

1959

Edward H. White v. John Alred Newman : Brief of Plaintiff and Respondent

Utah Supreme Court

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IN THE SUPREME COURT

of the
STATE OF UTAH

FILED

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EDWARD H. WHITE,
Plaintiff and Respondent,

vs.

JOHN ALFRED NEWMAN,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No.
9038

Brief of Plaintiff and Respondent

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INDEX

Page

STATEMENT OF FACTS	3
ARGUMENT:	
POINT I: THE COURT DID NOT ERR IN FINDING DEFENDANT'S EMPLOYEE NEGLIGENT, AND HIS NEGLIGENCE TO BE THE SOLE PROXI- MATE CAUSE OF THE DAMAGE.....	4
POINT II: THE COURT PROPERLY FOUND THAT THE NEGLIGENCE OF THE PLAINTIFF WAS NOT THE PROXIMATE CAUSE OF THE ACCI- DENT.	5
POINT III: ASSUMPTION OF RISK IS NOT AP- PLICABLE UNDER THE FACTS IN THE REC- ORD.	6
POINT IV: THE EVIDENCE AS TO DAMAGES WAS ADEQUATE.	6
CONCLUSION	6

TABLE OF CASES CITED

Finlayson v. Brady, 121 Utah 204, 240 P(2d) 491.....	6
Mingus v. Olsen, 114 Utah 505, 202 P(2d) 495	6
Vadner v. Rozzelle, 80 Utah 162, 45 P(2d) 561	5

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STATEMENT OF FACTS

Respondent has no quarrel with appellant's findings of fact with the following addition. Appellant's witness, Giatras, testified that the gas ignited on contact with the hot manifold (R. 28-29) and not from a spark (R. 29).

POINTS

POINT I.

The Court did not err in finding defendant's employee negligent, and his negligence to be the sole proximate cause of the damage.

POINT II.

The Court properly found that the negligence of the plaintiff was not the proximate cause of the accident.

POINT III.

Assumption of risk is not applicable under the facts in the record.

POINT IV.

The evidence as to damages was adequate.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN FINDING DEFENDANT'S EMPLOYEE NEGLIGENT, AND HIS NEGLIGENCE TO BE THE SOLE PROXIMATE CAUSE OF THE DAMAGE.

There was no issue on the question of agency, it being admitted that Giatras was the agent of the defendant.

Giatras was an experienced service station attendant (R. 26). He was engaged in his employment of filling a tank with gasoline and negligently either failed to release the nozzle before the tank overflowed or attempted to fill the tank too rapidly and caused the overflow. Giatras testified he was familiar with pressure forcing gas out of a car or any other thing (R. 19), yet instead of carefully putting gas into the already partially full two-gallon tank, he overflowed the tank and then:

"I pulled the nozzle right out of the hole and threw it off" (R. 19).

The Court properly found that the agent of the defendant was negligent and that negligence was the proximate cause of the explosion and fire. *Vadner v. Rozzelle*, 80 Utah 162, 45 P(2d) 561.

POINT II.

THE COURT PROPERLY FOUND THAT THE NEGLIGENCE OF THE PLAINTIFF WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT.

The only evidence as to the cause of the fire and explosion was the statement of Giatras that the gas ignited from the hot manifold rather than from a spark (R. 28-29). All the testimony indicates that the motor was being serviced almost immediately after it entered the service station. The manifold would have been hot and ignited the gas spilled on it even if the plaintiff had turned it off upon entering.

Viewing the evidence in the light most favorable to plaintiff, *Mingus v. Olsen*, 114 Utah 505, 202 P(2d) 495; *Finlayson v. Brady*, 121 Utah 204, 240 P(2d) 491, there is no error in the Court's holding that negligence of the plaintiff did not contribute to the proximate cause of the damage.

POINT III.

ASSUMPTION OF RISK IS NOT APPLICABLE UNDER THE FACTS IN THE RECORD.

Giatras was an experienced service station operator (R. 26) having been in the gasoline service business for ten years, and there is no evidence nor reason that plaintiff should have foreseen the attendant allowing the tank to overflow onto the manifold.

POINT IV.

THE EVIDENCE AS TO DAMAGE WAS ADEQUATE.

Plaintiff testified regarding an estimate of repair from the Stanley Motorcycle Shop, which he had mailed to the insurance company (R. 17-18). Counsel for the defendant read the actual amount, \$333.60, into the record (R. 18) and made no objection whatsoever to the evidence of said estimate.

There is undisputed and unobjected to evidence of repair cost in the amount of the Court's judgment.

CONCLUSION

The Court did not err in any of the particulars cited by

the appellant. There is sufficient evidence to support the Court's findings, conclusions, and judgment.

Respectfully submitted,

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By Sumner J. Hatch