Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1981

Little America Refining Company v. Jesse Albert Leyba And Sven Heimberg : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Frank N. Karras; Attorney for Defendant-RespondentSteven G. Johnson; Attorney for Plaintiff-Appellant

Recommended Citation
Brief of Respondent, *Little America Refining v. Leyba*, No. 17331 (Utah Supreme Court, 1981).
https://digitalcommons.law.byu.edu/uofu_sc2/2471

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

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
321 South Sixth East
Salt Lake City, Utah 84102

Attorney for Defendant-Respondent

FILED

JAN 16 1981

Clerk, Supreme Court, Utah

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT

OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

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
321 South Sixth East
Salt Lake City, Utah 84102

Attorney for Defendant-Respondent

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

TABLE OF CASES

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

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.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action for property damage to appellant's service station arising from a collision between defendant Leyba's vehicle and a vehicle driven by respondent.

DISPOSITION IN LOWER COURT

The case was tried before a jury on August 28, 1980. At the close of appellant's case, respondent moved for a directed verdict which was granted by the court. Default judgment was entered against defendant Leyba.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the trial court's directed verdict dismissing appellant's case as to respondent.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

STATEMENT OF FACTS

In the early morning hours of April 2, 1979, a collis occurred between vehicles driven by defendant Leyba and respond which resulted in damages to appellant's service station on Bec Street in Salt Lake City, Utah. (T., pp. 118-119)

The accident occurred when the vehicle driven by Leyba collided with the left rear portion of respondent's truck, causing respondent's truck to slide into the gas pumps at appellant's station and resulting in a fire. (T., pp. 149-150)

At trial, appellant's counsel attempted to introduce testimony concerning the speed of the vehicles involved from an employee of the service station, Barry Bell, who witnessed the accident. The Court sustained objections to the testimony on foundational grounds and excluded it from consideration. (T., pp. 95-96)

Respondent testified to a series of incidents which occurred between a passenger in his vehicle and the occupants of the Leyba vehicle as they drove north on State Street shortly before the accident involved herein. He further testified that he turned left at the intersection of State Street and Third North and proceeded on Third North to Main Street where he turned right. At that time, the Leyba vehicle, which had turned right at Third North, reappeared behind respondent's truck, cut around respondent's vehicle and parked sideways in front of respondent's truck. Respondent stopped his truck and an

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

altercation occurred between a passenger from respondent's vehicle and one from Leyba's vehicle. A fistfight between the passengers ensued and when it ended, respondent drove away from the scene down Victory Road. (T., pp. 145-149)

On direct, respondent testified that he did not participate in the incidents or fight between the passengers other than that he was driving one of the vehicles. He testified that, after the fight ended, he drove away at a normal rate of speed, proceeded down Victory Road when the Leyba vehicle came up behind him at a high rate of speed, rear-ended him causing his truck to slide into the gas pumps. At no time was he racing with or attempting to get away from the Leyba truck. (T., pp. 151-154)

At the close of appellant's case, the Court granted respondent's motion for a directed verdict on the basis that the evidence of negligence by respondent was insufficient to submit the case to the jury. (T., p. 171)

ARGUMENT

POINT I

THE TRIAL COURT RULED CORRECTLY IN REFUSING TO ADMIT TESTIMONY CONCERNING THE SPEED OF THE VEHICLES

Appellant's counsel attempted to introduce testimony by Barry Bell, an employee of appellant who witnessed the accident, concerning the speed, in miles per hour, of respondent's and Leyba's vehicles. Bell testified he saw the vehicles coming down Victory Road prior to the collision and that he had observed "millions" of cars coming down the same stretch of

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

road. (T., pp. 94-95) However, at no time did counsel for appellant elicit testimony from Mr. Bell that he drove a car himself, that he had observed his speedometer while driving, i.e., that he had a basis for estimating the speed of vehicles. Simply stating he had watched vehicles come down Victory Road, without any evidence of his familiarity with operating a car, is insufficient as a foundation for the admission of opinion testimony as to the speed of a vehicle.

It was precisely on foundational grounds that the trial court sustained respondent's objections to the testimony of Mr. Bell as to the estimated speed of the vehicles. Respondent has no quarrel with the proposition that a layman's opinion estimating speed of a vehicle is admissible where a foundation for such opinion is made.

Both cases cited by appellant in support of its argument that Bell's opinion should have been admissible recognize that such testimony is proper only when there is a foundation for the same. The Court in Townsend v. Whatton, 21 Ariz. App. 556, 521 P.2d 1014 (1974), cited the case of Southwestern FreightLines, Ltd. v. Floyd, 58 Ariz. 249, 119 P.2d 120 (1941), in support of the proposition that even a non-driver could testify as to speed where qualified by experien

In Floyd, supra, a 12 year old girl was allowed to testify as to the speed of a vehicle based on her experience of riding on many occasions with her father and observing the car's speedometer as a basis for estimating speed.

Similarly, in Potts v. Brown, Wyo., 452 P.2d 975 (1969), the speed estimates of two teen-age witnesses were

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

based on their driving experience, observation of other cars while driving within speed limits, etc.

Appellant's position in the case at bar simply presupposes that his witness was qualified by experience to estimate speed without any foundation that he had ever driven a car or ridden in one himself.

The trial court herein ruled correctly in excluding the testimony of Bell where there was no proper foundation. The question of admissibility of opinion testimony is within the discretion of the trial court and should not be upset without a clear showing of abuse of discretion. Ewell and Son, Inc. v. Salt Lake City Corp., 27 Utah 2d 188, 493 P.2 1283 (1972).

