1965

Rose Klafta v. Albert N. Smith, dba Ox Ranch : Appellant's Brief

Case No. 10275

In the Supreme Court of the State of Utah

ROSE KLAFTA,

Plaintiff and Respondent,

vs.

ALBERT N. SMITH, dba OX RANCH,

Defendant and Appellant.

APPELLANTS BRIEF

Intermediate Appeal from an Order of the District Court for Tooele County, State of Utah,
Honorable R. L. Tuckett, Judge.

YOUNG, THATCHER & GLASMANN
1018 First Security Bank Building
Ogden, Utah

GEORGE B. HANDY
517 David Eccles Building
Ogden, Utah
Attorneys for Defendant and Appellant

WLINGS, WALLACE, ROBERTS & BLACK
Judge Building
Lake City, Utah
Morneys for Plaintiff and Respondent

TABLE OF CONTENTS

COURT DECISIONS CITED

Page

STATUTES CITED

TEXT BOOKS CITED

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action for personal injuries arising out of a collision between the automobile in which Respondent was riding and a dead cow owned by Appellant. Said cow had been killed by another car driven by one Cox and left lying on the highway.

DISPOSITION IN LOWER COURT

The case was tried to a jury on special interrogatories. The answers of the jury were inconsistent. Respondent filed a motion for judgment n.o.v., for additur, and in the alternative for a new trial on damages only. On December 3, 1964, the Court entered the following ruling:

> "In this matter the evidence shows without dispute that the animal involved in the collision here in question had escaped from the vehicle

of the defendants. The Court is of the opinion that Section 27-1-33, UCA, 1953, was violated by the escape of the animal in question. Under the provisions of Section 27-1-34, UCA, 1953, the plaintiff is entitled to recover her damages. The motion of the plaintiff for judgment notwithstand the verdict is granted.

"A new trial is granted on the issue of the plaintiff's damages.

"Dated and signed this 3rd day of December, 1964.

R. L. TUCKETT
R. L. TUCKETT, Judge"

RELIEF SOUGHT ON INTERMEDIATE APPEAL

Appellant seeks a reversal of that part of said ruling to the effect that Section 27-1-33 and Section 27-1-34, UCA, 1953, were violated by the escape of the animal in question and that plaintiff is entitled to recover her damages, and that the motion of the plaintiff notwithstanding the verdict is granted and a new trial is granted on the issue of damages only.

STATEMENT OF FACTS

This case has been tried twice. The first trial was before the Honorable Aldon Anderson and a jury. The jury returned a verdict for defendant. Judge Anderson felt that his instructions relating to proximate cause were incorrect, and so on a motion by plaintiff for a new trial as to damages only the Court granted a new trial on all issues. The next trial was before the Honorable R. L. Tuckett and a jury. Judge Tuckett submitted

the case to the jury on special interrogatories. The answers returned by the jury were inconsistent. Respondent then filed a motion for judgment n. o. v. or for additur, or in the alternative for a new trial on damages only. On December 3, 1963, the Court entered an order granting Repondent's petition for judgment n.o.v and granted Respondent a new trial on damages only. Thereupon Appellant petitioned this Court for an intermediate appeal, which was granted on December 15, 1964.

This is an action brought by Respondent against Appellant for personal injuries which she is alleged to have suffered in an accident which took place in Tooele County on December 29, 1961, on Highway 40 about 45 miles East of Wendover, Utah. Appellant operates a livestock ranch in Ruby Valley, Nevada. At the time of the accident he was the owner of a truck upon which was constructed a cattle rack which he used for transporting livestock from his ranch to the Ogden Stockyards at Ogden, Utah, for sale. On December 29, 1961, he loaded in said rack seven grown cows and two grown bulls and started for Ogden. When he reached a point approximately five miles West of Grantsville, Utah, he was flagged down by the driver of a following car and told that his tailgate on said rack was loose, whereupon he stopped and found that the tailgate had loosened and three cows and one bull were missing. He immediately replaced the tailgate in its proper sockets, replaced two bolts which were then missing, turned around on the highway and traveled back about 40 miles in search of the missing animals, when he came to the scene of the accident. Neil Bishop, a trooper for the

Utah Highway Patrol, investigated the accident. He arrived at the scene at about 7:15 p.m. He received the call at about 6:45 p.m. when he was about 50 miles East from the scene of the accident. He described the road as having two lanes of traffic, divided by a broken white center line, on level terrain, no hills or obstructions, and straight. The road was of asphalt composition. It was dry, just in average condition (Tr. 13), with no particular defects. It had been chipped, which helps to reflect some light. It is not like a road of new-laid mix, which tends to absorb most all of the headlights (Tr. 14). He observed a 1961 Cadillac (the car in which Respondent was riding) on its right hand side of the roadway at a point indicated on a diagram placed by him on the blackboard. He also observed a 1956 Pontiac (Cox' car) on the left hand shoulder and some distance back of a puddle of radiator fluid, which indicated the probable final position of the Pontiac. He also noticed heavy, swerving marks at a point indicated on the drawing, some gouge marks, and 9' 8" of skid marks (evidently made by the Klafta car). He also noticed a dead black cow. It had been removed from its final position prior to his arrival. The animal was black (Tr. 15). The point "pp-1" was identified as the probable point of impact of the Cox car where it could possibly have hit the cow, and "pp-2" as the possible point of impact of the Klafta car where it could have had the collision with the cow. The skid marks from PP-2 showed a swerving, heavy black smear leading to Cadillac. They were caused, he believed, by the left front wheel being locked (Tr. 15). In the collision the distribution of the fender and parts had completely

