

1991

# Joseph Kitchen and Richard Phillips v. Cal Gas Company, Inc., a California corporation : Brief of Appellee

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH KITCHEN and RICHARD  
PHILLIPS,

Plaintiffs/Appellants,

vs.

CAL GAS COMPANY, INC., a  
California corporation,

Defendant/Appellee.

Case No. [REDACTED]

Priority No. 16

91-0420-CA

Appeal From a Final Judgment Entered in the  
Third Judicial District Court on  
January 31, 1990 by the Honorable Frank G. Noel

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FILED

FEB 15 1991

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH KITCHEN and RICHARD	)	
PHILLIPS,	)	Case No. 900187
	)	
Plaintiffs/Appellants,	)	Priority No. 16
	)	
vs.	)	
	)	
CAL GAS COMPANY, INC., a	)	
California corporation,	)	
	)	
Defendant/Appellee.	)	

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**PARTIES TO THE PROCEEDINGS BELOW**

C. R. England & Sons, Inc. ("England"), a Utah corporation, was named as a defendant in the Appellants' Complaint for Damages. England filed a third-party complaint against A. N. R. Freight System, Inc. ("A.N.R."). England and A.N.R. settled the third-party claim, and the Appellants settled their claims against England before the scheduled date of trial. Appellants have not appealed any judgment in favor of England to this Court. In all proceedings before the District Court, England was represented by John M. Chipman and Linda L. W. Roth of Hanson, Nelson, Chipman & Quigley, and Frederick N. Green and Julie V. Lund of Green & Berry, and A.N.R. was represented by Stuart Poelman of Snow, Christensen & Martineau.

All other parties are named in the caption of this appeal.

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## JURISDICTION

This Court has jurisdiction over this appeal pursuant to section 78-2-2(3)(j), Utah Code Annotated.

### ISSUES PRESENTED AND THE LEGAL STANDARD FOR APPELLATE REVIEW OF SUMMARY JUDGMENT

1. Does the record in this case contain sufficient evidence to allow a trier of fact to decide that the driver of the Cal Gas truck was negligent in the operation of his vehicle?

2. Does res ipsa loquitur apply under the facts of this case?

3. Does the record in this case contain sufficient evidence to allow a finder of fact to decide that the overturned Cal Gas truck was a proximate cause of the Appellants' injuries?

In Utah, "[a]ppellate courts scrutinize summary judgments under the same standard applied by the trial courts, according no particular deference to the trial court's legal conclusions concerning whether the material facts are in dispute and, if they are not, what legal result obtains." Wycalis v. Guardian Title of Utah, 780 P.2d 821, 824 (Utah App. 1989); accord Atlas Corporation v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987). Moreover, this court may affirm a summary judgment on any proper grounds, even if different from those relied on by the district court. Branch v. Western Petroleum,

Inc., 657 P.2d 267, 276 (Utah 1982); Jespersion v. Jespersen, 610 P.2d 326, 328 (Utah 1980).

#### STATEMENT OF THE CASE

##### A. Nature of the Case.

The Plaintiffs, Joseph Kitchen ("Kitchen") and Richard Phillips ("Phillips"), initiated this civil action against C. R. England & Sons, Inc. ("CR England"), and Cal Gas Company, Inc. ("Cal Gas") on April 13, 1987. In their Complaint for Damages, the Plaintiffs alleged that on February 6, 1986, Cal Gas negligently operated a semi tractor-tanker (the "Cal Gas Truck") by allowing it to overturn and block the eastbound lanes of Interstate 80 near Wendover, Utah. As a result of that alleged negligence, the Plaintiffs assert, the semi tractor-trailer they were driving (the "ANR Truck") was forced to overturn, causing them personal injury. Similarly, the Plaintiffs alleged that CR England negligently operated a semi tractor-trailer (the "CR England Truck") by allowing it to collide with the ANR Truck as the ANR Truck slowed.

As a result of their injuries, the Plaintiffs sought general damages from Cal Gas and CR England in the total amount of \$1 million, special damages in excess of \$1 million, interest on any award of special damages, costs

and such other relief as the District Court might deem fair.

B. Course of Proceedings.

Plaintiffs filed their Complaint for Damages on April 13, 1987. On September 12, 1988, Cal Gas moved for summary judgment on the grounds that, in view of the material facts in the record, the Plaintiffs could not show that the conduct of Cal Gas was the proximate cause of their injuries. By Order entered February 9, 1989, the District Court denied the Cal Gas motion.

Pre-trial discovery continued through November 1, 1989. On that date Cal Gas again moved for summary judgment. In its second motion, Cal Gas argued that summary judgment in its favor was proper because the Plaintiffs could not show that Cal Gas had breached a standard of care owed to them. In an Order in Limine and Summary Judgment entered on January 31, 1990, the District Court found that "on the undisputed facts viewed most favorably to the plaintiffs, no facts establish the Cal Gas driver was negligent, therefore any such finding by a jury could only be based on speculation." Accordingly, the District Court granted the Cal Gas Motion for Summary Judgment and dismissed the Plaintiffs' claims against Cal Gas with prejudice and on the merits. Final judgment as to

Cal Gas was entered on January 31, 1990.<sup>1</sup> This appeal follows from that final judgment.