POINT II

THE EVIDENCE OF NEGLIGENCE BY RESPONDENT IS INSUFFICIENT AS A MATTER OF LAW

Appellant presupposes that a race or chase situation existed between the Leyba vehicle and respondent's vehicle and that the supposed chase was the direct and proximate cause of the damage to appellant's service station. The evidence adduced at trial simply fails to support that thesis.

The key element of proof in any case involving an automobile collision is whether or not the driver of a vehicle operated it negligently so as to proximately cause damage to another party.

Appellant's theory of the case presumes that respondent was negligent simply because he was the driver of a vehicle in which a passenger became involved in a series of

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

incidents with the occupants of another vehicle which culminate in a fistfight. No evidence was offered that respondent operated his vehicle in a careless or negligent manner at any time from State Street through to the point of collision at appellant's service station.

The only evidence of negligent driving was as to the Leyba vehicle. The Leyba vehicle swerved around respondent, turned off in a different direction, turned around and chased respondent down and cut off his vehicle. A brief altercation ensued, in which respondent did not participate, after which respondent drove off at a normal rate of speed. The Leyba vehicle later negligently collided with the rear of respondent's vehicle causing the damage to appellant's service station.

Appellant sought at trial to derive an inference of negligence from respondent's purported involvement in or failure to restrain the tortious conduct of respondent's passenger. Counsel for respondent objected to the attempt to introduce any testimony as to the incidents on State Street or the fight between occupants of the vehicles.

The matter was argued at some length to the court outside the presence of the jury. (T., pp. 124-140) The court found that appellant's authorities in support of his argument were actually contrary to his position. The incidents prior to the collision did not constitute a chain of negligent acts amounting to concurrent negligence by respondent. (T., p. 140) The court ruled that the evidence of the prior incidents would

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

be admitted but that appellant would be prohibited from relying upon it as a basis for presuming negligence or liability as to respondent. (T., pp. 140-142)

Appellant relies heavily on the case of Hillyard v. Utah By-Products Co., 1 Utah 2d 143, 263 P.2d 287 (1953), in support of the proposition that joint liability may exist where separate, but concurrent acts of negligence combine to cause injury. However, Hillyard, supra, is readily distinguishable from the case at bar. That case involved the issue of negligence as between the driver of a truck who had parked it five feet into the roadway and the driver of a car which collided with the truck. There was no series of claimed negligent acts nor any claim of a race or chase.

The evidence of a race or chase in the instant case falls of its own weight. Appellant relies on the conclusory statements of two witnesses, Bell and Boyle, that the two vehicles appeared to be racing down Victory Road. No competent testimony was offered in support of those conclusions as to any speeding or negligent driving by respondent.

The cases cited by appellant on the issue of a race clearly involved testimony that vehicles were speeding or chasing each other. In Lemons v. Kelly, 239 Ore. 354, 397 P.2d 784 (1964), both the plaintiff and defendants testified that a race had occurred, and the case turned on whether or not the race had terminated prior to the accident.

In the instant case, the series of events prior to the collision came to rest at the point where the fistfight

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

occurred. At that point, respondent drove away at a normal rate of speed and was heading home. The Leyba vehicle then came up behind respondent and collided with him while attempting to pass. Leyba's own testimony at a deposition in this case was that, rather than racing respondent down Victory Road, he was hurrying to seek assistance for his companion who had been injured in the fistfight.

There can be no dispute that respondent's vehicle sliding into the gas pumps was an actual cause, or cause-in-fact, of appellant's damages. However, it is equally indisputable that the sole legal, or proximate, cause of the damages to appellant's station was Leyba's negligent act of rear-ending respondent's vehicle on Victory Road.

Appellant's counsel, throughout his brief, assumes facts which were not in evidence at trial and attempts to link them in a supposedly concurrent chain of negligent acts culminating in the collision. There is simply no competent, tangible shred of evidence to support that claim.

The trial court was correct in ruling that the evidence of negligence by respondent was insufficient to submit the case to the jury.

POINT III

THE TRIAL COURT APPLIED THE PROPER STANDARD IN GRANTING A DIRECTED VERDICT

Appellant correctly states the standard to be employed by the trial court in considering a motion for a directed verdict

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

i.e., the court must view the evidence in a light most favorable to the non-moving party and construe the controverted facts, if any, in that party's favor. Boskovich v. Utah Construction Co., 123 Utah 387, 259 P.2d 885 (1953).

If the court finds that reasonable minds cannot differ as to the lack of negligence in a case such as the instant one, then it is obliged to direct a verdict as to the lack of liability.

The Court, in the present case, ruled properly in that the uncontroverted facts established that the only negligent act which proximately caused the damage to appellant was Leyba's negligence in rear-ending respondent. The fact that some sort of tortious incident occurred prior to the collision is irrelevant absent some showing of negligent operation of the truck driven by respondent. Appellant is entitled to no inference of negligence by respondent regardless of whether or not respondent was involved in a dozen fistfights prior to the collision.

The trial court correctly concluded herein that the evidence of negligence by respondent was insufficient, such that reasonable minds could not differ, and was compelled thereby to direct a verdict dismissing appellant's case.

CONCLUSION

Based on the foregoing, respondent respectfully requests this Court to affirm the judgment of the District Court granting a directed verdict.

Respectfully submitted,

Frank N. Karras

FRANK N. KARRAS
Attorney for Respondent

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the Brief of Respondent to Steven G. Johnson, Attorney for Plaintiff Appellant, 333 East Fourth South, Salt Lake City, Utah 84111 this 16th day of January, 1981.

Frank N Karras

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.