locked that wheel (Tr. 16) and kept it locked on that side. These marks extended a distance of 120' covered by the Klafta car as it traveled West from the point of impact, swerving and coming to rest (Tr. 17). The front end of the Klafta car was quite heavily damaged, indicating that the damage had been inflicted by a collision at a fairly low center of gravity to the vehicle. The Cox vehicle showed heavy damage to the hood, headlights and top (Tr. 17), which was a basis for his stating that the vehicle went underneath and the cow was propelled up over the top of the vehicle and stopped on the roadway behind it (Tr. 18). On cross-examination he stated that maintenance and chipping of the road is done regularly as the road needs it, and this is a factor in lighting the roadway, making it more of a lighter textured surface than travel wear will do to it. The weather was clear. It was a dark night. The road surface was dry, no fog, no mist or dust in the air (Tr. 32). It was ascertained that the Cox car was the first to hit the animal (Tr. 34). The Cox car was facing West, partially on the roadway, so that the rear end of the Cox car would be facing an oncoming car from the East. The Cox car had red reflectors on the rear and the lights from an oncoming car would reflect themselves into the rear. As the lights hit the surface they would definitely reflect back (Tr. 36). They would be visible for probably, under most conditions, 250 to 300 feet as a minimum. The Cox car was partially on the asphalt portion of the highway (Tr. 37). He estimated that the top of the animal would be about 36" above the surface of the highway. The appearance of the marks on the highway would indicate that the Klafta car was

braked and its wheels locked for a distance of 9' 8" before striking the carcass (Tr. 38). The Klafta car started to brake 9' 8" East of the point of impact and then continued over the cow and down the highway for a distance of 125 feet before it came to rest (Tr. 39). A copy prepared by the witness of the drawing on the blackboard was offered in evidence marked "P-1" and received in evidence (Tr. 41). Rose Klafta testified concerning the happening of the accident that she was an occupant in the Klafta car that became involved in the accident (Tr. 42). She was seated in the front seat next to the driver and her husband, Bruno seated in the rear seat. That her son, Richard, was the driver; that they had come from Kankakee, Illinois, and were enroute to Sacramento, California; that there were no cars in front of them (Tr. 44). (Note: The Cox car must have been a considerable distance ahead of them when he struck and killed the cow.) She saw this black object in front of them. Richard applied his brakes real hard and we hit some hard object (Tr. 45). Just before the accident she said to Richard, "Thank God for bringing us this far in safety." (Tr. 62). There were no seat belts in the car. She was thrown forward and the seat came back with her. She admitted that if she had had a seat belt on she was sure it wouldn't have (Tr. 63).

Richard Klafta (Tr. 70) testified that they left Kankakee on the 27th day of December around 4:00 p.m. (Tr. 72). He did all the driving. They arrived in Salt Lake City late in the afternoon but did not stop and continued on Highway 40. The accident happened about 6:30 or 6:35. In describing how the accident

happened he said, "I was driving down Route 40 and all of a sudden here was this big critter. I yelled 'Look out', and put my right arm up, hit the brakes, and bang, we hit it. My lights were on dim. Sometime before I noticed lights way off in the distance and he flicked at me and I did the same to him and left them on dim. I did not reduce my speed. I was traveling about 50 miles per hour." (Tr. 75). On cross-examination he admitted that in a written statement signed by him he stated he was traveling between 50 and 55 miles per hour (Tr. 81); that he did not reduce his speed when he dimmed his lights to low beam (Tr. 83). He further stated that this was a barren country but he did not remember seeing any signs "Watch for Cattle" (Tr. 85).

DEFENSE

Appellant Smith was asked the following question: "Speaking specifically about the rack, who constructed it, who manufactured it?" Objected to by Respondent as being immaterial, and the objection was sustained by the Court. The Court then indicated that it was his view that Appellant could not go into any matters tending to prove justification or excuse (Tr. 108). Appellant's counsel, in the absence of the jury, made a proffer of proof, which is set out in the transcript at pages 109 to 111, inclusive. Upon objection to the offer by Respondent the Court stated (Tr. 111), "Well, the Court feels that the offer of proof, if the evidence were such, it would not amount to a justification for violation of the statute we have here." Upon inquiry by Appellant's counsel as to what issues would be tried the Court stated, "Well, I think your other

