1980

# Little America Refining Company v. Jesse Albert Leyba And Sven Heimberg : Plaintiff-Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

---

LITTLE AMERICA REFINING COMPANY,

Plaintiff-Appellant,

vs. CASE NO. 17331

JESSE ALBERT LEYBA,

Defendant, and

SVEN HEIMBERG,

Defendant-Respondent.

---

# PLAINTIFF-APPELLANT'S BRIEF

---

Appeal from the Judgment of the Third District Court for Salt Lake County
Honorable Peter F. Leary, Judge

---

Steven G. Johnson
RICHARDS, BIRD & KUMP
333 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant

Frank N. Karras
34 South Sixth East
Salt Lake City, Utah 84102

Attorney for Defendant-Respondent

TABLE OF CONTENTS



AUTHORITIES CITED

CASES

## STATUTES AND ORDINANCES



## OTHER AUTHORITIES

IN THE SUPREME COURT OF THE

STATE OF UTAH

---

| | | |
|---|---|---|
| LITTLE AMERICA REFINING COMPANY, | : | |
| Plaintiff-Appellant, | : | |
| vs. | : | CASE NO. 17331 |
| JESSE ALBERT LEYBA, | : | |
| Defendant, and | : | |
| SVEN HEIMBERG, | : | |
| Defendant-Respondent. | : | |

---

# PLAINTIFF-APPELLANT'S BRIEF

---

## STATEMENT OF THE CASE

This is an action for property damage arising out of a collision with plaintiff's service station by a vehicle driven by defendant Sven Heimberg, following a collision between the Heimberg vehicle and a vehicle driven by defendant Jesse Albert Leyba.

## DISPOSITION IN LOWER COURT

The case was tried to a jury. From a directed verdict and judgment for defendant Heimberg at the close of plaintiff's evidence, plaintiff appeals. Default judgment was entered against defendant Leyba for failure to appear or answer plaintiff's Complaint.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the directed verdict in favor of defendant Heimberg, and a new trial on the issues in this case. Defendant Leyba is not a party to this appeal.

## STATEMENT OF FACTS

### A. Yelling and Throwing Firecrackers

At approximately 1:00 a.m. on April 2, 1979, the individual defendants were each driving pickup trucks northbound South State Street in Salt Lake City, Salt Lake County (T. 1 121). Occupants of the vehicle driven by defendant Leyba (hereinafter referred to as the "Leyba vehicle") yelled at the occupants of the vehicle driven by defendant Heimberg (hereinafter referred to as the "Heimberg vehicle") and revved their engine as if they wanted to race (T. 123).

Near North Temple Street a passenger in the Heimberg vehicle threw firecrackers at the Leyba vehicle (T. 145).

### B. Race by Leyba Vehicle

The Leyba vehicle then accelerated up the hill northbound on State Street to Third North Street in Salt Lake City, followed by the Heimberg vehicle (T. 146). The Leyba vehicle turned right. The Heimberg vehicle turned left and drove towards Columbia Street (T. 146).

### C. Fight by Capitol Building

The Leyba vehicle then turned around and passed the

Heimberg vehicle at about the corner of Columbia Street (Main Street) and Third North Street. The Leyba vehicle turned north on Columbia Street and stopped in the middle of the street. Defendant Heimberg stopped his vehicle behind the Leyba vehicle (T. 147).

Passengers of the Leyba vehicle got out, came back to the Heimberg vehicle and started "bad-mouthing" its occupants (T. 147). After a further exchange of words, a fight broke out between a passenger of each vehicle (T. 147, 148). The passenger from the Heimberg vehicle, a James Harris, hit and knocked down a passenger from the Leyba vehicle, and kicked him while he lay on the ground (T. 148).

D. Race Down Victory Road

Mr. Harris got back into the Heimberg vehicle, and defendant Heimberg started up his truck and drove around the Leyba vehicle down Victory Road towards Beck Street (T. 148, 149).

