no effect upon the actions of the jeep driver since he only saw the bus for the first time when he was almost on top of it. In any event, however, the Court did submit both the issue of negligence and proximate cause to the jury as to the maintenance of the equipment.

Plaintiffs' third contention was that since the bus driver failed to recall seeing the jeep in his mirror as he pulled over he was guilty of maintaining an improper lookout as a matter of law. Negligence is defined as a breach of a duty to use due care under the circumstances of a situation. Wheeler v. Jones, 431 P.2d 986 (Utah 1967). Mr. Loosemore testified at trial that before pulling over to the side of the road to pick up the passenger he looked in his mirrors and recalled seeing a white stationwagon. He stated that he was sure there were other vehicles behind it but did not pay any attention to them. (Tr. 639).

While the length of time that the bus stopped was contested by the plaintiff, there was no doubt that the bus was stopped. The time varied from a minimum of one second to a maximum of over 10 seconds. It was also undisputed that the stop made by the bus driver was gradual and smooth and was in no way abrupt or sudden. Certainly, it could not be said as a matter of law that the failure of the bus driver to look into the mirror while the bus was stopped

or immediately preceding such stop could have, as a matter of law, been negligence on his part when it was disputed whether the jeep would even have been in the immediate range of the mirror when the stop was made.

Plaintiffs were permitted to argue this alleged act of negligence to the jury as constituting negligent conduct on the part of the bus driver. Once again, defendants contended that, as a matter of law, even if the driver was negligent in failing to observe the approaching jeep, such negligence would not be a proximate cause of the accident. The trial court, nevertheless, submitted both issues to the jury and the jury found against the plaintiffs.

It is therefore obvious that the alleged negligence of the defendant bus driver or the UTA was either a matter of fact for the jury to determine or, as a matter of law, should never have been submitted to the jury in the first place because of the failure to show any proximate cause which could have resulted even from proven negligence. Nevertheless, the lower court gave plaintiffs every opportunity to argue and prove all elements of defendants' alleged negligence and no error prejudicial to plaintiffs was committed.

POINT III.

INSTRUCTION NO. 14 GIVEN BY THE TRIAL COURT
WAS PROPER.

Appellants quote "in part" Instruction 14 in their brief. Since instructions must be viewed as a whole, however, it

is necessary to examine the entire Instruction and not just that portion quoted by the appellants. Instruction 14 in its entirety states the following:

In this case, in addition to denying that they were negligent as claimed by the plaintiffs, or negligent in any manner whatsoever, the defendants have asserted the defense that the actions of the driver of the jeep in which the plaintiff was riding were an independent, intervening proximate cause of the accident, and therefore the sole proximate cause of the accident and plaintiff's subsequent injuries.

To be an independent intervening cause that would relieve another's negligence from being a proximate cause, it must be negligence that was not foreseeable.

In that regard, you are instructed that the driver of the jeep, Rodney Talbot, was negligent as a matter of law, and if you find that he observed the bus stopped upon the highway, or, under the circumstances should have observed the bus, but because of his negligence failed to do so in time to avoid the accident, then you are instructed that the negligence on his part was the sole proximate cause of the collision.

If you find Talbot did not observe the bus in time to avoid it, and it could reasonably be anticipated that circumstances may arise wherein one may not observe such a dangerous condition until too late to escape (i.e., reasonably anticipated that an emergency might arise), then his negligence would not be the sole proximate cause. (R. 253).

Thus, the instruction correctly covers two types of situations: first, whether Talbot had sufficient time to observe the bus but failed to do so and, consequently, was the sole proximate cause of the accident; second, whether Talbot was put into an emergency situation in which he had

no time to observe the bus and whether Loosemore should have anticipated that a driver could have been placed in a situation where he could not escape.

The last sentence of Hillyard v. Utah Byproducts Company, 263 P.2d 287 (Utah 1953) cited by the appellants in their brief is applicable to this distinction:

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. 263 P.2d at 292.

It should be noted that except for the last paragraph of Instruction No. 14 the instruction was nearly identical to that given and approved in McMurdie v. Underwood, 346 P.2d 711 (Utah 1959). The instruction in that case read as follows:

You are instructed that the driver of the pickup truck was negligent as a matter of law, and if you find that she observed the hazards, if any of the stopped vehicles upon the highway or under the circumstances should have observed said vehicles, but because of her negligence failed to do so in time to avoid said accident, then you are instructed that the negligence on her part was the sole proximate cause of the collision . . . Id. at 712.

The cases of Valasquez v. Greyhound Lines, Inc., 366 P.2d 989 (Utah 1961), and Anderson v. Parsons Red-E-Mix Paving Company, 467 P.2d 45 (Utah 1970), also support the proposition that a driver who has an unobstructed view of a stopped vehicle, but who does not exercise that view is negligent and

is the sole proximate cause of an accident, just as is stated in paragraph 3 of Instruction No. 14.