issue is the negligence of plaintiff driver being the sole proximate cause of the collision." Appellant then offered in evidence the pleadings set forth in Respondent's second cause of action wherein Respondent alleged that defendant Cox was guilty of primary negligence which caused the injury, as bearing on the issues of proximate cause. Upon this offer, which was objected to by Respondent, the Court stated, "In that respect the Court is of the opinion that while the plaintiff may have originally made claim against defendant Cox, he was not brought into the proceedings by service of process and I doubt whether plaintiff's bare claim alone would establish that defendant Cox was guilty of any negligence. The offer is denied." (Tr. 112-113). Thereupon Appellant proceeded with his defense on the sole issue of negligence of Richard Klafta as the sole cause of the accident. Appellant then testified that the weather was dry, clear and cool. Visibility was very good. No dust, rain, wind or fog, and lights are a lot better on a dark night (Tr. 113). A picture marked "Exhibit 4" and received in evidence showed a sign on the right hand side of the highway some distance West of Grantsville on the desert. "Exhibit 5" showed one of three signs as they existed on the date of the accident (Tr. 115) and was received in evidence. He further testified that there are other signs along the highway between Grantsville and the scene of the accident reading "Range Cattle". The country is open range known as the desert but contains winter feed that cattle and sheep winter on. There were cattle grazing in that general area (Tr. 117). This animal weighed about 1,200 lbs. and was a black Angus with white spots on her flank and belly.

Donald E. Green was a driver for P. I. E. He testified that he was driving East on No. 40; that the night was clear, visibility good, and that visibility is much better on a clear, dark night. You can see better if there is any object on the highway in front of you. He was 200 or 300 yards back when he observed the lights of an oncoming car approaching and all of a sudden they jumped into the air 3 or 4 feet, then the car made violent swerves and went to the right hand side of the road; that he did not believe he signalled for dimming lights because he was too far away (Tr. 121).

The ruling of the Court restricting Appellant to the one issue of whether or not Richard Klafta was guilty of ngeligence which was the sole cause of the injuries, restricted Appellant in offering evidence as to the other affirmative defense hereinafter to be discussed.

ARGUMENT

POINT I. The Court erred in entering its order that upon the retrial of this action the only issue will be that of damages, thus in effect holding that as a matter of law Appellant violated Section 27-1-33 and Section 27-1-34, U.C.A. 1953, and that such violation constituted negligence per se and was the proximate cause of Respondent's injury.

POINT II. That such ruling by the Court precludes Appellant from offering any evidence in support of his defense of contributory negligence of Respondent and the issue of proximate cause.

POINT III. That such ruling by the Court precludes Appellant from offering any evidence in support

of his defense that Richard Klafta, the driver of the car in which Respondent was riding, was guilty of negligence, which negligence on his part was the sole cause of the accident and resulting injury to Respondent.

POINT IV. That on the retrial of this action Appellant should be permitted to offer evidence in support of each of the foregoing defenses and the same should be submitted to the jury as questions of fact rather than questions of law for the Court.

POINT V. That the trial court erred in sustaining objections to Appellant's proffered evidence.

POINT VI. That the trial court erred in instructions given to the jury.

POINT VII. That the trial court erred in refusing to give to the jury instructions as requested by Appellant.

Point I. With respect to the offer of proof made by Appellant we desire to call attention to the case of *Condas v. Adams,* 15, Utah 2d 132, 388 P. 2d 803. Plaintiff sued for rent under a farm lease. Defendant filed a counter-claim alleging fraud. On the morning of the trial a conference was held in Chambers. Judge Ellett asked counsel for defendant what his proof would be and after discussion of the matter the Judge then dismissed the counter-claim. This court made the following observation:

> "Further, the trial court's dismissal of the counter-claim is akin to the granting of a summary judgment and therefore the proposed proof and

every inference arising therefrom must be viewed in the light most favorable to the defendants. It is with these legal principles in mind that the defendants' offer of proof must be reviewed."

The order of the Court in our case granting a new trial by restricting it to damages only is also akin to the granting of a summary judgment against Appellant, and the above observations by the Court should also apply in considering Appellant's offer of proof.

This case has already been tried twice. The first trial, before the Honorable Aldon Anderson, resulted in a no cause verdict. Judge Anderson, however, felt he had erred in defining proximate cause in his instructions and so he granted a new trial on all issues, although Respondent moved for a new trial restricting it to damages only.

The second trial was before the Honorable R. L. Tuckett. He submitted special interrogatories and the jury became confused in answering the interrogatories, which resulted in their bringing in of an inconsistent verdict. His first interrogatory is as follows:

> "Did the defendant violate the statute here in question by failing to properly secure the livestock to prevent their escape? Answer yes or no."

His second interrogatory is as follows:

> "Was the defendant's violation of the statute a proximate cause of the plaintiff's injury and damage? Answer yes or no."

Interrogatory No. 2 should have been asked in the following form:

> "If your answer to Interrogatory No. 1 is yes, then you will answer plaintiff's Interrogatory No. 2."

