1965

Donna Stapely v. Salt Lake City Lines : Respondent's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

DONNA STAPLEY,
Plaintiff and Respondent,

vs.

SALT LAKE CITY LINES,
a corporation,
Defendant and Appellant.

Case No.
10345

RESPONDENT'S BRIEF

Appeal from the Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Ray VanCott, Jr., Judge

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IN THE SUPREME COURT
of the
STATE OF UTAH

ANNA STAPLEY,
Plaintiff and Respondent,

vs.

SALT LAKE CITY LINES,
a corporation,
Defendant and Appellant.

Case No.
10345

RESPONDENT'S BRIEF

NATURE OF CASE

Action by plaintiff for personal injuries sustained while riding as a passenger in an automobile operated by her husband which collided with defendant's bus.

DISPOSITION IN LOWER COURT

The jury returned an unanimous verdict in favor of the plaintiff upon which judgment was entered by the Court after a stipulated reduction in the amount of special damages awarded.

RELIEF SOUGHT ON APPEAL

Affirmance of the judgment of the trial court entered on the jury verdict.

STATEMENT OF FACTS

Respondent agrees generally with appellant's statement of facts with the following exceptions and amplification.

The shoulder of the highway immediately south of the pole showing the "Coach Stop" marker was wet and somewhat muddy, but was not soft or deeply rutted (R. 292). The ruts referred to by appellant were in an area in front of the Concrete Block House (Ex. 10) across the driveway and approximately 25 to 30 feet north of the pole bearing the "Coach Stop" sign (R. 292, 295 & Ex. 6). The shoulder area was composed of a mixture of gravel, cinders and dirt (R. 218 & 295) and there were no physical objects which would have prevented the bus driver from pulling off the highway and onto the shoulder area (R. 128).

The bus driver avoided stopping on the shoulder of the highway because of his concern that the passengers not get their feet wet rather than being apprehensive that the bus would get stuck (R. 179 & 197). He at no time pulled off the highway (R. 14[illegible] & Ex. 10).

The bus driver did not remember ever stopping at this particular "stop" before (R. 154 &

He had no definite understanding as to where was going to stop with relationship to the pole ing the "Coach Stop" marker (R. 156), and in did not know what he intended to do with refer- to where he was going to stop (R. 160). How- the general practice of bus drivers on that was to pull off onto the shoulder of the high- as far as possible immediately south of the pole ing the "Coach Stop" marker when picking up discharging passengers at this location (R. 216, & 220 — 222).

The bus driver gave no arm and hand signal his intention to stop (R. 163); nor does he re- member actuating the brake light by means of the brake pedal at any time in advance of when he ac- tually started to stop (R. 163). He claims to have made an unorthodox signal of his intention to stop by turning on the right-turn signal marker which is a small light with an arrow in it at the rear of the bus (Ex. 7), but his assumption that he did so is made on the basis that this is the "general prac- tice" and the bus company "requires" it (R. 164). He stated he "believes" that he would have turned it on when he started to stop. (R. 189).

The bus brake lights and the rear end of the bus generally were covered with a film of grime and dirt from the wet roadway (R. 200 - 201 & 246). Prior to the accident he had cleaned the headlights and windshield of the bus but did not clean the

brake lights at the rear of the bus (R. 200 - 20
No one checked after the accident to see if
brake lights when illuminated could be seen at a
distance to the rear of the bus in the daylight
201 & 311). Neither the plaintiff nor her husba
who had their attention drawn specifically
rear of the bus when it changed lanes in fron
them (R. 226 - 227 & 255 - 256) and again wh
they noticed that the bus was stopping immedia
before impact (R. 230 & 257), saw any illuminati
from the brake lights or the turn signal light.

The bus driver was not aware of any traffi
behind him before the accident occurred (R. 175
However, when he heard the sound of tires skiddi
behind the bus, he looked into his rear view mirr
and saw without difficulty the automobile slidi
toward the bus (R. 176).

Mrs. Stapley never said in her deposition tha
she saw "brake lights". The term was used by de-
fendant's counsel and was misunderstood by Mr
Stapley as "back lights." She identified which "back
lights" by correction of her deposition and at tria
(R. 276 - 281). The bus driver stated that the "run-
ning lights" or "back light" allegedly seen by Mr
Stapley were used only at night and he did not thin
they were "on" because there was no reason to hav
them "on" (R. 307).

