

1955

Ray Naisbitt v. Joseph Eggett : Brief of Respondent

Utah Supreme Court

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Stewart, Cannon & Hanson; Don J. Hanson; Attorneys for Defendant and Respondent;

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STATE OF UTAH

RAY NAISBITT, Guardian Ad Litem
for DARRYL R. NAISBITT, a minor,

Plaintiff and Appellant,

— vs. —

JOSEPH EGGETT,

Defendant and Respondent.

Case No. 8385

BRIEF OF RESPONDENT

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INDEX

	<i>Page</i>
NATURE OF THE CASE.....	1
STATEMENT OF FACTS	2
STATEMENT OF POINTS.....	8
ARGUMENT	8
POINT I. THE DEFENDANT WAS NOT GUILTY OF ANY NEGLIGENCE WHICH WAS A PROXIMATE CAUSE OF INJURY TO THE PLAINTIFF.	8
CONCLUSION	23

INDEX OF AUTHORITIES

Blair v. Rice, et al, (Ore.) 246 P. (2) 542.....	14
Covelchic v. Demo, 94 Pa. Supra, 167.....	21
McBride, Admr. v. Stewart, (Iowa) 290 N.W. 700.....	18
Party, et al, v. Kendall, et al, 228 N.Y.S. (2) 25.....	18
Praded v. McGowan, (N.H.) 190 Atl. 287.....	17
Pennington, Admr. v. Pure Milk Co., (Ky.) 130 S.W. (2) 24....	16
Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 2A, page 427	15
Blashfield Cyclopedia of Automobile Law and Practice, Vol. 4, Part II, page 31.....	13
Section 41-6-53, Utah Code Annotated 1953.....	12

IN THE SUPREME COURT
of the
STATE OF UTAH

RAY NAISBITT, Guardian Ad Litem
for DARRYL R. NAISBITT, a minor,

Plaintiff and Appellant,

— vs. —

JOSEPH EGGETT,

Defendant and Respondent.

} Case No. 8385

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action brought by Ray Naisbitt as guardian ad litem for Darryl R. Naisbitt, a minor, to recover damages suffered by the minor when a sleigh on which he was riding collided with the automobile of the defendant. At the conclusion of the evidence, the trial judge granted defendant's motion for a directed verdict on the grounds that no actionable negligence had been shown on the part of the defendant. The question presented by this appeal is whether the trial judge erred in so directing a verdict.