In the absence of this clarifying statement the jury could not help being confused by reason of the Court's stating as a positive fact that the defendant's violation of the statute was a proximate cause of plaintiff's injury and damage. After the jury had been out for some considerable time they asked for further instructions, and thereupon the Court entered into a discussion with the jury. See Tr. commencing on page 165 and continuing to page 170. We think the actions of the Court constituted reversible error. See *Cornia v. Albertson's*, ...Utah....., 397 P. 2d 66.

Appellant does not object to the granting of a new trial for the reasons hereinbefore set out, but strenuously objects to that part of the order which limits the third trial to damages only. It is from this part of the ruling that Appellant appeals. The effect of the Court's order is that Judge Tuckett has held that as a matter of law Appellant violated the provisions of Section 27-1-33; U.C.A. 1953; that such violation was the proximate cause of the accident and resulting injuries suffered by Respondent; that Respondent was not guilty of contributory negligence; and that Richard Klafta, the driver of the car in which Respondent was riding, was either not guilty of negligence or that his negligence was not the sole cause of the accident. We contend that all of these issues presented questions of fact for the jury's

determination under proper instructions. We further contend that if Appellant is permitted to offer evidence as to justification or excuse, as set forth in the offer of proof hereinafter discussed, and the jury finds that under all the circumstances surrounding the accident Apellant was justified or excused from said violation, then it must follow that Appellant did not violate Section27-1-33 and if he did not violate this section then he did not violate Section 27-1-34, which applies *only to and when* he violates Section 27-1-33. This section is somewhat ambiguous. Subdivision (a) provides as follows:

> "No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent its contents from dropping, shifting, leaking or otherwise escaping therefrom."

Then (b) provides:

> "No person shall operate on any highway any vehicle with any load unless said load and *any covering thereon* is suitably fastened, secured and confied according to the nature of such load so as to prevent said *covering* or load from becoming loose, detached, or in any manner a hazard to other users of the highway." (Emphasis added.)

It is a matter of common knowledge that no coverings are placed over trucks holding livestock. Therefore, we must assume that subdivision (b) relates to trucks hauling merchandise and similar articles which are covered while in transit. Otherwise, subdivisions (a) and (b) are synonymous. We think, therefore, that

the only statute involved in this case is subdivision (a), but irrespective of this, and whether it applies to (a) or (b), we contend that Appellant should be permitted to offer the evidence set forth in his offer of proof that his truck was so constructed and loaded as to prevent the cattle from escaping therefrom but due to an unfortunate accident for which Appellant was not responsible or which could not be prevented by the exercise of reasonable and ordinary care and caution, the three cattle escaped from said truck. Conceding for the purpose of this argument only that Appellant did violate the above statute, then we next consider the important question as to whether such violation constitutes negligence per se, rendering him liable as a matter of law, or whether a violation of a statute such as the one in question raised a presumption of negligence which may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct of Appellant was excusable or justifiable and such as might reasonably have been expected from a person of ordinary prudence, and that this presents a question of fact to be submitted to the jury under proper instructions. We desire to call the Court's attention to the case of *White v. Piney* 90 Utah 484, 198 P. 2d 249. Defendant was a wholesaler of beer. Neslen was his driver of a truck making deliveries. Plaintiff's truck was parked to the curb headed south on Highland Drive. Plaintiff was standing behind his truck taking out flowers for delivery to a florist. Defendant's stake body truck was loaded with beer, barrels and cases. On the rack was a hand truck or dolly used in unloading and moving barrels of beer. As the truck passed plain-

tiff's truck one wheel of the dolly came off, crossed the street and struck plaintiff. Verdict for defendant. Three questions were presented: (1) Was plaintiff entitled to instruction that defendant was negligent as a matter of law? (2) Did the Court err in submitting to the jury the question of contributory negligence of plaintiff? (3) Was instruction 13 so erroneous as to require reversal of the judgment? The Court first discusses the question of *res ipsa loquitur*. The Court then proceeds to discuss instructions No. 12 and 13, and as to 12 the Court says:

> "Instruction No. 12 is clear that liability for defects in a motor vehicle exists only (a) when a defect was known, or (b) when it could have been discovered upon reasonable inspection. It further made clear that if there was a defect in defendant's equipment they could not escape liability unless the jury found not only that the defect was unknown but that it could not have been discovered by reasonable, prudent inspection."

Defendant offered evidence (a) that the dolly was fastened to the truck in a proper and secure way, (b) that the wheels on the dolly were held in place by cotter pins, (c) that they had no knowledge of any defect in the dolly or the way the wheel was fastened on, (d) that the hand truck or dolly had been regularly lubricated and inspected once or twice each week, (e) that it had been used that day shortly before the accident, was in good condition, and had nothing wrong with it, (f) that when the dolly was put back on the truck when last

used shortly before the accident it worked all right and seemed in good condition, and (g) that there was nothing to be seen about it to indicate it was not in good condition. For some reason the statute involved in this case was not raised either by the Court or counsel, and so the case was tried on the theory of common law negligence, but we think that the evidence offered in that case is so similar to our offer of proof that if the theory of justification or excuse is permitted then the offer of proof would be sufficient to permit a jury to find that Appellant was justified or excused from the violation of the statute, so that the real question involved is whether or not this Court will recognize the doctrine adopted in California and many other states that an alleged violator may offer evidence of justification or excuse and that the ultimate question is one of fact for a jury.