Exhibits 13, 14 and 15 show only that the ar
signal is not visible when the left wheels of an aut

...ile 100 feet to the rear of the bus are further ...e right than are the left wheels of the bus. (R. ...

ARGUMENT

POINT I

THERE IS SUFFICIENT EVIDENCE OF NEGLI...ENCE ON THE PART OF DEFENDANT'S DRIVER ...SUSTAIN THE JURY VERDICT IN FAVOR OF ...HE PLAINTIFF AND THE TRIAL COURT DID NOT ...IN REFUSING TO DIRECT A VERDICT FOR ...HE DEFENDANT.

The trial court submitted the following issues ...defendant's negligence as alleged by the plaintiff ...the jury for their determination:

1. That the bus was brought to a stop without a proper or visible signal; that either the defendant's driver did not signal or because of the condition of the signal lights the signal was not visible to the driver of the automobile in which plaintiff was riding.

2. That the driver of said bus failed to exercise reasonable care to keep a proper lookout to the rear of said bus to observe automobiles following and particularly the automobile in which the plaintiff was riding.

3. That the driver of said bus stopped the same on a traveled portion of the roadway without pulling off to the side. (R. 59 - 60).

Regarding the first allegation, Section 41-6-69 ...U.C.A., 1953 provides as follows:

"No person shall stop or suddenly decrease the speed of a vehicle without first giving an ap-

propriate signal in the manner provided he... in to the driver of any vehicle immediately ... rear when there is opportunity to give such signal."

Section 41-6-70(b), U.C.A., 1953 requires that ... hicles of the length of defendant's bus give the ap... propriate signal by means of signal lamps of ... type approved by the State Road Commission. Plain... tiff does not contend that the brake lights on ... fendant's bus were not of the type approved by the State Road Commission, but does contend that either (1) defendant's driver did not make an "appropri... ate signal" of his intention to stop, or (2) he did not keep the signal lights clean enough to afford reasonably adequate illumination to the rear. De... fendant's driver admits that he gave no arm and hand signal of his intention to stop (R. 163). The evidence is inconclusive as to whether or not such a signal could have been seen by the driver of the automobile in which plaintiff was riding if it had been given (R. 298).

The giving of an "appropriate signal" of one's intention to stop, whether by arm and hand signal or by means of brake lights which are actuated by depressing the brake pedal as were the brake lights on defendant's bus, must be made in advance of the time the stop is commenced in order to afford any warning of the contemplated stop. Our Utah statute was thus construed by the Tenth Circuit Court of Appeals in *United States vs. First Security Bank*

Utah, 208 F.2d 424, (10th Cir. 1953) wherein it stated at page 429:

> "... It is urged that the visible light showing the application of Vernon's brakes complied with the statute. A fair inference to be drawn from the testimony of Mardis and his wife is that the brake light signal which was given by the Vernon automobile was simultaneous with its sudden decrease in speed. Under such circumstances, the signal was not effective and was not in compliance with the statute which provides that an appropriate signal must be given *prior* to stopping or suddenly decreasing thespeed of a vehicle." (Emphasis added).

Also, in *Johnson vs. Hill*, 274 F.2d 110 (8th Cir. 1960) a nearly identical statute of North Dakota was considered by the court in the following language:

> "We first take up the question of Johnson's negligence. In North Dakota the driver of a motor vehicle is under a statutory duty not to stop or suddenly decrease the speed of his vehicle 'without first giving an *appropriate* signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such a signal.' Section 39-1038 of the North Dakota Supplement. Section 39-1039 of the North Dakota statute provides that a stop signal shall be given either by means of the hand and arm or by a signal lamp or mechanical device. In construing nearly identical statutes of Utah and Minnesota, under facts analogous to the instant situation, it was held that a jury ques-

tion was presented as to whether the dr... of the lead vehicle had warned the drive... vehicle following closely behind by appropr... ate signal, of his intention to stop or sudde... decrease his speed. (Auth. Cited)

It is to be noted that giving a signal is not t... sufficient statutory compliance. It must be an ... *propriate* signal . . . ."