The Leyba vehicle followed the Heimberg vehicle at a high rate of speed (T. 149). Although Heimberg gave self-serving testimony that he was not trying to get away from Leyba (T. 153), witnesses testified that the two vehicles drove down Victory Road at a rate of speed much faster than other cars coming down Victory Road (T. 101). Witnesses also testified that the two vehicles appeared to be racing (T. 96, 100), and that the engine sounds of the two vehicles driven by the respective

defendants just prior to their collision was louder than the engine sounds of other vehicles (T. 94).

E. Collision

The two vehicles collided at or near the intersection of Beck Street and Victory Road (T. 149, 150). The Heimberg vehicle crashed through plaintiff's gasoline station, knocking over several gasoline pumps and light poles and starting a fire which damaged plaintiff's gasoline station, and caused lost profits. The total damages equal $20,594.17 (T. 107, 113, 149, 150, 163).

STATEMENT OF POINTS

1. The trial court erred in refusing to allow testimony concerning the speed of the defendants' vehicles at the time of the collision between the two vehicles.

2. The evidence is sufficient to support a finding that defendant-respondent Heimberg was negligent.

3. The evidence is sufficient to support a finding that defendant-respondent Heimberg's negligence was the proximate cause of plaintiff-appellant's damages.

4. The trial court in granting a directed verdict for defendant-respondent Heimberg improperly refused to submit the issue of his negligence to the jury.

ARGUMENT

Point 1. The trial court erred in refusing to allow testimony concerning the speed of defendants' vehicles at the time of the collision between the two vehicles.

The trial court should have allowed the testimony of Barry Bell with respect to the speed the two pickup trucks driven by defendants were traveling at the time of the collision between the two vehicles. Mr. Bell observed the vehicles for a few seconds prior to their collision and actually saw them collide (T. 94). He heard the loud engine noises (T. 94), and he was only approximately 75 yards from the point of impact (T. 95). Mr. Bell has observed, in his words, "millions" of cars driving down Victory Road (T. 95), knows approximately how fast cars are traveling as they drive down Victory Road (T. 96), and knows that the posted speed limit is 50 miles per hour at that location (T. 95). He testified that the trucks looked like they were racing (T. 96).

The general rule accepted by jurisdictions which have examined this issue is that any person of ordinary intelligence, who has an opportunity for observation, is competent to testify as to the rate of speed of a moving vehicle. This rule was followed by the Court of Appeals of Arizona in Townsend vs. Whatton, 21 Ariz. App. 556, 521 P.2d 1014 (1974), an action for injuries and property damage sustained when plaintiff's car

was struck by defendant's car after the plaintiff driver tur onto the road in front of the defendant's car. The trial co refused to allow plaintiff's witness to testify that the def dant was drag racing just prior to the accident, and plainti claimed error. The Court of Appeals did not agree with the court and said:

> A non-expert witness, where qualified by sufficient experience, may give an opinion as to the speed of a vehicle if there has been a reasonable opportunity to observe it. Even a non-driver may be sufficiently qualified to give an estimate of speed. 521 P.2d at 1016; citations omitted.

The Townsend court went on to hold that non-expert testimony that the defendant was driving in excess of a reasonable and prudent speed was inadmissible, but that the estimate of spe "should be couched in terms of miles per hour, fast or slow, etc. . . ." 521 P.2d at 1016. The case was reversed and re to the trial court for a new trial.

In the matter of Potts vs. Brown, 452 P.2d 975 (Wyo. 1969), the Supreme Court affirmed a jury verdict for plainti The Potts case was an action for personal injuries sustained when vehicles driven by plaintiff and defendant collided at uncontrolled, ninety-degree intersection. Witnesses, includ two minor children, were allowed to testify over the objecti of the defendant as to the speed of the vehicles involved, a

the defendant appealed. The court stated:

> . . . [A] witness who observed the moving object in question will be permitted to estimate its speed if he possesses some knowledge or experience, however slight, which will enable him to form an opinion. The qualification of the witness to judge accurately goes to the weight which the jury may give his testimony rather than to its competency. 452 P.2d at 976.