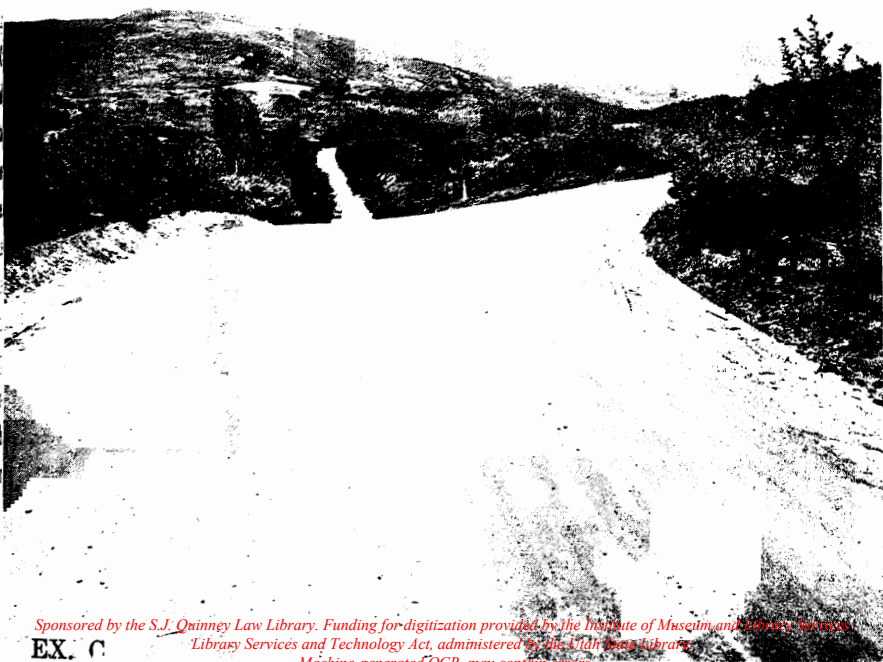
STATEMENT OF FACTS

This accident occurred on a curve where a road designated as the Ranch Road intersects the Mueller Park Road in the Mueller Park area southeast of the center of Bountiful in Davis County, Utah (R. 1). The Mueller Park Road extends in an easterly direction from Fourth East Street in Bountiful toward the mountains east of Bountiful (See diagram, Exhibit N). It travels generally uphill to a point where the Ranch Road intersects it. From that point on, Mueller Park Road continues on east making a dip downhill. The Ranch Road extends to the south and uphill from its intersection with the Mueller Park Road for about 300 feet, where there is likewise a dip and the Ranch Road goes down hill (Tr. 99). There are a number of families who live on the Ranch Road who must use the Mueller Park Road in getting to and from their homes (Tr. 104, 105). Mueller Park Road is also used by the families living on that road, including the defendant in this case (Tr. 170). Exhibits H and C are photographs looking east on Mueller Park Road and show the dip in that road and the curve leading off into the Ranch Road which is on the right hand side of the pictures. Exhibits 1 and 2 show the same general scene. The photographs, Exhibits B and F, were taken from the Mueller Park Road looking around the curve and up the Ranch Road. Exhibits D and G are pictures taken from a different point on the Mueller Park Road looking up the Ranch Road toward the dip in the Ranch Road. Exhibits A and E are taken from a point on the Ranch Road looking around the curve and toward the Mueller

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EX. E.



Park Road. This accident occurred just around this curve on the Mueller Park Road. Exhibit C, looking east on the Mueller Park Road, and Exhibit E, taken from the Ranch Road and looking toward the Mueller Park Road, are reproduced in this brief for the convenience of the Court.

In December of 1953, there had been a number of snow storms and the roads were covered with snow (Tr. 53-101). A sign designating the road as a coasting lane had been put at the entrance to the Mueller Park Road on Fourth East in Bountiful (Tr. 53), and a Seth Williams had been designated to supervise the sleigh riding on the hill (Tr. 8). On the day of the accident, the defendant, Joseph Eggett, who lived a block east of the Ranch Road on the Mueller Park Road, got off work at eight o'clock in the morning and was returning to his home about nine o'clock (Tr. 159). As he got nearly to the top of the hill on the Mueller Park Road, his car started to quit, whereupon he turned it around and parked it on the right hand side, the north side, in the vicinity of the Ranch Road intersection with the front of the car facing west (Tr. 160). Leaving the car in that position, he walked home to his breakfast some short distance further up the Mueller Park Road (Tr. 160).

On the same morning, the plaintiff, Darryl Richard Naisbitt, had been playing basketball at Darryl's home with his boy friend, Bruce Allen Litster (Tr. 108). At about 10:00 A.M. they took Darryl's sleigh and a sleigh belonging to Darryl's brother and went over to the Mueller Park Road (Tr. 109). There they met the third

boy, Carlos Leland Litster, the brother of Bruce, at the bottom of the hill (Tr. 109). When they arrived, a road scraper was scraping out an area at the bottom of the hill and Seth Williams would not let them go up the road (Tr. 110). At about 12:00 the road crew finished scraping and Seth Williams went home to lunch after telling the boys that they could go up the hill (Tr. 112). Darryl and Carlos took one sleigh and went about half way up the hill and sleighed down and were waiting for Bruce, who took the other sleigh, when a Mr. Grant Adams Child came along (Tr. 112).

Grant Adams Child, who lived on the Ranch Road, arrived at the bottom of the hill or the Mueller Park Road at about noon (Tr. 96). He was watching the children and did not notice Darryl's sleigh, which had been left in the middle of the road, until after his car had run over it (Tr. 96). Apparently in an effort to make up to the boys for having run over their sleigh, he offered to give them a ride up the hill (Tr. 97). Seth Williams had apparently left before he arrived, as there was no one supervising the boys at the time (Tr. 98). The Litster boys and Darryl climbed into the car and Mr. Child took them up the Mueller Park Road to the Ranch Road and then around the curve and up the Ranch Road about 300 feet to the point where the road dips off so that they could get the maximum amount of coasting (Tr. 98).