The reasoning behind such statutes is stat... in *Benson vs. Hoenig*, 37 N.W.2d 422 (Minn. 194... at page 425:

". . . As pointed out in the Christensen ca... the theory underlying such a statute is ... the knowledge of a driver of a car to the re... of the presence on the highway of a car f... ward is not in itself adequate to enable ... to guard against a rear-end collision if t... forward car should stop suddenly witho... warning, and that a warning would enab... the car in the rear to guard against the st... by bringing his car to a stop with the forwa... one."

In a somewhat later Minnesota case, *Ryan vs. Gr... fin*, 62 N.W. 2d 504 (1954) the plaintiff drive... sued as defendants the drivers of the two preceding automobiles for personal injuries he sustained as ... result of a three car rear-end collision. The tr... court dismissed the case against the first driver an... directed a verdict in favor of the second driver o... the ground that the plaintiff was contributori... negligent as a matter of law for having run int... the second car immediately in front of her. Th... Minnesota Supreme Court reversed and remande...

the case for a new trial. Regarding the reciprocal duties of the leading and following drivers, the court stated as page 507:

> "... There are reciprocal duties on the part of a driver of a leading automobile and the driver of a car following. Each must exercise due care, must keep his vehicle under reasonable control, must drive at a speed which is reasonable and proper under the circumstances, must give due regard to the right of the other, and in general must so operate his automobile as to avoid unnecessary collision with the other. The driver of a leading automobile has no absolute legal rights superior to the driver of the car following. The leading driver must exercise due care not to swerve, slow up, or stop without adequate warning of his intention to do so to the driver of the car following. The driver of the car following must exercise due care to avoid collision with the leading automobile. Just how close an automobile may be followed and what precautions a driver must take in the exercise of due care to avoid colliding with the automobile ahead and just what warning the driver of the leading automobile must give in the exercise of due care before swerving, slowing up, or stopping cannot be stated in a fixed rule. In each case, except where reasonable minds may not differ, what due care requires and whether it has been exercised *is for the jury.* (Emphasis added).

In each of the foregoing cases the facts differed slightly as to the speed, distance between automobiles, and various other factors, i.e., in the ***First***

Security Bank of Utah case the automobiles were traveling at a high rate of speed, in the *Benson* case they were going slowly in a funeral procession, and in the *Ryan* case they were going at a moderate rate of speed, approximately 20 miles per hour; however, in each case the reviewing Court found that the questions of negligence, contributory negligence, and proximate cause were, or should have been, properly submitted to the jury.

In the instant case, defendant's driver admitted that he gave no arm signal and indicates that he did not actuate the brakes, and thereby the brake lights at any time before he actually started to stop (R. 163). The only type of a signal which he claims to have made was a right-turn signal. Such a signal was held by this court in *Flippen vs. Milward*, 12 Utah 373, 234 P.2d 1053, (1951) as not complying with the statutory requirements of giving a proper signal of intention to stop. In that case the plaintiff was struck from the rear when she slowed down to make a turn. She stated she signaled for the turn, but not for the slowing or stopping. On this point the court through Justice Wade stated:

> "By her own testimony she did not give an appropriate signal for such an event, even if a hand signal could be seen in such a dense fog, for she testified she signaled she was going to turn and did not testify that she signaled she was going to slow down or stop."

Also, in *Sturdavant vs. Covington*, 3 Utah 2d 14, 277 P.2d 814, (1954) the duty of the forward driv-

... to anticipate the possible necessity of stopping ... discussed. In that case the plaintiff was the forward driver who stopped suddenly to avoid striking a dog. He contended that he was relieved from the duty of making an appropriate signal of his intention to stop because the dog suddenly ran in front of him, and also that because he was going very slowly, the following driver, the defendant, should have known that it was likely that the plaintiff might stop. Considering these points, the court stated:

> "... By his own testimony, he realized from the time he started up at the intersection that he might have to stop to avoid striking the dog and yet he did not give or prepare to give any signal of a contemplated stop. For a distance of 130 feet he drove with the dog running ahead of him . . . While we recognize some force in appellant's argument that because he was traveling very slowly after he started up from the intersection the respondent should have known that it was likely that appellant might stop, we do not think that fact can absolve appellant from contributory negligence as a matter of law."