Appellant admits that there is a division of authority on this question, but we contend that this Court has elected to follow the California rule that violation of a statute such as the one in question raises only a presumption of negligence. *Berkovitz v. American Rico Gravel Co.* (Cal.), 215 Pac. 675, is perhaps the first California case to lay down clearly the rule. At page 677 the Court says:

> "The only question remaining open on this point is whether conclusive proof of the violation of such a statute or ordinance is also conclusive proof of negligence. Some courts have held that it is and some that it is not. But the true rule is perfectly plain. The violation of such a law, left without explanation or excuse, is conclusive

of negligence, but it may be excused. If some good excuse appears which would be a sufficient defense to an action for the penalty imposed by the law . . . then the law is not really violated . . . We find but few cases in which this is clearly stated, but they deserve to take precedence of all the others, as they reconcile the principle upon which the other cases were actually decided." (Citing Sherman & Redfield on Negligence, Section 467).

This case is cited and referred to in most of the cases involving the violation of a statute or ordinance subsequent to the Berkovitz case. For an instruction approved by California courts, together with a long list of cases supporting the rule, see B.A.J.I., Third Revised Edition, No. 149, commencing at page 187. Also B.A.J.I., Fourth Edition, No. 149, commencing at page 387. Also B.A.J.I. Supplement No. 149-149b, commencing at page 144.

Utah cases.

We admit that this Court has held that violation of a statute or ordinance constitutes negligence as a matter of law.

Smith v. Mine & Smelter Supply co., 32 *Utah* 21, 88 Pac. 683.

Skirl v. Wheeler Creek Coal Co., 92 *Utah* 476, 69 P. 2d 502.

However, these cases involve a wilful violation of an ordinance governing the storage of dynamite and the wilful violation of a statute governing the keeping of

explosives. These two cases will be further discussed when we refer to the case of *Thompson v. Ford Motor Co.* This Court, however, soon began to recognize that the sweeping statement contained in the explosive cases above referred to had limitations. The first case was *White v. Shipley,* 48 Utah 496, 160 Pac. 441, where the trial court included the statement contained in the explosive cases in one of its instructions to the jury. In this case the defendant's team ran into the plaintiff while defendant was driving to the left of center of the street. This court reversed, holding that where there was an excavation on the right side of the street defendant was justified in driving on the left in violation of the ordinances of Ogden City, in spite of the sweeping language in the Mine & Smelter case.

> *Morrison v. Perry* (on rehearing), 104 Utah 151, 140 P. 2d 772.

This court held "that the presumption of negligence on the part of defendant, arising from automobile collision on defendant's wrong side of the street, ceases the moment an explanation is offered that the evidence upon which the presumption was based remains in the case and is to be considered by the jury unless there is no conflict between such evidence and the explanatory evidence."

> North v. Cartwright, 119 Utah 516, 229 P. 2d 871.

This case involved the question of plaintiff's contributory negligence in violating two traffic statutes, from which we quote as follows:

"Plaintiff's driving on the wrong side of the street contrary to statute is *prima facie evidence of negligence,* and calls for an explanation to justify his position upon the highway." (Emphasis added)

Robinson v. Robinson, ... Utah....., 394, P. 2d 876.

While this case does not involve the violation of a statute, it does involve the rule of absolute liability and to that extent it is similar to our case in which the trial court applied the rule of absolute liability for violating a statute. We quote from Mr. Justice McDonough, the author of this opinion, as follows:

"It is to be observed that even where the circumstances justify its application, this so-called rule of absolute liability has the weakness of most generalities. There are almost always exceptions which prove them fallacious."

Further quoting:

"It will thus be seen that the so-called rule of 'absolute liability' is not absolute at all. Both the propriety of its application in the first instance, and any defenses against it, are conditioned by the limitations imposed by the fundamental standard which pervades all tort law: *the conduct of the reasonable prudent man under the circumstances;* and its procedural corollary, that whenever there is a dispute in the evidence or uncertainty therein as to whether that standard is met, the question is one for the jury to

determine." (Citing cases in the footnote.) (Emphasis added.)

We now come to the case of *Thompson v. Ford Motor Co.*,.....Utah 2d....., 395 P. 2d 62, decided September 1, 1964, which we believe is conclusive of the question involved on this appeal. Plaintiff sued for injuries suffered when the parking brake on a Salt Lake City garbage truck suddenly gave way so he was unable to get back into and control it. Plaintiff alleged that the brake mechanism was defective. On the basis of depositions of the plaintiff and his co-worker the trial court ruled that plaintiff was contributorily negligent as a matter of law, and granted defendant's motion for summary judgment. The truck in question was manufactured by defendant. Plaintiff took the truck to the hilly avenue section of Northeast Salt Lake City to collect garbage. Plaintiff stopped the truck on a steep grade headed downhill. On stopping, plaintiff set the parking brake, got out and went to the rear to collect garbage. He left the cab door open, left the key in the ignition and the motor running. At about the time the plaintiff turned to set down the cans something snapped underneath the truck. The brake gave way and the truck started to roll. Plaintiff ran forward and grabbed the door but was unable to get into the truck and was thrown to the ground, sustaining injuries.