When they got out of Mr. Child's car, Carlos Litster, who was fifteen years of age at the time, got on the sleigh first. Bruce Litster, who was thirteen years of age, got on next, and Darryl, who was eleven at the time,

got on the top. Darryl gave a push and the trio started down the hill (Tr. 143). In the meantime, the defendant, Joseph Eggett, had finished his breakfast and was returning to his car with the idea of taking it to be fixed. As he walked down to the car, he met his brother, James Lynn Eggett, age eleven, who had come to the area to sleigh ride. The two of them walked down the hill to the defendant's car. About the time they arrived at the car, they saw Grant Child going up the road and both waved to him (Tr. 162). Getting into his car, the defendant found that the car would run with the front end facing down hill and assumed that the difficulty must be in the fuel pump (Tr. 162). Knowing that his wife wanted to go down town to do some shopping, he decided to take her with him and started backing the car up the hill toward his home to pick up his wife (Tr. 162).

The defendant backed his car on the north side of the highway and his brother walked along the south side pulling his sleigh and keeping about even with the side of the car (Tr. 162). As the defendant approached the Ranch Road turn he saw the sled with the three boys come around the curve and immediately stopped his car (Tr. 163). The boys were wide in their turn and struck the back of his car (Tr. 163). He immediately got out of his car and noticed Carlos standing up; Bruce sitting down; and Darryl lying in the snow (Tr. 163). Darryl had a cut over his eye and on his mouth (Tr. 163) and the defendant decided to take him to the doctor rather than to leave him on the hill. Bruce and Carlos got into his car and he put Darryl into the car and then drove

the three boys to the Bountiful Medical Center (Tr. 164).

On cross-examination Carlos Litster testified that this was the first time that winter he had gone up the Ranch Road to sleigh ride (Tr. 148). He testified that Seth Williams would usually take them to a point known as Sandy, a little more than a block from the top of the hill in his jeep (Tr. 148), and stop the cars while the sleigh riders went down the hill (Tr. 149). He stated that he saw the Egget car as they came around the curve. The car was backing slowly and was completely stopped when they hit the wheel of the car (Tr. 149). There was plenty of room to pass the car on the left and had they leaned more on the turn, they would have missed the car (Tr. 150).

Bruce Litster said that as they came around the curve he saw the defendant looking out the back window of his car and backing his car (Tr. 153). He saw the defendant turn and put on his brakes and testified that the car was stopped at the time they hit it (Tr. 153). They had tried to fall off the sleigh, but did not have time (Tr. 153).

He also testified that this was the first time he had been up the Ranch Road (Tr. 154), and on the way up, he had asked Mr. Child to let them out at a point called "Sandy", which is the place they usually started from (Tr. 154), and Mr. Child had said, "Why don't you come up further and you can get a longer ride?" He stated he knew that cars would use both the Mueller Park Road and the Ranch Road (Tr. 157), and that the boys could

not see around the curve because of an embankment and that they had not checked the cars on the Mueller Park Road prior to starting their ride down the hill (Tr. 158).

Darryl Richard Naisbitt testified that as he came down the hill around the curve, he saw the car backing up on the north side of the highway (Tr. 115), and that Carlos had said to lean to the left so that they could turn and that he had leaned and felt like he was going to fall off and that was all that he remembered until he woke up some time later in the hospital (Tr. 115). He testified that prior to the time Mr. Child took them up the hill, they would usually start riding from a point about one-third of the way up the Mueller Park Road (Tr. 123, 124) (See the point marked "RN" on Exhibit N). He further testified that Seth Williams had made a run from the top of the hill and timed it and that a top speed of forty miles per hour had been obtained in the run down the hill (Tr. 126). He stated that he knew both roads were traveled by persons living in the area (Tr. 128).

Upon the basis of this evidence, the court in granting a directed verdict said:

"In giving the widest latitude that I can—giving you the benefit of all the ramifications that you are entitled to have—from the evidence there isn't anything in this record, in the opinion of this court, which justifies this court submitting it to the jury. I think the court would be derelict in this case to jeopardize the defendant's rights in submitting this case to a jury, so I'm going to grant the motion for a directed verdict."

STATEMENT OF POINTS

POINT I.

THE DEFENDANT WAS NOT GUILTY OF ANY NEGLIGENCE WHICH WAS A PROXIMATE CAUSE OF INJURY TO THE PLAINTIFF.