In the case at bar, defendant's driver knew from the time the children passengers pulled the buzzer cord as the bus passed the preceeding Coach Stop that he would have to stop at the next Coach Stop where the accident occurred (R. 187), yet he gave no *appropriate* signal of his intention to stop, when that intention was evidently to decelerate from

a speed of 30 miles per hour and stop on the trav... portion of a wet highway without making any ob... vations to the rear for vehicles that may be fol... ing him. The driver of the automobile in which pl... tiff was riding had no forewarning or reason ... anticipate that the bus would stop at this loca... when it had not stopped at any prior points s... entering onto State Street (R. 225 - 226).

The record is quite clear that defendant's dri... er did not make an appropriate signal of his inte... tion to stop before the stop commenced. Also, the... is sufficient evidence on which the jury could fi... that the brake lights were so covered with grim... and mud that it would have been impossible to s... *any* type of signal emitted by them at a substanti... distance to the rear (R. 200 - 201 & 246). In a ca... almost identical with the instant case, *Garrison v. Dixie Traction Company*, 232 S.W.2d 997, (K... 1950) the allegation of dirt on the brake lights wa... held sufficient to make a jury question as to the de... fendant's negligence. The Trial Court had directe... a verdict for the defendant at the conclusion of a... of the evidence and in reversing this judgment th... Kentucky Supreme Court ruled as follows:

> "Two well defined issues are thus raised by... the evidence, and these are whether the bus... was abruptly halted as it approached the in... tended stop, and that if the driver gave the... stop signal, was it so obscured by dirt that... could not be seen. While the weight of evi... dence was that there was no sudden stoppage

of the bus as it approached the 'Power House' stop and that the bus was clean so as its stop lights could be seen, the majority of the Court is of the opinion that the testimony of the appellant C. William Garrison, that the bus did on that occasion make a sudden and abrupt stop, and the testimony of his witness, Mrs. Wilson, and himself that the stop signals were so obscured by mud that they could not be seen, was sufficient to take the case to the jury. The issues of fact, whether the bus did or did not stop suddenly and whether the stop signal required by K.R.S. 189.050 was so obscured by mud as to render it ineffective in this particular case, *were for the jury.*" (Emphasis added)

Concerning plaintiff's second allegation that defendant's driver failed to exercise reasonable care to keep a lookout to the rear, plaintiff does not contend that defendant's driver should have maintained a constant lookout to the rear, but does contend that the exercise of reasonable care would require the driver of a large bus to make an observation to the rear before stopping the same on the traveled portion of a principal highway, especially when he knew for a considerable period in advance that he would be making a stop at this location. The children alerted the bus driver as the bus passed the prior Church Stop that they wanted to exit at the next stop (R. 187). There is no doubt but that the automobile in which plaintiff was riding as a passenger was following the bus at this time and could have been seen by the bus driver if he would have looked

since he was able to see the automobile as soo... he glanced in his side rear-view mirror upon a... ing the brakes of the automobile immediately be... impact. (R. 162 - 163 & 175 - 176).

This court held in *Hayden vs. Ogden* ... Utah 2d 171, 263 P.2d 796, that it is a jury ques... tion whether or not a forward driver is guilty ... negligence in failing to observe traffic approach... from the rear. In that case the plaintiff was a pas... senger in a truck which was struck from the rear ... defendant, a police officer, traveling 45 to 50 mi... per hour. Any negligence of the truck driver was admittedly imputable to the plaintiff to bar his re... covery. The trial court denied a motion for directed verdict and the jury returned a verdict for the plain... tiff on instructions which included one to the effect that if they believed that the exercise of due care required the truck driver to look to the rear or to the rear-vision mirror to ascertain if there were vehicles behind him, *and* such failure was a proxi... mate cause of the collision, he would be guilty of contributory negligence and plaintiff could not re... cover. However, the trial court granted a motion for judgment notwithstanding the verdict on the ground that the truck driver violated a statute pro... hibiting a vehicle from turning right or left upon the roadway unless such movement could be made with reasonable safety. This court reversed and re...

...ing the duty to make reasonable observations ... the rear stated through Justice Hneroid:

> "Aside from statute, whether one is negligent in failing to observe traffic approaching from the rear, after giving a proper signal in the proper lane of traffic, would be a jury question based on the particular facts of each case, unless reasonable minds could not differ as to the fact of negligence or non-negligence, — whence a matter of law would arise."