The pivotal controversy devolves upon Section 41-6-105, U.C.A. 1953. We quote from the opinion by Mr. Justice Crockett:

> "The defendant contends that under the above facts above recited the leaving of the truck un-

attended and the violation of the statute constitute proof as a matter of law that plaintiff was guilty of negligence and that it proximately contributed to cause his injury, which precludes his recovery and justifies the summary judgment against him. Plaintiff rejoins that notwithstanding the statute, he is entitled to have his conduct judged on the universally applied standard of care: *that of the reasonable, prudent man under the circumstances.* We are aware that it has sometimes been stated as a general rule that violation of the statutory standard of care is negligence as a matter of law. This is indeed a sound rule but, like all generalities, it has its limitations and is applicable only under proper circumstances." (Emphasis added)

Justice Crockett then cites and analyzes a number of Utah cases which we have heretofore cited, and then continues:

"Subsequent to the North case just referred to, this Court has in a number of cases but with slight variations in the language reaffirmed the view, which we think is the correct one, 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 if the evidence is such that it reasonably could be found that the conduct was nevertheless within the standard of reasonable care under the circumstances." (Emphasis added)

Citing in the footnote, among others, the case of

Alarid v. Vanier, 327 P.2d 897, with this comment:

> "A well-written opinion which reviews numerous California decisions and states: 'The presumption of negligence which arises on the violation of a statute is rebuttable and may be overcome by evidence of justification or excuse.' Citing numerous law reviews and textbooks in support of the foregoing.

It would seem that Utah is now definately committed to the so-called California rule. While the statute involved in the Thompson case is different from the statute involved in our case, both relate to a standard of care to be observed by operators of motor vehicles. We think that a violation of Section 41-6-105 referred to in the Thompson case will expose more people to the hazards of life, limb and property that result from a violation of Section 27-1-33. It is also noteworthy to mention that all of the cases cited by us refer generally to any and all statutes, especially statutes or ordinances relating to a standard of care to be observed by operators of motor vehicles. When the trial court refused to allow Appellant to offer evidence of justification or excuse, Appellant made an offer of proof referred to in the Statement of Facts which, if Appellant were permitted to offer in evidence, would have made the question of justification or excuse a question of fact for the jury, and if the order of the trial court granting a new trial on damages only is sustained Appellant will be foreclosed from offering any evidence in the retrial except as to damages. Appellant therefore feels that this question can be resolved in advance of the next

trial and will probably avoid a fourth trial. The rule of absolute liability is a harsh one. Suppose that a trucker without fault loses a wheel on his truck, causing it to overturn and and permit livestock to escape, or that he strikes an icy spot on the road or a sudden wind of sufficient velocity causes his truck to overturn, or sudden floods caused by heavy rains, or any unforeseen defects in the motor vehicle of which the driver is unaware even though he makes a reasonable inspection, to hold that he is guilty of a misdemeanor subject to fine or imprisonment and civilly liable in damages, with no opportunity to offer any evidence of justification or excuse, is so harsh that it is no wonder the courts have adopted the humanitarian doctrine which permits the alleged violator to offer explanatory evidence of justification or excuse. In Harper and James, Volume 2, Section 176, page 1010, the author summarizes the situation as follows:

> "If negligence per se is tempered by the doctrine of justifiable violation, it means that violation of a statutory standard is negligence per se in a civil case only in the absence of evidence tending to establish some excuse which the court will recognize. If there is such evidence the reasonableness of the actor's conduct is for the jury in the light of all the circumstances, including the statute and the justifiable reliance that others may usually place on tis observance. Now the evidence of negligence rule can be so administered that every case is sent to the jury, but it is more often ruled that breach of the statute is prima facie evidence of negligence

so that a verdict of negligence will be directed on such a showing in the absence of some evidence tending to show factors of explanation, excuse or justification. . . There seems to be a perceptible trend in the decisions in a number of states towards just such an expansion of the negligence per se rule."

A number of cases support the above statement.

Baldridge v. Cummings, 87 P. 2d 369
Elaine v. Lloyd, 204 P. 2d 280

Wood v. Chicago & Milwaukee Railroad Company, 277 P. 2d 345

Tossman v. Newman, 233 P 2d 1

Taylor v. Jackson, 266 P 2d 605

Mays v. Ritchie, 5 S. W. 2d 728

Mulberry v. Turner, 174 N.E. 471

Highland v. Cobb, 169 N.E. 401

Lancaster v. B & H Coach Line, 150 S.E. 716.

In the light of the foregoing decisions we contend that the Court was in error in not permitting Appellant to offer the evidence set forth in his offer of proof, and in the Court's ruling that violation of this statute constitutes negligence per se.