ARGUMENT

POINT I.

THE DEFENDANT WAS NOT GUILTY OF ANY NEGLIGENCE WHICH WAS A PROXIMATE CAUSE OF INJURY TO THE PLAINTIFF.

In the first two points of the argument in his brief, the plaintiff and appellant makes the assertions:

(1) In order for the court to grant a request for a directed verdict grounded on non-negligence of the defendant, the record must disclose no evidence against the party so requesting upon which reasonable minds could find him guilty of the negligence charged.

(2) In reviewing the evidence where the defendant was granted a directed verdict, the court must view the evidence in the light most favorable to the plaintiff to determine whether or not there was sufficient evidence to go to the jury.

We find no fault with these two pronouncements of the law and consequently will not discuss them further. Rather we will proceed to what we consider to be the real issue of this case; that is, whether the defendant was guilty of negligence which might be found by the jury to be the proximate cause of injury to the plaintiff.

The evidence in this case discloses a chain of circumstances, negligent or otherwise, over which the defendant had no control, which ultimately resulted in the accident in this case. As was stated by counsel for the defendant in his motion for a directed verdict:

“* * * It appears affirmatively from the evidence that there was fault, negligent acts, omission or commission on the part of other persons which entered into the cause of this accident, and for which the defendant will not be responsible. One is the lack of supervision the County failed to provide at the time and place of the accident. The failure of Seth Williams to either remain on the job or have some one else there to supervise it, the failure to have any supervision whatsoever at the time and place where this accident occurred, and it appearing that this was the first time these boys had gone up the Ranch Road during this year, and certainly they had never been there to the knowledge of the defendant. The lack of supervision here is certainly more of a legal cause for this type of accident than trying to blame the defendant under these conditions. There is also the acts of conduct of Grant Child, who, knowing the conditions then and there existing, took these boys up on the Ranch Road, knowing there would be danger in coasting down the Ranch Road, and especially where they didn't have any visibility of the traffic on the Mueller Park Road. Then there is also the conduct of Carlos Litster, who was the oldest of the boys, and who was directing the sleigh, who knew the conditions then and there existing, or should have known them, and the hazards involved. So you have the acts of several people here who entered into this thing, and all of them that I have mentioned—in my opinion any-

way—certainly had more to do with causing this accident than the defendant, whose acts if anything simply furnished a condition, rather than being an actual legal cause of the accident itself. Then as a fourth ground, the contributory negligence of the plaintiff himself. From his own testimony, it appeared that he knew there was danger, yet he ran the risk of riding three deep on the sleigh and coasting down a steep hill, where he knew that on Mueller Park Road the speed got up to as high as forty miles per hour, and on the Ranch Road, where their speed was estimated to be twenty or twenty-five per hour, which certainly was an unsafe condition in riding around that curve on the Ranch Road with no visibility, and where admittedly the collision would have been avoided had the boys seen the car even a fraction of a second sooner, or had they exercised more care in reducing their speed or even leaning further to the left in order to avoid the collision. That they barely did strike the car. I think there are many cases where a situation of this kind exists where a car stopped on a highway, or in a position on the highway, even though it's in movement, is nothing more than a condition and not the actual cause of the accident itself. Not the actual legal cause."

Let us examine the acts of the defendant. Since he lived on the road and necessarily had to travel back and forth on Mueller Park Road to get to his home, it was not negligent for him to be on the road. Nor was there anything negligent about the manner in which he parked his car. He was also backing his car at the time of the accident at a very slow speed, since his brother was walking alongside. He saw the boys coming down the hill and

was therefore keeping a lookout and had completely stopped his car at the time of the accident. The mechanical failure of the car had nothing to do with the accident except that it might explain his being there at the particular time of the accident. Nor did his backing cause the accident. There is no evidence that he lacked any control over the car by reason of the backward movement of the same that he would have had if the car had been moving forward. The accident would have happened just as it did had his car been faced in the opposite direction at the same time and place.

The plaintiff and appellant cites several cases to the effect that a person should exercise care in backing an automobile, especially when he knows or should know that there are children about. Again we agree with the authorities cited, but in this instance feel that they are not applicable to this case for two reasons:

(1) The defendant had no reason to know that there were any children about at the time he was backing. The evidence shows that the children usually started at a point down the hill from the intersection of the Ranch Road, and that the defendant had no reason to know or to believe that the children would be sleigh riding down the Ranch Road.