Could not the jury have found in the case at ...r that if the bus driver had looked in his rear-...ew mirror as he approached the Coach Stop where ...e accident occurred, he would have seen the automobile in which plaintiff was riding as a passenger ...pproaching in the same lane of traffic at a constant speed, indicating that the driver thereof was ...naware of the bus driver's intention to stop? The ...us driver could have then taken action to avoid the ...ollision such as pulling off onto the shoulder of the ...ighway (which he should have done anyway) or in ...ot stopping at all until the danger of collision had ...assed.

The duty to keep a reasonable lookout to the ...ear is increased when the driver contemplates slow-...g or stopping. In 60 *Corpus Juris Secundum*, Motor Vehicles, Section 301 this duty is stated as follows:

> "Generally, a motorist intending to stop his vehicle must use due care for his own safety and for the safety of others, any sudden slow-

ing up may amount to a practical stop ... to require the same precautions as would ... necessary in case of an actual stop. Although the duty to use due care in stopping exists independently of any statutory regulation, ... sometimes prescribed by regulation that a motorist may not, except in cases of emergency, suddenly decrease his speed or stop unless he first *sees* that such operation may be made without endangering other traffic. As a rule the operator should *look* for vehicles so close behind that they may be imperiled by a sudden stop or decrease of speed, and give a proper signal of his intention as discussed in subdivision b of this section . . ." (Emphasis added).

In *Scott vs. MacElroy*, 361 S.W. 2d 432, (1962) the Texas Court of Civil Appeals upheld a finding that the plaintiff driver of the first automobile in a series of three was guilty of contributory negligence when he slowed down to five miles per hour in contemplation of pulling off the highway. The plaintiff slowed without observing the defendant's automobile, which was the third automobile in line as he passed the second automobile and collided with the rear of plaintiff's automobile.

In the case of *Richardson vs. Hackett*, 134 S.E. 2d 312, (Va. 1964) cited by appellant, the facts regarding the caution exercised by the plaintiff truck driver who was struck from the rear are as follows:

> "He *looked* in his rear-view mirror to see if there were any vehicles following him ...

saw none. Thereafter he began *pumping his brakes to activate his brake light to signal that he was slowing down.* He did not look again for traffic behind him." (Emphasis added).

The trial court non-suited the plaintiff at the conclusion of his evidence. The Supreme Court of Appeals of Virginia reversed and held that on the facts plaintiff truck driver was not guilty of contributory negligence as a matter of law, but that his negligence was a jury question. Certainly this case is no authority for appellant's proposition in the case at bar that defendant's bus driver was not negligent as a matter of law, since he made *no* observation to rear before commencing his stop and *did not* pump his brake pedal to actuate the brake light. Also, the case of *Mack vs. Decker*, 128 N.W.2d 455 (Wis. 1964) cited by appellant, wherein the forward automobile driver was held not to be guilty negligence in failing to exercise a lookout to the rear before stopping when he was hit by a motorcycle on which plaintiff was riding is dinstinguishable from the case at bar on several factual points, i.e., (1) the motorcycle was following two to three times as far behind the forward automobile as in the instant case, (2) the car was stopped for 25 to 40 seconds and possibly longer before it was struck from the rear, whereas in the instant case the bus was still slowing down for its stop at the time of impact and (3) the automobile made an emergency or at least an uncontemplated stop for children

crossing and about to cross the highway in front of the automobile while in the instant case the bus was indicated at the preceding Coach Stop.

Respondent agrees wholeheartedly with the rule stated in *Morris vs. Christenson*, 11 Utah 2d 356 P.2d 34, (1960) cited by appellant for the proposition that the failure to observe is not the proximate cause of an accident if the driver, having observed, could not have avoided the accident. However, in the instant case, respondent contends that the jury could reasonably have found from the evidence that if the bus driver had made an observation to the rear as he approached the Coach Stop he could have avoided the accident. He would have seen the following automobile under circumstances which would indicate that the automobile driver was unaware of his intention to stop. The bus driver could then have taken evasive action such as pulling onto the shoulder of the highway or refraining from stopping until the danger of collision had passed. But, obviously, if one makes no observation of a potentially dangerous situation, he will not be able to avoid it.