The last paragraph of Instruction 14 adopts the foreseeability expansion as stated in the Watters case. This Court in Watters held that if an emergency situation is created where the oncoming driver does not have opportunity to sufficiently observe the situation, then the question arises as to whether the stopped vehicle driver should have been able to foresee that the vehicle following would be placed in a perilous situation by the actions of the first vehicle.

The final paragraph of Instruction 14 clearly allows the jury to consider whether or not such a situation existed and whether the bus driver should have foreseen a dangerous situation being created by his stop.

The recent case of Jensen v. Mountain States Telephone and Telegraph Company, No. 16417 (Utah, April 15, 1980), also supports this instruction. In that case it was held that the question of proximate cause and foreseeability must be decided by a factfinder even if it is assumed that negligence is established as a matter of law. The second paragraph of Instruction 14 and the fourth paragraph of Instruction 14 clearly adopt the foreseeability standard and allow the jury to weigh whether or not the bus driver could have foreseen the actions taken by the jeep driver.

There was ample evidence presented to the jury for it to conclude that the jeep driver had the opportunity

to observe the bus in front of him, but simply failed to do so. The evidence showed that no "emergency situation" existed and that Loosemore could not have reasonably foreseen that a vehicle traveling in back of the bus at a distance of many hundred feet would not see a large bus parked to the side of the road in broad daylight and be able to pass it with 1-1/2 southbound lanes available.

For these reasons, Instruction 14 was a correct statement of current Utah law and was not erroneous.

POINT IV.

THE JURY INSTRUCTIONS, TAKEN AS A WHOLE, WERE NOT IMPROPER OR INCOMPLETE, AND DID NOT OVEREMPHASIZE DEFENDANTS' THEORY OF THE CASE.

Plaintiffs make numerous complaints concerning the remaining jury instructions. (Appellants' brief, pp. 15-16). These arguments too are groundless.

Plaintiffs complain that the lower court erred in failing to instruct the jury that the negligence of Talbot could not be imputed to plaintiff Matthew Harris and in failing to instruct the jury that Matthew Harris was himself not negligent. Since defendants did not claim that Harris was negligent or claim that the negligence of Talbot should be attributed to Harris, such an instruction would only have confused the jury.

A court is not required to instruct a jury on questions and issues which are not presented in the lawsuit. This Court has held that no instruction should be given unless

it is both necessary and applicable to the fact situation involved in the case. Hadley v. Wood, 345 P.2d 197 (Utah 1959). In fact, it is error to instruct on legal propositions that are not within the issues of the case and on which there is no evidence presented. Ryder v. Sandlin, 374 P.2d 133 (N.M. 1962).

Plaintiffs further complain that their theory of the case was not presented by the lower court since their Instruction No. 1 was not given whereas they claim Instruction No. 14 stated defendants' theory of the case. A comparison of these instructions, however, does not support this contention. Plaintiffs' Requested Instruction No. 1 is an elaborate recitation of the facts similar to that given by counsel in his opening argument to the jury. Instruction No. 14, on the other hand, merely explains and defines the elements necessary for an independent, intervening proximate cause.

The fact that the first paragraph to Instruction 14 makes reference to defendants' "asserted defense" hardly makes the Instruction a "theory of the case." The jury was entitled and had to know the elements of intervening proximate cause in order to understand all of the issues and defenses raised by the parties. However, the jury did not need to know the alleged factual occurrences claimed by plaintiffs in the form of a jury instruction.

Next, plaintiffs complain that proposed Instruction No. 20

was not given which would have told the jury to draw no inference from the fact that Talbot was not a party in the proceeding. This, like the first complaints of plaintiffs, was an irrelevant instruction request since there was never any claim by defendants that Talbot should have been a party to the lawsuit or that his presence had any effect upon the negligence of the plaintiffs.

Finally, plaintiffs argue that, because witnesses testified that a second southbound lane was unobstructed, an instruction should have been given stating that such unobstructed lane did not lessen Loosemore's duty to pull off the road. Again, there was no claim by defendants that the existence of a free lane of traffic lessened Loosemore's duty pursuant to the Utah statute or that the existence of the other lane made pulling over to the curb "impractical."

The existence of the southbound lane, however, was pertinent in establishing the conduct of Talbot as to whether he had an opportunity both to observe the bus and to avoid it. Plaintiffs' speculation that the jury could interpret the other southbound lane to negate the effect of the statutory parking requirement does not rise to the level of a valid objection.

The instructions given to the jury were fair, complete, and not misleading. No error was made in either the giving of the Court's instructions or in the omission of the instructions offered by plaintiffs.

POINT VI.

THE COURT DID NOT ERR IN EXCLUDING PLAINTIFFS' EXHIBITS NO. 42 AND 43.