The holdings of the cases cited above follow the reasoning of Rule 56 of the Utah Rules of Evidence:

> (1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.
>
> * * *
>
> (4) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

Mr. Bell possessed experience with moving vehicles in the vicinity of the collision of the defendants' vehicles in this case. He is of reasonable intelligence and actually observed the vehicles in question. He was qualified to give opinion testimony as to the speed of the vehicles at the time

of the accident. His opinion is based on his perception of the incident, and it is helpful to the determination of the issue of defendant-respondent's negligence.

Rule 5 of the Utah Rules of Evidence provides as follows:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

Plaintiff-appellant indicated the substance of the expected evidence of the speed defendants were traveling at the time of the accident by questions indicating the desired answers (T. 95). The excluded evidence of the defendants' speed at the time of the accident would have a substantial influence in bringing about a denial of defendant-respondent's directed verdict motion, and was crucial to plaintiff-appellant's case. The trial court should have allowed testimony of the speed of defendants' vehicles at the time of their collision.

Failure to allow the evidence of speed is prejudicial and reversible error.

Point 2. The evidence is sufficient to support a finding that defendant-respondent Heimberg was negligent.

A. Evidence of Racing

Witnesses who observed the defendants' vehicles immediately prior to the collision gave direct testimony that the vehicles were racing or otherwise traveling at a high rate of speed (T. 96, 100). Their engine sounds were louder than engine sounds of other vehicles (T. 94), and the trucks were going faster than most other cars which drive down Victory Road (T. 101).

Also, the defendant-respondent Heimberg himself testified of facts from which a jury could infer that the vehicles were racing or involved in a chase or high-speed pursuit at the time of the accident. A few minutes prior to the accident the Leyba vehicle's occupants yelled at the Heimberg vehicle and revved their engine as though they wanted to race (T. 123). Firecrackers were thrown by at least one occupant of the Heimberg vehicle (T. 145). There had been, by analogy, an "offer" and "acceptance" of some form of confrontation. The confrontation or joint activity continued as the Leyba vehicle raced up State Street towards the Capitol. This "cat and mouse" game did not terminate when Leyba turned right and Heimberg turned left on

Third North Street. Once the joint activity had begun, it could only terminate upon mutual agreement.

The joint activity continued on Columbia Street, wh Leyba stopped his truck in front of Heimberg's truck (T. 14 Heimberg could perhaps have avoided further contact with the Leyba vehicle, but chose to stop his truck behind the Leyba vehicle. At that point a fight broke out between occupants the vehicles, and a passenger of the Heimberg vehicle knocke down and kicked a passenger of the Leyba vehicle (T. 147, 14 Heimberg then let the passenger who had been involved in the fight back into his vehicle and he left the scene of the fi with the Leyba vehicle behind him (T. 148, 149). Moments la the vehicles collided while, according to the testimony of witnesses, they appeared to be racing (T. 96, 100, 148, 149).

B. Racing as a Violation of a Statutory Duty of Care

Racing an automobile on the public highways in the State of Utah is a violation of the statutory duty of care s forth in Section 41-6-51(a), Utah Code Annotated (1953, as amended):

> No person shall engage in any motor vehicle speed contest or exhibition of speed on a highway . . . .

The comparable Salt Lake City Ordinance is § 41-6-119:

> No person shall engage in any vehicle speed contest or exhibition,

> or in any vehicle acceleration contest or exhibition on any street or alley.

C. Racing as Negligence

Other jurisdictions, and early Utah cases cited in Thompson vs. Ford Motor Company, 16 Utah 2d 30, 365 P.2d 62 (1964), in examining the violation of a duty of care fixed by law or ordinance where the law or ordinance is instituted for the safety of life, limb, or property, have gone so far as to hold that violation of such duty is negligence as a matter of law.

In Newcomb vs. Cassidy, 245 N.E.2d 846 (Ind. App. 1969), the guardian of a minor brought an action against allegedly racing automobile drivers to recover for injuries sustained by the minor when the vehicle in which the minor was a passenger was involved in an accident. When the trial court granted summary judgment for both defendants, plaintiff appealed.