The third allegation of defendant's negligence as made by the plaintiff is that defendant's driver was negligent in stopping the bus on the traveled portion of the highway when he could have stopped on the shoulder of the highway. Appellant contends that the requirements of Section 41-6-101, U.C.A. 1953 do not apply to the temporary stopping of a

discharge passengers. However, the question not whether the statute absolutely requires the driver to stop on the shoulder of the highway, but whether or not it was practical to stop the bus on the shoulder of the highway since the statute prohibits vehicles from stopping on the main traveled portion of the highway *only* "when it is practical to stop, park, or so leave such vehicles off such part of highway, . . ." Considerable evidence concerning the condition of the shoulder of the highway and the practicability of stopping the bus on the shoulder of the highway rather than on the traveled portion of the highway was presented to the jury. The jury could have found either under the provisions of the statute or independent of any statute that, as a matter of fact, it was practical to stop the bus on the shoulder of the highway. It was plaintiff's contention during the trial that the Coach Stop zone at this particular location was that area immediately south of the pole bearing the Coach Stop marker on the shoulder of the highway where the shoulder area widens slightly to the east as shown on the photograph, Exhibit 3, and the Engineer's Diagram, Exhibit 10. The shoulder area at this point is approximately nine feet wide (R. 208) which would allow sufficient space for the bus, being eight feet wide (R. 123), to pull substantially off the highway before discharging passengers.

The plaintiff produced three witnesses who lived in the immediate area of the Coach Stop who

on many occasions observed other buses of defendant's line stop at this location. These witnesses testified that the buses stopped south of the sign bearing the Coach Stop marker and pulled anywhere from completely off, to halfway off the highway when stopping to receive or discharge passengers (R. 216, 218 & 220 - 222). Defendant's driver contended that passengers could not be discharged on the shoulder area because it was too muddy, yet defendant's photograph, Exhibit 6, shows a man standing in this very area after the accident without apparent concern.

Thus, from all of the evidence, the jury could easily have found that it was practicable and reasonable for the bus driver to pull off the highway to discharge his passengers.

There are a multitude of cases cited at 15 *A.L.R.* 583 which hold or imply that the question of the practicability or opportunity of leaving the traveled portion of the roadway when required by statute is a question for the jury. In this connection the Supreme Court of Wyoming in *Merbach v. Blanchard*, 105 P.2d 272 (1940) stated:

> "We have not noticed any case holding that a driver who stopped on the traveled part of the highway where it was possible and safe for him to have driven off the pavement was held free from negligence as a matter of law merely because he testified that he did not at the time realize that he could have safely driven off the road."

At the conclusion of plaintiff's evidence defendant was well aware of plaintiff's contention that the normal stop zone at this Coach Stop was on the shoulder of the roadway. If such was not the fact, it was peculiarly within the defendant's knowledge as to where the stop zone was and it offered absolutely no evidence to the contrary. Thus, the jury could very properly conclude that this area was the normal stop zone used by the bus company at this location and that defendant's driver was negligent in stopping on the highway.

The mere fact that the designation of the Coach Stop at 8300 South State Street was adopted by agreement between Midvale City and the defendant does not authorize defendant's driver to stop on the traveled portion of the highway at this point if the Coach Stop area is actually off the traveled portion of the highway and was reasonably accessible at the time of the accident, which was what the jury apparently concluded.

Appellant contends in his brief that plaintiff's husband felt it unsafe to turn off onto the shoulder of the road. However, this was because he was traveling approximately 30 miles an hour and there was a danger of hitting trees in the general area of the Coach Stop (R. 242), not because the shoulder was muddy.