(2) The defendant exercised all the care in backing his automobile that might be expected of him assuming that he knew or should have known that the children were sleigh riding in the area. He was backing slowly. He was watching to the rear of the car. He had his car under

control. And lastly, he was able to stop the same within a reasonable time upon seeing the children.

It is assumed that the defendant was negligent for backing his vehicle on the right side of the highway, the assertion being made that he was driving on the wrong side of the road. We know of no law which compels such a conclusion. *Section 41-6-55 Utah Code Annotated 1953*, provides that a vehicle shall be driven upon the right half of the roadway with certain exceptions, none of which are applicable here. We find no statute which specifically states which side of the road a vehicle shall be driven on when it is backing up. We will concede that under certain circumstances, not present here, it would be negligent to even try to back a vehicle along a highway. On the other hand, there are a number of situations in which it is necessary to back an automobile, such as in getting out of a parking place. Under the theory advocated here, every vehicle which attempted to back out of a parking place would be driving on the wrong side of the highway.

Moreover, even if we assume the vehicle was being driven on the wrong side of the road, this was no more a proximate cause of this accident than the fact that a vehicle might be parked facing the wrong way on the side of a highway is the cause of another car running into it when so parked. Of course, it is admitted that if the defendant and his automobile had been nowhere in the vicinity at the time of the accident, this accident would not have occurred. Therein lies the crux of this case. The defendant's being where he was when he was and

under the circumstances then existing was not negligence, but rather a condition but for which the accident would not have happened.

As stated in *Blashfield's Cyclopedia of Automobile Law and Practice*, Vol. 4, Part II, page 31 :

“A distinction must be drawn between the proximate cause of an accident and a mere condition.

“The slippery condition of a street or sidewalk may be a mere condition, or a cloud of dust, or smoke, snow, fog, mist, blinding lights or other elements impairing vision, as well as ice and place of parking.

“So a distinction is drawn between a wrongful act, which is at least a contributing cause of the injuries sued for, and one which is merely an attendant circumstance or condition, though perhaps a necessary condition of the acts resulting in such injury. An event may be one without which a particular injury would not have occurred; yet, if it was merely the condition or occasion affording opportunity for other events to produce the injury, it is not the proximate cause thereof. * * *

“As an illustration, where plaintiff's vision was obscured by a cloud of dust, caused when another automobile which he was following swerved and left the paved portion of the highway to avoid a heavily loaded and disabled wagon left on the highway overnight by defendants, the proximate cause of the collision between the plaintiff and the wagon was defendant's neglect in leaving it on the highway, in violation of a statute, and not the cloud of dust, which was merely a condition and contingency which naturally would arise under

the circumstances, and defendant was bound to anticipate that it would happen."

Illustrative of this principle is the case of *Blair v. Rice, et al*, (Ore.) 246 P. (2) 542. In that case the plaintiff was a passenger in an automobile which skidded on a patch of ice and struck the defendant's truck which was parked partially on the highway. The court held that the existence of ice constituted an intervening operation of a force of nature which caused the automobile in which plaintiff was a passenger to strike the truck because it could not be steered away from it, and the failure of the defendants to park the truck off the highway or to maintain a lookout or to display warning signals or to park the truck elsewhere than in the icy patch was not negligence. In deciding the case, the court said:

"Assuming, but not deciding, that the defendants negligently failed to maintain a lookout and give notice that their truck was standing upon a part of the pavement, we still do not believe that plaintiff was entitled to recover. All of the roadway to the left of the truck was free of traffic, as is evident from the fact that the car ahead of the Blair car, after being hit by it, skidded safely along the left half of the pavement. The only reason the Blair car ran into the truck was because it had escaped from the control of the plaintiff's husband and he could not steer it away from its target. Had a flagman been present, his signals, no matter how patent and numerous, would not have restored the control of the skidding car to its driver. The ice had taken charge of the situation. It constituted an 'intervening operation of a force of nature' within a contemplation of Section 451, Restatement of the Law of Torts. (Cita-

tion). If the truck, instead of being motionless, had been moving slowly upon the paved portion of the roadway which it occupied, the collision would, nevertheless, have occurred. Under the circumstances, the presence of the truck must be deemed to be a condition rather than a legal cause of the injury;”