Plaintiffs claim that the lower court erred in excluding Exhibits 42 and 43 which consisted of maintenance records of the bus subsequent to the accident. Such a proposition is unsupportable. It should be noted at the outset that the trial court allowed Exhibits 40 and 41 into evidence. These exhibits were an itemized listing of all of the defects and electrical defects reported on the bus from 1975 until the date of the accident. (Tr. 219). Mr. Daniel L. Newland, UTA's shop foreman, was extensively examined by plaintiffs' counsel as to the alleged defects existing in the bus prior to the accident. (Tr. 695-696).

The trial court refused to admit Exhibits 42 and 43, however, for several reasons. First, the proposed exhibits did not show repair of the rear lights per se, but concern all of the electrical system of the bus including the speedometer, dimmer switches, headlights and electric doors. The exhibits, themselves, therefore, do not go to the specific condition of the rear lights but contain extraneous information which could only prejudice the defendants by allowing the jury to conclude that the bus was in general disrepair.

Second, there was no evidence shown that any subsequent defects in the electrical system of the bus was not caused by the accident itself. The collision with Talbot required the "wiring up of new lights" as shown in Exhibit 43. (Tr.

showed that it was necessary to replace the left side electrical system of the bus including the bulbs, the reflectors, and the panel. (Tr. 709).

Finally, Utah law is well-settled that subsequent repairs cannot be used to establish that a former condition was unsafe or was negligently maintained. Potter v. Dr. W. H. Groves Latter-day Saints Hospital, 103 P.2d 280 (Utah 1940). In spite of plaintiffs' contentions, the proposed exhibits could not be used to establish a prior condition since the collision itself damaged the electrical system making it irrelevant as to subsequent repairs.

This Court has stated on numerous occasions that a trial court is given considerable discretion in deciding whether or not evidence submitted is relevant. Lambrough v. Bethers, 552 P.2d 1286 (Utah 1976). Even if the evidence was wrongfully excluded, that fact alone is insufficient to satisfy a verdict unless it has "a substantial influence in bringing about the verdict." Rule 4b, Rules of Evidence, Utah 1971.

In this case the trial court was justified in refusing to admit the subsequent repairs of the bus for the reasons stated. No error was committed.

CONCLUSION

The trial of this matter consumed four days of court hearings, involved 19 witnesses, and introduced over 50 exhibits. The legal issues now before this Court were carefully briefed by both parties during the trial and the lower court heard

The jury returned a verdict finding no negligence on the part of defendants. There was substantial evidence to support this verdict and, in fact, plaintiffs do not contest the evidence supporting the jury verdict.

Rather, plaintiffs maintain that the court committed prejudicial error in instructing the jury that the jeep driver was negligent as a matter of law. The evidence shows, however, that reasonable minds could not differ that Rodney Talbot was in fact negligent. The evidence was uncontroverted that Talbot had an unobstructed view of the bus, that the road conditions were good, but that he simply did not see the bus because of inattention on his part.

This is not a case, as claimed by plaintiffs, where one driver is following another driver who suddenly stops, thereby causing the second driver to collide. Here, the evidence is clear that the bus had pulled over onto the shoulder of the road in a smooth normal stop and was loading the passenger for a minimum of at least one second and a maximum of over 10 seconds before the collision occurred. Talbot himself admitted that he never saw the bus until a split second before he hit it, thereby negating any claim of negligence as to the location of the bus or as to its functioning tail lights.

Again, it should be remembered that only the issue of negligence of Talbot was directed by the court and not the

in cases such as this. The jury, in spite of the court's direction, still could have concluded that the negligence of the defendants was the sole proximate cause of the accident.

Talbot was clearly negligent as a matter of law. Loosemore, on the other hand, was negligent only if he violated the parking statute, only if the violation of such statute was unreasonable, only if his lights were not functioning properly, and only if he maintained an improper lookout. Unlike the case of Talbot, Loosemore's claimed negligence could only be determined by evaluating the disputed evidence presented by both sides.

For these reasons, the Court properly submitted the question of Talbot's causation, and Loosemore's negligence and causation to the jury for its determination.

Likewise, Instruction 14 was completely proper in that it correctly incorporated the standard of Hillyard v. Utah Byproducts as modified by Watters v. Query.

Plaintiffs' other complaints concerning giving or failing to give instructions are equally without merit. A lower court has no obligation to instruct the jury on mere "possibilities" speculated upon by the plaintiffs. The instructions, as a whole, were fair and complete.

Finally, the lower court did not err in refusing to admit the subsequent repair records of the bus since such records did not refer specifically to the rear lights of the

bus, the damages could have been caused by the accident itself, and the records could only be shown for the purpose of establishing negligence which is contrary to existing Utah law.

For the preceding reasons, therefore, the jury verdict should be affirmed.

Respectfully submitted,

HANSON, RUSSON, HANSON & DUNN

BY 

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MAILING CERTIFICATE

I hereby certify that I served two copies of the foregoing Respondents' Brief upon appellants by mailing the same, postage prepaid, to Merlin Lybbert, 700 Continental Bank Building, Salt Lake City, Utah 84101, this 18 day of November, 1980.