Point II. Contributory Negligence of Respondent and Proximate Cause. After Respondent had rested her case, Appellant sought to offer evidence supporting his defense of justification or excuse, already discussed under Point 1, and to offer evidence of Respondent's

contributory negligence and proximate cause. The Court ruled that the only issue (outside of damages) upon which he would receive evidence was the alleged negligence of Richard Klafta and whether such negligence was the sole cause of the accident. This ruling precludes Appellant from offering evidence of contributory negligence of Respondent and whether such negligence, if proved, was a contributory cause of her injuries. The trial court by its order of December 3, 1964, has now withdrawn this issue from the jury.

We readily admit that an occupant of a car does not have the same duty as the driver. However, a passenger riding in a car owes a duty to protect herself against foreseeable injuries. Her conduct is judged on the universally applied standard of care, that of a reasonable, prudent person under the circumstances, and in most instances presents a question of fact for the jury.

Maybee v. Maybee, 79 Utah 585, 11 P. 2d 973.
Esernia v. Overland Moving Co., 79 Utah 585
Edwards v. Germer, 12 Utah 2d 215, 364 P. 2d 1015

While Appellant was restricted in offering evidence concerning Respondent's contributory negligence, yet the evidence offered by Respondent and her witnesses disclosed the following: That Respondent was an experienced driver; she was riding in the front seat next to her son; that Richard was driving at a speed of 50 miles per hour on low beam; that Richard in a written statement said he was driving between 50 and 55 miles per hour. It is significant that just before the accident Respondent said to Richard, "Thank God for bringing us this far in safety." (Tr. 62) The jury was not bound

to believe their testimony as to speed, especially when there is physical evidence which suggests he was driving at a much faster speed. Those facts developed by Respondent's own witnesses were that he slammed on his brakes, traveled 9' 8" with locked wheels, struck the carcass and his car jumped three or four feet in the air and then traveled 120 feet with his left front wheel locked the entire distance. From this evidence a jury as trier of the facts could logically believe that he was traveling at a much faster rate of speed than 50 miles per hour. There is one other matter bearing on Respondent's negligence. She admits that she wore no seat belt and that if she had it would have probably saved her from serious injuries. With the alarming increase of deaths on the highway and the publicity through television, radio, newspapers and magazines and safety first organizations, all of which advise the use of seat belts as a helpful media to prevent serious injury to travelers in automobiles, it seems to us that in applying the test of a reasonable and prudent person contemplating a trip from Kankakee, Illinois, to Sacramento, California, in winter without taking the precaution of providing herself with a seat belt presents a question of fact for the jury as to whether or not Respondent was guilty of negligance, causing or contributing to her injuries. Our search of the authorities has failed to find any case involving seat belts. However, our conclusion is based upon general tort law. We suggest that this Honorable Court should be the first to pass upon this interesting problem.

PROXIMATE CAUSE.

The authorities are almost unanimous in holding

that one guilty of negligence is not liable unless said negligence is the proximate cause of the accident and that in most cases the question of proximate cause presents a question of fact for the jury. The courts and text writers have encountered difficulty in applying the rule. 65 C.J.S. Sec. 103, page 645; 65 C.J.S. Sec. 104, page 650. This Court has approved the following definition of proximate cause:

> "The proximate cause of an injury is that cause which in natural, continuous sequence, unbroken by any effective intervening cause, produces the injury and without which the result would not have occurred. It is the active cause; the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by intervening agencies."
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> Kawagricki v. Bennett, 112 Utah 442, 189 P. 2d 109.

It is the application of this rule to the facts in each case which causes the confusion. We claim that the facts in this case disclose that permitting the animal to escape was not a natural, continuous sequence, unbroken *by any effective intervening cause,* but on the contrary there were two effective intervening causes which broke the chain of causation, to wit, the negligence of Cox, who killed the animal, and the negligence of Richard Klafta in striking the carcass. Respondent in her original suit joined both Smith and Cox in separate causes of action. In the second cause of action against Cox she alleges that he was negligent in the following particulars:

"(a) After striking and killing said steer defendant negligently failed and neglected to put out flares or otherwise give warning to approaching motorists of the presence of said animal on said highway.

"(b) Defendant failed and neglected to immediately take steps to remove said steer from said highway.

"That the foregoing acts of negligence on the part of said defendant Cox caused the injuries, damages and loss of which plaintiff complains."

Cox was never served with summons and did not appear in said action. Respondent later amended her complaint against Appellant by alleging a violation of Section 27-1-33 and Section 27-1-34, UCA 1953. At the pre-trial preceding the second trial Respondent's counsel advised the Court and counsel that they were abandoning the common law negligence upon which their original cause of action was based and also the issue as to *res ipsa loquitur,* and would stand solidly on the violation of the above statutes. At the conclusion of Respondent's case Appellant offered in evidence the allegations contained in the second cause of action, on the theory that this was a judicial admission on the part of Respondent and was relevant on the issue of proximate cause. The Court sustained the objection by Respondent on the theory that Cox was not a party to the action. (Tr. 112). We think the Court was clearly in error. It makes no difference whether Cox was in the case or not. The question is whether a statement of fact in a pleading is admissible is a judicial admission.