The Appellate Court of Indiana, in reversing the trial court's decision, held that a genuine issue of material fact existed, i.e., whether there was a race or speed contest, and stated,

> The racing of motor vehicles on a public highway is negligence and the drivers who engage in speed contests are each liable for injuries to third persons regardless of which of the racing vehicles actually inflicted the injury and even though there is no contact between the

racing vehicles. 245 N.E.2d at 851.

Racing motor vehicles on a public highway has also been held to be negligence per se in Jonas vs. Peterson, 279 Minn. 241, 156 N.W.2d 773 (1968), where, following a fatal accident during a race on a public highway, the trustee for the next of kin brought a wrongful death action against the driver of the vehicle in which the decedent was riding and against the driver of the other vehicle. Upon judgment for the plaintiff, the defendants appealed. The Supreme Court of Minnesota affirmed the trial court's decision, stating:

> We agree with the trial judge that this [proceding at a high rate of speed and apparently racing] constitutes negligence as a matter of law and we find nothing . . . cited by defendants . . . requiring us to hold otherwise. 156 N.W.2d at 737.

The leading case in the State of Utah on the matter of whether the violation of a statutory duty of care is negligence as a matter of law is Thompson vs. Ford Motor Company, supra. In Thompson the plaintiff sued to recover for injuries received when a parked garbage truck of which he was in charge suddenly gave way, throwing him to the ground. The trial court held that the plaintiff was contributorily negligent as a matter of law for violating the "unattended vehicle" statute, § 41-6 Utah Code Annotated (1953, as amended), and granted the defen

dant's Motion for Summary Judgment. Plaintiff appealed.

The Utah Supreme Court examined Utah common law on the issue of statute violation as evidence of negligence, and held that violation of a standard of safety set by statute or ordinance is to be regarded as prima facie evidence of negligence, but is subject to justification or excuse. 16 Utah 2d at 33, 34. The matter was remanded to the trial court for a presentation of the disputed issues.

In the case at bar, defendant-respondent Heimberg gave no justification or excuse for his participation in a race, chase or high-speed pursuit in which he was engaged at the time of the accident.

D. Abandonment of Race by One Party Does Not Terminate Liability

In the case of Lemons vs. Kelly, 239 Ore. 354, 397 P.2d 784 (1964), a passenger injured when the car in which she was riding was involved in an accident, sued her driver and the driver of the other vehicle involved. The jury concluded that the defendants were racing at the time of the accident, and that the racing was the cause of the accident and plaintiff's injuries. From a verdict for plaintiff, the defendants appealed on the grounds that the race had terminated by the time of the accident.

The Supreme Court of Oregon stated the general rule:

> "There can be no doubt that liability for injury to a third person is imposed upon all participants in an automobile race even though only one vehicle is actually involved in an accident." 397 P.2d at 785.

With regards to the alleged termination of the race by defendants, the court stated:

> . . . It is said in all of the authorities cited that racing on a highway is hazardous to all other persons upon the highway and that the actor participates at his peril . . . . One who does participate in setting in motion such hazardous conduct cannot thereafter turn his liability off like a light switch. From the authorities cited we conclude that one who participates in setting such hazardous conduct in motion cannot later be heard to say: "Oh! I withdrew before harm resulted even though no one else was aware of my withdrawal." It would be a reasonable probability that the excitement and stimulus created by this race of several miles had not dissipated nor, in fact, terminated at all, in the fraction of a minute in time between the act of passing and the accident. The state of mind of the participants was material. We cannot gauge that state of mind to the point of saying that the stimulus or intent had ended. The evidence warrants a finding that it did continue. It would be for the jury to decide if the racing were the cause of the accident. 397 P.2d at 787. (Citations omitted.)

The Lemon court held that all participants in a race are civilly liable for injuries to a third person which results from the race.

Plaintiff's evidence of defendant-respondent Heimberg's racing by witnesses who actually saw the vehicles immediately prior to the accident (T. 96, 100, 101), and who heard the loud engine noises of the respective vehicles (T. 94), and evidence of "fooling around" and a fight just before the accident (T. 146 to 150), is evidence from which the jury could conclude that Heimberg was participating in a race, chase or high-speed pursuit without cause or justification and was negligent in operating his vehicle at the time of the accident.