Turning now to authorities dealing with negligence in situations similar to this, we find:

“If the driver does not know and has no reasonable grounds for knowing that boys are, or are likely to be, sliding on an intersecting street at the time of passing at right angles thereto, he is not negligent because he does not take precaution to prevent injury to a boy so sliding, if he does what he can to avoid striking the child after seeing his situation. Accordingly, if a motorist comes into a collision with a sled which is coming rapidly and not under control, and which does not give a warning or opportunity to apprehend its approach, he is not liable for the injuries resulting.

“Where a street on which coasting is permissible intersects with a street on which it is forbidden, a driver turning into the street on which coasting is permissible has been held not to be required in the exercise of ordinary care to anticipate that the two streets were being used as a common coasting ground.

“In at least one jurisdiction the humanitarian or last clear chance doctrine has been applied to motorists injuring children playing in the street. Under this principle, a driver is liable, notwithstanding the negligence of the boy, after seeing the boy, or could have seen him had he used rea-

sonable care, and realized, or could have realized, his peril in time to avoid injuring, he failed to act as a reasonably prudent person to avoid so doing.

“As in other situations involving injuries to children, the drivers of motor vehicles are not insurers against such accidents, and, if the driver has exercised the care of a reasonably prudent man under the circumstances, he is not liable for injuries resulting from a collision between the vehicle he was driving and a boy coasting in the street.” (Cyclopedia of Automobile Law, Blashfield, Page 427, Vol. 2 A.)

The action of *Pennington Adm'r. v. Pure Milk Company*, (Ky.) 130 S.W. (2) 24, involved the death of a thirteen year old boy who was killed while coasting. The accident occurred about 7:30 in the evening. Plaintiff's intestate and a group of about eight boys were coasting down the hill in the direction from which the defendant's truck was approaching. The truck had been operated on the right hand side of the highway until the driver came into view of a group of coasters. The driver thereupon applied the brakes and moved his truck toward the center of the roadway to miss one sled on his north. At that moment the sled carrying the deceased struck the truck. A verdict was directed for the defendant by the lower court. The reviewing court said:

“It is sufficient to state that there is no showing of negligence on the part of the appellee's driver. Even appellant's own witnesses admit that the driver of the truck was on his right side of the highway until the swarm of sleds swung into view. His acts thereafter were instinctive, in the face of an emergency not of his making—an emer-

gency at least partially attributable to appellant's decedent. In *Commonwealth v. Bowman*, 267 Ky. 50, 100 S.W. (2) 801, 803, we held: 'That one meeting a sudden danger, not of his own creation, although bound to take active measures to save himself from impending harm, is not held by the law to the same degree of judgment and activity that he might be held were the condition otherwise. A choice of evils or of dangerous causes may be all that is left to a man, and he is not to be blamed if he chooses one and not the other to escape if he is in difficult and perilous circumstances and compelled to decide hurriedly.' "

In *Praded v. McGowan*, (N.H.) 190 Atl. 287, the defendant was driving his automobile in an easterly direction on a highway. On the south side of the highway a group of children were watching for automobiles. Plaintiff, a six year old, commenced to slide down the hill toward the highway when warned by his friends of the approaching automobile. Plaintiff was unable to stop his sled in time to avoid entering the street and colliding with the automobile operated by the defendant. Defendant testified that he saw the group of children and veered to the left of the roadway, but saw nothing to indicate that a sled was coming down the hill. When he did see the sled, he immediately applied his brakes and brought his vehicle to a stop just at the point of collision. On appeal, judgment was awarded to defendant. The court pointed out that even though the defendant had passed this particular spot about every week or so for several weeks, this was not sufficient to charge him with the knowledge that children were in the habit of sleigh

riding in this area, and further, he was not negligent in failing to see the boy in time to avert the accident.