31 C.J.S. Evidence, Section 301, page 1071
Slater v. Larkin, 110 F. 2d 226
Kirk v. Head, 152 S. W. 2d 726
Knowles v. New Sweden, 101 Pac. 81.

Respondent herself testified that there were no cars traveling in front of them (Tr. 62). This being the case, the Cox car must have been traveling a considerable distance ahead of the Klafta car and Cox certainly could have prevented the accident had he gone back a short distance and flagged the oncoming Klafta car. Yet under Respondent's judicial admission he failed to do so. Therefore, the negligence of Appellant, if any, was broken by the intervening negligent act of Cox. It was further broken by the intervening negligent act of Richard Klafta to be discussed under Point III. We contend that whether the alleged negligent act of Appellant was the proximate cause of the accident presents a question of fact which should be submitted to the jury on the retrial of this action.

Point III. As heretofore noted, the trial court ruled that the only issue, apart from damages, upon which the trial could proceed was the issue as to whether or not Richard Klafta was guilty of negligence which was the sole cause of the injury, and the Court submitted this issue to the jury but by his ruling of December 3, 1964, the Court has now taken that issue from the jury on the retrial. We assert that this issue presented a question of fact for the jury's determination. We rely on the following cases:

Dalley v. Widwestern Dairy, 80 Utah 331, 15 P. 2d

309, which lays down the following ruling:

> "It has long been the rule in this state that it is negligence as a matter of law to drive an automobile upon a traveled public highway at such a rate of speed that said automobile could not be stopped within the distance at which the operator of such car is able to see objects upon the highway in front of him."

Hansen v. Clyde, 89 Utah 31, 56 P. 2d 1366, wherein the Court, in applying the doctrine set forth in the Dalley case, says:

> "Where a driver upon a public highway with his light equipment cannot see more than 50 feet ahead of him it is his duty to drive at such a speed as will enable him to stop within that distance."

While the Dalley case has been criticized by the late Judge Wolfe, it has never been overruled. It is true that this Court has narrowed its application by reason of peculiar conditions, none of which are present in our case. Richard Klafta admitted that he was driving at such a rate of speed that he could not stop his car within the distance at which he was able to see an animal lying on the highway. This cow was no small object. It weighed about 1,200 pounds and stood about 4 foot above the surface of the highway. He does not contend he was blinded by the lights of the oncoming truck, which was 200 or 300 yards back of the point of the accident, but if he was then it was his duty to reduce his speed so that he could see the dead animal on the highway and stop within his vision.

Appellant did not request the Court to instruct the jury that Richard Klafta was guilty of negligence as a matter of law, but left this question for the jury's determination. If a jury should find, as well they might, that Richard Klafta as driving at a high rate of speed with his lights on low beam then they could also find that this negligence on his part was the sole cause of the accident. We think, therefore, that the trial court was correct in submitting this issue to the jury and that he erred in his later ruling to the effect that either Richard Klafta was not negligent or if negligent, his negligence was not the sole proximate cause of the accident.

Point IV. Appellant contends that on the retrial of this action he should be permitted to offer evidence in support of each and all of the foregoing defenses and that this Court should direct the trial court to submit each of said affirmative defenses to the jury for their determination as questions of fact rather than questions of law for the Court.

Point V. Appellant contends that the trial court erred in sustaining Respondent's objections to Appellant's proffered evidence in support of his defense of justification or excuse and also his offer of Respondent's pleading set forth in her second cause of action, for the reasons specifically set forth supra and fully discussed under Points I and II.

Point VI. Appellant contends the Court erred in instruction No. 9 wherein the Court quoted Section 27-1-33, Subdivision (b), for the reason it is not applicable to the undisputed facts in this case. Subdivision (b) applies only to transportation of goods under cover and

not to livestock being transported in open racks. Otherwise, his instruction on the one issue submitted to the jury appears to be proper. Appellant's complaint, however, is that this issue has now been withdrawn from the jury by virtue of the Court's ruling of December 3, 1964.

Point VII. Appellant submitted to the Court eight requested instructions which covered his theory of his affirmative defenses. The Court refused to give any of these requested instructions, on the apparent theory that each of these affirmative defenses, except as to Richard Klafta's negligence, presented questions of law for the Court. If the trial court was in error then this Court should so indicate on this intermediate appeal for the guidance of the trial court and counsel on the retrial of this action. We call the Court's particular attention to Appellant's requested instruction No. 4. If this Court adopts the California doctrine as to justification or excuse, then this requested instruction should have been given as it has been repeatedly approved by the Courts of California. The same is also true as to requested instructions No. 3 and 5. Each and all of the other requested instructions relate to the other defenses of contributory negligence of Respondent and proximate cause.

Respectfully submitted,

LeROY B. YOUNG, of
YOUNG, THATCHER & GLASMANN
1018 First Security Bank Bldg.
Ogden, Utah

GEORGE B. HANDY
517 David Eccles Building
Ogden, Utah
Attorneys for Defendant and Appellant