Point 3. The evidence is sufficient to support a finding that defendant-respondent Heimberg's negligence was the proximate cause of plaintiff-appellant's damages.

A. Definition of "Proximate Cause"

This court has defined "proximate cause" of an injury in Cox vs. Thompson, 123 Utah 81, 254 P.2d 1047 (1953) as "the primary moving cause without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury." 123 Utah at 89, 90.

There can be more than one proximate cause. In Hillyard vs. Utah By-Products Co., 1 Utah 2d 143, 263 P.2d 287 (1953), an action to recover for wrongful death to a passenger of a vehicle which struck an improperly parked truck, this court stated:

> It has frequently been recognized that more than one separate act of negligence, even though they do not happen simultaneously, may be proximate causes of an injury. 1 Utah 2d at 147.

The court in this landmark decision went on to say:

> One is guilty of negligence when he does such an act or omits to take such a precaution that under the circumstances present, as an ordinary prudent person, he ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm. When one does so he may be held liable for any resulting injuries caused by any reasonably foreseeable conduct whether it be innocent, negligent, or even criminal. Hillyard, supra at 147.

B. Test of Foreseeability

The test of liability is not whether the defendant could have foreseen the precise form in which the injury act resulted, but whether the damage or injury appears to have b a natural and probable consequence of his act. If the act i one which he could have anticipated as likely to result in injury, although he could not have anticipated the particula injury which did occur, liability would attach. Hillyard, su at 148.

"The . . . test", stated this court in Watters vs. Querry, 588 P.2d 702 (Utah, 1978), "is whether under the par cular circumstances [the defendant] should have foreseen tha

his conduct would have exposed others to an unreasonable risk of harm; and this includes situations where negligent or other wrongful conduct of others should reasonably be anticipated." 588 P.2d at 704.

Racing in pickup trucks at night is an activity in which the likelihood of a serious injury is great. With automobile racing, as the public has been well-educated, lives are at stake, and serious property damage may occur. To the reasonable and prudent man, serious damage and injury is readily foreseeable.

In a race or chase, especially after an exchange of words and a fight as happened in this case (T. 145, 147, 148), a reasonable and prudent man would be on notice of the other driver's probable negligence or other irrational or criminal act.

C. Heimberg as the Cause-in-Fact

Heimberg's participation in the negligent act of racing was the cause-in-fact of plaintiff's damage. His vehicle smashed into plaintiff's service station and set it on fire in a literal cause-and-effect sense (T. 97, 98, 150).

The cause-in-fact relationship between plaintiff's damages and Heimberg's wrongful conduct is the proximate cause of plaintiff's damages. Participation by Heimberg in the race,

chase or high-speed pursuit was the primary moving cause of damages. But for that participation, the accident would not have happened and plaintiff-appellant's service station would have been damaged. The accident was in the natural and proximate sequence of events and a reasonable and prudent man should have foreseen that a traffic accident could occur as a result of Heimberg's actions.

A reasonable man in Heimberg's circumstances, especially after the fight at the top of the hill (T. 147, 148), would have avoided the risk by slowing down to a safe speed, by avoiding the "goofing off" which occurred while driving or riding in automobiles, by turning from potential conflicts rather than stopping to participate or to allow fellow passengers to participate, or by taking other reasonable action. But Heimberg was not willing to make the small sacrifice to avoid the risk of great harm and injury and he continued in the confrontation until the time the accident occured.

D. Leyba's Negligence Not an Independent, Intervening Act

The collision with the Heimberg vehicle by the Leyba vehicle (T. 149, 150) was not an independent intervening cause which superseded the negligence of Heimberg, thereby insulating Heimberg's negligence from being a substantial factor in causing the collision with plaintiff's service station and relieving Heimberg from liability. Heimberg should have realized that

the Leyba vehicle could have been involved in an accident with the Heimberg vehicle or with third parties during the course of the race or chase. A reasonable man knowing the situation would not regard the collision between the two vehicles as highly extraordinary, and the purported intervening act is a normal response to the race or chase in which Heimberg participated.