In *Party, et al, v. Kendall, et al*, 228 N.Y.S. (2) 25, an infant plaintiff was coasting on a sled on a very icy hill in violation of a village ordinance. He was relying on an eight year old boy to stand at the intersection and warn him of approaching traffic. The infant plaintiff knew of the danger involved at this intersection. Immediately before the collision, at a point thirty feet from the collision, he was warned of the approach of defendant's automobile. However, he slid into the intersection, passed the stop sign, and the collision occurred. Plaintiff had a verdict below, which was reversed in favor of the defendant on appeal, the court saying:

"In the light of all the circumstances and particularly the knowledge of the infant plaintiff of the danger, we are of the opinion that he failed to exercise the reasonable care required of him and was guilty of contributory negligence as a matter of law."

In *McBride, Admr. v. Stewart*, (Iowa) 290 N.W. 700, the accident between the plaintiff who was riding on a sled and the defendant's vehicle occurred at an intersection in the city of Eldora. The snow had melted somewhat on the streets and evidently the more traveled portion of the roadway was bare, but there was still snow to the sides of the street. Plaintiff's decedent, a child of seven years, was coasting down the street toward the east. Defendant was approaching in a northerly direction on the intersecting street. The child entered the inter-

section and struck the left rear wheel. At the close of the evidence, defendant's motion for a directed verdict was sustained. On appeal by plaintiff the court held:

"Turning to the record it discloses that defendant was driving twenty miles per hour in a residential district up to the moment he saw decedent coming into the intersection. He then soon stopped, but the accident had occurred. Defendant had all the control of his car that was incidental to that speed. He was observing the street ahead and 14th Avenue and noted that there were neither vehicles nor pedestrians thereon. As he drove toward the intersection any vehicles or pedestrians on Tenth Street or Fourteenth Avenue would have been readily visible and there was no obstruction of view requiring giving a signal of approaching the intersection. The testimony established the fact that as defendant approached the intersection, he was prevented by the snow bank from seeing decedent as he came down the hill. The witnesses most favorable to plaintiff stated that at a point about twenty-five feet south of the south line of the hill one could look up the hill and see what was there. The evidence further shows that defendant first saw decedent just as the latter was entering the intersection from the west, the decedent being then three or four feet out from the south curb and two or three feet east of the east line of the sidewalk on Tenth Street. Defendant was then approximately even with the south edge of the sidewalk that is located along the south side of Fourteenth Avenue.

"These facts were quite insufficient to establish that defendant was negligent in any of the respects plaintiff specified. But plaintiff says that there were surrounding circumstances known to

defendant and that these determined what was reasonable care on his part. The circumstances were these. For many years it had been the practice of those in authority to permit children to coast on this hill, and each time, while permission continued, barricades were maintained on Tenth Street at the intersection in question. There had been coasting recently permitted, but the snow having in a large measure melted, the barricades had been taken down on the day before the accident and the middle portion of the paving up and down the hill was bare of snow. Plaintiff urges that these facts, known to defendant, imposed the duty on him to anticipate that some child might be coasting as decedent was doing and to be prepared for that possibility by driving at less speed and having better control, keeping better lookout and sounding a warning of approach. In *Webster v. Luckow*, 219 Iowa 1048, 258 N.W. 685, this court adopted the Pennsylvania rule that a driver of an automobile may not assume that a child under the age of fourteen in plain view of the driver will not move from a position of safety outside the pathway of the vehicle and into a place of danger in such pathway. But in connection with so doing, the court declared itself as not holding that such driver is under any obligation to anticipate that some child not in plain view upon the street or public road will suddenly and unexpectedly dart out from a place of concealment into the pathway of a driver's vehicle. To an ordinary prudent person, the disappearance of snow from the hill until it was largely bare and the taking down of the barricades would appear to afford assurances that the road was open to his ordinary use. And we think it would be an assurance sufficiently dependable that he would not anticipate that a child would dart out upon a sled

as happened in this case, despite all that appeared to indicate to the contrary. If so, defendant's conduct was not below the usual standard of ordinary and reasonable care. The ground that has been discussed warranted the ruling on the motion for a directed verdict."