Regarding appellant's contention that Section 41-6-101, U.C.A., 1953 regarding the stopping, park-

ing, or leaving vehicles upon the roadway does apply since the evidence does not show that the ac was outside a business or residence district, it sh be noted that Section 41-6-8(d) U.C.A., 1953 fines "Business District" as an area contiguous highway when within any 600 feet along such hig way at least 300 feet of frontage on one or o sides, collectively, of the highway are used for bu ness purposes. The Engineer's Diagram of the sce introduced in evidence as Exhibit 10, shows abs lutely no business houses of any kind in the are Subparagraph (e) of the foreging statute defin "Residence District" as any territory contiguo to a highway not comprising a business distri when the property on such highway for a distanc of 300 feet or more is in the main improved wit residences or residences and buildings in use for business. The before-mentioned Engineer's Diagra covers a distance of approximately 360 feet whic contains a residence area bounded on the north b a fence just north of the concrete block house an on the south by a row of trees south of the orch house, which area measures approximately 200 fee which would indicate that this is not a residenc district within the meaning of the statute. Defe dant offered no evidence to the contrary.

Since plaintiff produced creditable evidence all three allegations of defendant's negligence w

...ese issues of fact on which reasonable men could ...sagree, it was proper to submit such issues to the ...ry.

POINT II

THE NEGLIGENCE OF THE AUTOMOBILE DRIV... IF ANY, WAS NOT AN INTERVENING PROXIM... CAUSE, BUT A CONCURRENT PROXIMATE ...SE WITH THE NEGLIGENCE OF DEFENDANT'S ...VER IN CAUSING THE ACCIDENT IN QUESTION.

The case at bar does not fit the hypothetical ...uation mentioned in *Hillyard vs. Utah By-Pro... Company*, 1 Utah 2d 143, 263 P.2d 287, 19..., as cited by appellant, because the truck re...ferred to in the *Hillyard* case was a parked, station...ary object. In the instant case, defendant's bus was ...ll moving when the collision occurred (R. 159). The problem considered by the *Hillyard* case is that which arises when one tort-feasor creates a poten...tially dangerous situation and a second tort-feasor ...mmits a negligent act with respect to the poten...tially dangerous situation already created by the ...rst tort-feasor. In determining whether or not the ...cond act of negligence is such an intervening act ... negligence as to relieve the liability of the first ...rt-feasor, the *Hillyard* case cites with approval the ...ticle written by Professor Bohlen, *Fifty Years of ...*, 50 Harv. L. Rev. 122 in which he states at ...ge 129:

> "The earlier of two wrongdoers, even though his wrong has merely set the stage on which the latter wrongdoer acts to the plaintiff's in-

> jury is in most jurisdictions no longer re-
> ed from responsibility merely because the a-
> ter act of the other wrongdoer has been
> means by which his own misconduct was ma-
> harmful. The test has come to be whether
> later act, which realizes the harmful pos-
> tialities of the situation created by the de-
> fendant, was itself foreseeable."

This test was applied by this court in the *Hi-yard* case at page 148 where the court met the arg-ment of intervening negligence in the follow-language:

> "It is uniformly affirmed by leading auth-ties that this argument would only be va- if Mr. Ashton's conduct was so unusua- out of the ordinary, so unforseeable as t- unanticipated from a legal point of view."

The acts of following a little too close, drivi- a little too fast for existing conditions, or bei- slightly inattentive at a particularly inopportu- time are committed almost daily upon every hig- way of the state; and while such conduct cannot an- should not be condoned, it certainly is not so unusua- or unforeseeable as to make such an act an inte- vening or supervening act of negligence in a rea- end collision between two moving vehicles. The que- tion of intervening proximate cause was prope- submitted to the jury under the facts of the ca- at bar since the accident arose from the typi- causitive factors of a rear-end collision. This cou- noted in the *Hillyard* case, "Ordinarily the questi- of proximate cause is one of fact for the jury an-

...ne of law for the Court." The following recent ...es all hold that the question as to the proximate ...ause of the negligence of a forward driver in a ...ear-end collision between two moving vehicles ...ould be submitted to the jury: *Rose vs. Portland ...raction Company*, 341 P.2d 125 (Ore. 1959), *...T. Lines Inc. vs. Chappell's Dairy*, 298 S.W.2d ...3 (Ky. 1957), *Jones vs. Hutchins*, 154 N.E.2d 304 ...Ill. 1958) and *Daly vs. Schaefer*, 331 S.W.2d 150 ...Mo. 1960).

POINTS III & IV

THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTIONS NOS. 4 AND 5.