The defendant who owned the parked truck in Hillyard, supra, argued as a matter of law that the negligence of the driver of the vehicle in which the plaintiff was riding was an intervening act which superseded the negligence in parking the truck, thereby insulating that negligence from being a substantial factor in causing the collision. In addressing this argument the court said:

> The Restatement of the Law of Torts essentially expressed the same concept in a different manner:
>
> > "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if:
> >
> > "(a) The actor at the time of his negligent conduct should have realized that a third person might so act, or
> >
> > "(b) A reasonable man knowing the situation existing when the act of

> the third person was done would not regard it as highly extraordinary that the third person had so acted, or
>
> "(c) The intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent."
>
> The doctrine enunciated in the above quotations is based upon the proposition that one cannot excuse himself from liability arising from his negligent acts merely because the later negligence of another concurs to cause an injury, if the later act was a legally foreseeable event.

This is true particularly where, in retrospect, the interven act did not appear to be particularly unusual or extraordina 1 Utah 2d at 149 (footnotes omitted); quoted with approval i Jensen vs. Mountain States Telephone and Telegraph Company, 611 P.2d 363 (Utah, 1980).

E. Plaintiff-Appellant May Sue Either Defendant

Plaintiff-appellant may sue either defendant, or bo of them, and it may recover judgments against one or both of them. This court in Dawson vs. Board of Education of Weber County School District, 118 Utah 452, 222 P.2d 590 (1950), a action to recover for the wrongful death of a minor child hi by a defendant as the child alighted from a school bus owned by the defendant school district, stated the widely recogni rule that having a single cause of action against more than tort feasor, an injured party may proceed against the wrongd

either jointly or severally and he may recover judgment or judgments against one or all. 118 Utah at 456.

When two parties are jointly charged with negligence, it is only necessary to show that both contributed to the injury, notwithstanding the fact that one may have been wanton and reckless, and the other simply manifested want of ordinary caution. Blackwell vs. American Film Co., 48 Cal. App. 681, 192 P. 189 (1920). Blackwell is an action for personal injuries arising from a head-on collision between two automobiles owned by the defendants. The court stated:

> Although the act of each defendant alone might not have caused the injury, there is no good reason why each defendant should not be liable for the damage caused by the different acts of all. 192 P.2d at 190.

See also Annotation: Joint Liability for Injury to Third Person for Damage to His Property Due to Concurring Negligence of Drivers of Automobiles, 62 ALR 1425 (1929).

Both Heimberg and Leyba contributed to the injury of plaintiff-appellant by participating in the mutual activity of racing or chasing (T. 96, 100, 101). Even if Leyba intentionally rammed his truck into Heimberg's vehicle, Heimberg would not be relieved of liability because of his participation in the negligent act.

Point 4. The trial court in granting a directed v for defendant-respondent Heimberg improperly refused to sub issues of his negligence and the proximate cause of the pla appellant's damages to the jury.

The directed verdict law in the State of Utah is s forth in the recent Supreme Court case, Kim vs. Anderson, 6 P.2d 1270 (Utah 1980). Kim vs. Anderson was a malpractice wherein the plaintiff alleged the defendant negligently dro a drill bit down the plaintiff's throat during a root canal operation. When the trial court granted defendant's motion a directed verdict for failure to present expert testimony to the required standard of care and the violation thereof, plaintiff appealed to this court.

This court vacated the order and remanded for furt proceedings, holding that expert testimony was not required under the facts of the case, and further stated:

> In directing a verdict, the trial court should examine the evidence in the light most favorable to the party against whom the motion is made. On appeal, we view the evidence in the same manner and if there is a reasonable basis therein, and the inferences which may be drawn therefrom, which would support a judgment in favor of the losing party below, a judgment based on a directed verdict cannot be sustained. (610 P.2d at 1271; footnotes omitted.)