In a Pennsylvania case, *Covelchic v. Demo*, 94 Pa. Supra, 167, the parents of an eleven year old boy brought an action to recover consequential damage suffered as the result of his being struck by defendant's truck. It appeared that the boy coasted out from a twelve foot alley, on which there was a slight grade, and into a twenty-seven foot wide street, and immediately upon entering the street ran under the truck, which came from his left, and was run over by the rear wheel. The accident occurred at dusk. The truck's lights had not been turned on, but the street lights had, although the one at the alley was dark, being out of repair. Plaintiffs charged negligence as to speed, lights, failing to sound horn in violation of certain ordinances relating to operations of automobiles at the intersection. In affirming a judgment entered for the defendant, notwithstanding verdict for the plaintiffs, the reviewing court said:

"Even in full daylight, neither the occupant of the sled nor the driver of the truck could see each other until the intersection was reached, by reason of the retaining wall around the property on the left. This wall, about four feet high at the corner, was on the left of the boy and the right of the defendant as they approached the intersection.
* * * The only question involved on this appeal is whether plaintiffs have sustained the burden of

proof resting upon them to show that the defendant was guilty of negligence and that such negligence caused the injury complained of. * * * No ordinances of the city * * * were offered in evidence and the testimony for the plaintiffs not only fails to show that defendant's truck was operated at an excessive rate of speed but directly negated that charge and indicates it was stopped almost instantly after the sled ran under it. The first and second specifications of negligence (speed and ordinance violations) may therefore be dismissed from consideration. And taking up the third and fourth charges of negligence we assume * * * that defendant did not sound his horn as he approached the alley and that the lamps upon his truck were not lighted. * * * The only possible inference from the testimony for the plaintiffs is that this (alley) was not a place where the drivers of vehicles on (the street in question) might reasonably anticipate the presence of children upon sleds. It was not generally used for coasting. * * * In our opinion there was no evidence which would legally support the finding that the failure of the defendant to sound his horn was under all the circumstances, a negligent omission to perform a legal duty. The remaining ground for recovery averred * * * is the failure of defendant to have lamps upon his vehicle lighted. Plaintiffs offered no evidence with respect to weather conditions or actual visibility at the time of the occurrence."

The court then concluded that the trial judge was warranted in taking judicial notice of the time of sunset, and the evidence was that the accident occurred less than an hour after sunset, lights not therefore being required by statute.

Thus we see that an act may be necessary to the happening of an accident; that is, a condition without which the accident would not have happened, and yet not be the legal cause of the accident. In this case, the defendant was not guilty of any wrongful act which was a legal cause of the accident. He was driving very slowly. He was maintaining a proper lookout and saw the boys and immediately stopped his car before the collision. He had no reason to expect the boys to be sleigh riding in that area and to come around the curve in question, that not being a place where the boys were permitted to or usually coasted, but even if we assume that he did know or should have known, it is not seen how he could have been more careful.

CONCLUSION

The accident itself in this case and the resulting injuries to the plaintiff was brought about by the operation of a number of factors over which the defendant had no control. The County may have been negligent in failing to provide adequate supervision of the sleigh riding on the hill. Seth Williams, the person who was designated to take care of the hill, may have been negligent in leaving and going home when the boys were sleigh riding. Grant Adams Child was surely negligent in taking the boys up on the Ranch Road to sleigh ride, where sleigh riding had never been permitted before, especially when the boys themselves knew this and protested and

requested to be let out on that part of the hill from which they usually started. The boys themselves knew that they were not permitted to sleigh ride on the area in question. They knew that automobiles would be traveling back and forth upon the Mueller Park Road, as well as the Ranch Road. They were aware of the fact that they could not see around the curve and they were also aware of the high speeds which were attained by sleds in going down this hill. Whether or not they could be found guilty of contributory negligence, we cannot overlook the fact that their own acts and omissions, negligent or otherwise, were the immediate proximate cause of this accident. Unless we are prepared to hold that the defendant was negligent in even being in the area, which, of course, is not warranted, we can find no culpable action on his part. He had no reason to know that the boys were sleigh riding in the area, yet, he could not have exercised any greater caution had he known. He was driving his automobile very slowly, observing a proper lookout, and was able to stop the automobile immediately upon seeing the boys before the collision. The boys themselves were going so fast that they could neither turn, nor get off of the sleigh fast enough to avoid the collision, even though they saw the automobile when they were a considerable distance from it.

The most that can be said for the defendant's presence in the area at the time and under the existing circumstances is that his presence was a condition without which this accident would not have happened, but was not the legal cause of the accident, which would have

occurred in spite of and not on account of any negligence of which he was alleged to be guilty.

Respectfully submitted,

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