With reference to the standard of care set forth in Instruction No. 4, Paragraph 2, regarding a driver's duty to exercise reasonable care to keep a proper lookout to the rear, the general rule is that such a duty exists, particularly when the forward driver contemplates turning, slowing or stopping. This duty is acknowledged in 60 *Corpus Juris Secundum*, Motor Vehicles, Section 301 wherein it is stated:

> ". . . As a general rule, the operator should *look* for vehicles so close behind that they may be imperiled by a sudden stop or decrease of speed, and give a proper signal of his intention as discussed *infra* . . ." (Emphasis added).

The evidence is susceptible of the finding that if such an observation had been made by defendant's

driver, he would have seen the automobile in w... the plaintiff was riding as a passenger approac... from the rear in such a manner as to make it ... to attempt to stop the bus upon the traveled ... of the highway. Thus, since exercise of the ... might have prevented the injury, the giving of ... instruction was proper.

Regarding paragraphs 3 of Instruction 4, ... language of Section 41-6-101, U.C.A. 1953 impo... no greater duty than would exist under comm... law since an ordinarily prudent person would ... stop in the traffic lane of a principal highway if ... was *practical* to pull off the highway and onto ... shoulder area. The statute only prohibits stopping ... on the traveled part of a highway "*when it is prac-tical* to stop, park or so leave such vehicle off such part of said highway." (Emphasis added). Therefore, whether under the statute or independent of any statute, the same ultimate question would have been presented to the jury — was it, or was it not *practical* for defendant's bus driver to stop off the highway on the shoulder area. In view of the evidence that other drivers of defendant's company always stopped on the shoulder area at this particular Coach Stop and the evidence regarding the condition of the shoulder on this occasion, the jury was justified in finding that it *was practical* to stop on the shoulder of the highway and therefore the instruction was properly given.

Since defendant did not request any instructions incorporating the definitions mentioned in Sections 41-6-9 & 10, U.C.A., 1953 he cannot now raise such an objection.

The trial court committed no error in giving Instruction No. 5 since an appropriate signal is required by Section 41-6-69(c), U.C.A., 1953 for any stop if there is a vehicle immediately to the rear and if there is an opportunity to give such a signal. The adjective "suddenly" applies only to a "decrease in speed" which may not ultimately result in a complete stop of the vehicle. A fair inference seems to be that any actual stop, particularly from substantial speeds on heavily traveled highways, would result in sufficient deceleration to require compliance with the statute. In this case, defendant's bus decelerated from at least 30 miles an hour to make a stop with an automobile following within 100 feet at approximately the same speed on a wet highway. Certainly it cannot be said as a matter of law that such a signal was not required when the bus driver had ample opportunity to make an appropriate signal as required by the statute.

CONCLUSION

Respondent and plaintiff below presented creditable evidence of the negligence of defendant's driver with respect to his failure to give an appropriate signal of his intention to stop, to exercise reasonable care to keep a lookout to the rear, and

stopping on the traveled portion of the highw when conditions were such that he could hav ped on the shoulder of the highway. The evid was admittedly disputed as to the last allega but as to plaintiff's first two allegations of neg gence, defendant's driver admitted not looking the rear before commencing his contemplated s and not actuating his brake to give a signal of intention to stop before actually starting to dece ate. The issue as to whether or not defendant's dr er was negligent in not pulling onto the shoul of the highway to stop was clearly a jury ques Also the issues as to whether or not his failur look to the rear before stopping, failure to giv appropriate signal of his intention to stop, and dirty condition of the brake lights were proxima causes of the accident were properly for the ju These questions, including the question as to whe er plaintiff's husband's negligence was the s proximate cause of the accident were submitted the jury under proper instructions of the trial cou (R. 63 & 68) and the jury returned an unanim verdict in favor of the plaintiff.

A review of such evidence on appeal must made in the light most favorable to the plaint which would be (1) that the brake lights were eit not actuated before deceleration commenced or we too dirty to provide adequate illumination to the rea in the daytime when the accident occurred, (2) tha if the bus driver had made an observation to rea

would have been appraised of a potentially dangerous situation and could have taken steps to avoid the accident, and (3) that the condition of the shoulder of the highway did not preclude defendant's driver from stopping thereon in the area where other drivers of defendant's line usually stopped.

WHEREFORE, Respondent prays that the judgment of the trial court be affirmed and that she be awarded her costs herein.

Respectfully submitted,
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