This court has further stated in the matter of

Boskovich vs. Utah Construction Company, 123 Utah 387, 259 P.2d 885 (1953), an action to recover for a balance alleged to be due under an alleged oral guarantee of payment for use of plaintiff's patended machine, that "the court must consider the evidence in the light most favorable to the party against whom the motion is directed and must resolve every controverted fact in his favor." 123 Utah at 390.

From a verdict and judgment in favor of plaintiff after defendant's motion for a directed verdict was denied in an action for personal injuries when a father attempted to rescue his minor son from a dangerous situation in defendant's railroad yard, the defendant appealed. This court in affirming the trial court's decision stated that the non-moving party's evidence must be taken as true and every legitimate inference drawn in its favor. Christensen vs. Los Angeles and S.L.R. Co., 77 Utah 85, 90, 291 P. 926 (1930).

This court has also held that it is not the province of the trial court to weigh or determine the preponderance of the evidence in Finlayson vs. Brady, 121 Utah 204, 240 P.2d 491 (1952), an action for damages for the price of defective gas heaters and for loss of rentals where defendants counterclaimed for the balance due under a conditional sales contract for the purchase of the heaters. The trial court directed a verdict for defendant on plaintiff's complaint and awarded a money judg-

ment on defendant's counterclaim. The Supreme Court on appe found substantial contradictory evidence on both sides whic required giving the case to the jury, reversed the trial co order, and remanded for a new trial.

If, in granting defendant-respondent's motion for a directed verdict, the trial court considered Heimberg's tes mony that he drove away from the scene of the fight at a mor speed (T. 153), thereby inferring that the confrontations between the defendants had terminated, then the court impro weighed the preponderance of the evidence. The issues of Heimberg's negligence and its being the proximate cause of plaintiff-appellant's damages should have been given to the jury and Heimberg's directed verdict motion denied.

Applying the Kim vs. Anderson rule cited above at pa 22, the trial court in the present case improperly granted a directed verdict to defendant-respondent Heimberg. Plaintiff appellant produced competent, uncontroverted evidence of Heimberg's racing (T. 96, 100, 101), and further evidence (T. 94, 118 to 121, 123, 145 to 150) from which a jury could reasonably infer that Heimberg and Leyba were involved in a race or chase or other high-speed pursuit during which their respective vehicles collided, sending Heimberg's vehicle cras into the Little America Service Station. Such evidence, if taken as true, and in a light most favorable to plaintiff-app

is sufficient to support a judgment for plaintiff-appellant.

## CONCLUSION

The trial court should have allowed testimony concerning the speed of the defendants' vehicles at the time of the accident. Refusal to admit such testimony is reversible error.

Plaintiff-appellant produced competent evidence that defendant-respondent Heimberg was involved in a race or chase on a public highway at the time of the accident in this case. Additional competent evidence was produced from which the jury could infer that the defendants were racing or chasing each other at the time of the accident. Such a course of action would create a dangerous situation in which a reasonable and prudent person could easily foresee that a third party could be injured or damaged.

Defendant-respondent's negligent conduct, without which the damages to plaintiff-appellant's service station would not have occurred, was a proximate cause of said damages.

Taking all of plaintiff-appellant's evidence as true, the trial court should not have granted the motion for directed verdict. The issues of negligence and proximate cause should have been given to the jury and the directed verdict motion denied. To allow Heimberg to be free from liability under the facts of this case would encourage racing on public highways

and create imminent hazards to other users of the public hig
ways and to those whose property adjoins the highways.

The trial court's Order Directing Verdict for Defen
Sven Heimberg should be reversed and the case remanded for a
new trial.

Respectfully submitted,

RICHARDS, BIRD & KUMP

By: Steven G. Johnson
Attorneys for Plaintiff-Appell

CERTIFICATE OF DELIVERY

I hereby certify that on the 3rd day of December, 19
I delivered two copies of the foregoing Plaintiff-Appellant's
Brief, to Frank N. Karras, attorney for defendant-respondent,
at 321 South Sixth East, Salt Lake City, Utah 84102.

Steven G. Johnson