C. Statement of Facts.

To present the facts in this case in the light most favorable to the party against whom summary judgment was granted, Cal Gas has derived the following statement of facts from the pleadings, deposition testimony and appeal brief of the Plaintiffs.<sup>2</sup>

1. In February 1986, Kitchen and Phillips were employees of what is now A.N.R. Freight Systems, Inc., and were, respectively, the driver and alternate driver of the ANR Truck. See Record at 3, ¶7; Deposition of Joseph Richard Kitchen ("Kitchen Deposition"), pp. 6, 12.

2. On February 5, 1986, Kitchen and Phillips drove the ANR Truck out of Los Angeles heading for the ANR terminal in Salt Lake City. Kitchen Deposition, pp. 35-36. Early in the morning of February 6th, they stopped at the Port of Entry immediately east of Wendover, Utah

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<sup>1</sup> A copy of the Final Judgment is included in the Addendum, together with the minute entry from the hearing at which Cal Gas' motion was granted and the Order in Limine and Summary Judgment.

<sup>2</sup> Not all of these facts were undisputed below. For example, CR England disputed the claim that its truck struck the ANR Truck from behind, causing it to overturn. CR England was able to establish through its accident reconstruction expert that the ANR Truck was on its side when the CR England Truck first came in contact with it. But none of these factual disputes is material to Cal Gas' Motion for Summary Judgment or the issues raised on appeal.

(the "Port of Entry"), to have the ANR Truck weighed. See Kitchen Deposition, pp. 42-43.

3. The Plaintiffs were told by a Utah Highway Patrolman at the Port of Entry that there would be black ice on Interstate 80 beginning 12 to 14 miles east of the Port of Entry and continuing all the way into Salt Lake City. Kitchen Deposition, p. 44.

4. Five minutes after the Plaintiffs left the Port of Entry, at a point less than one mile east of the Port of Entry, they were passed by the Cal Gas Truck. Kitchen Deposition, pp. 48-49.<sup>3</sup>

5. At the point on Interstate 80 where the Cal Gas Truck passed the ANR Truck (approximately one mile east of the Port of Entry), the surface of Interstate 80 was wet, but not icy. Kitchen Deposition, pp. 48, 46.

6. Kitchen first encountered black ice 14 or 15 miles east of the point at which the Cal Gas Truck passed the ANR Truck. Kitchen Deposition, pp. 48-49, 46.

7. About 19 miles east of the Port of Entry, while driving 20 to 25 miles per hour, the ANR Truck was passed by a Toyota pickup truck. Kitchen Deposition, pp. 49-51. The Toyota truck had been driving in the left-hand

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<sup>3</sup> The trial court granted Cal Gas' Motion in Limine to exclude this evidence on the grounds that it was not relevant and was more prejudicial than probative. See Record at 253-54 and 311-12.

lane, and the ANR Truck was in the right-hand lane. The Toyota truck turned on its high beams, and Kitchen saw "a shadow" in the road ahead, "like a glare...from the lights hitting on the object." Kitchen Deposition, p. 50. The object was at least one-quarter mile away. Kitchen Deposition, p. 53.

8. Between the time the Cal Gas Truck passed the ANR Truck coming out of the Port of Entry and the time the Toyota truck passed the ANR Truck, approximately 45 minutes had elapsed. See Kitchen Deposition, pp. 48-50, 114.

9. As the Toyota truck passed the ANR Truck, Kitchen took his foot off the throttle to let the Toyota truck into his lane ahead of him. Kitchen Deposition, p. 52.

10. Almost immediately thereafter, the CR England Truck struck the ANR Truck from behind, causing Kitchen to lose control of the truck and causing the truck to overturn on its side, injuring the Plaintiffs. Kitchen Deposition, pp. 52, 79-80, 96-97; Record at 4, ¶11.

11. After the Plaintiffs were pulled out of their truck, they saw the Cal Gas Truck overturned ahead of them, blocking the left-hand lane and part of the right-hand lane. Kitchen Deposition, pp. 49, 51; Deposition of Richard Allen Phillips ("Phillips Deposition"), pp. 12, 14.

12. Immediately before the ANR Truck was struck from the rear by the CR England Truck, Kitchen was in control of the ANR Truck. Kitchen Deposition, p. 79.

13. If the CR England Truck had not struck the ANR Truck, Kitchen could have stopped the ANR Truck short of the Cal Gas Truck without applying his brakes. Kitchen Deposition, pp. 52, 128.

14. To stop the ANR Truck without striking the Cal Gas Truck, Kitchen needed to do no more than take his foot off the throttle. Kitchen Deposition, p. 128.

15. The ANR Truck never struck the Cal Gas Truck. Kitchen Deposition, p. 93. In fact, after the ANR Truck overturned, it came to rest 200 feet away from the Cal Gas Truck. Appellants' Brief, p. 2.

16. The cause of the turnover of the ANR Truck was the rear-end collision with the CR England truck that occurred when Kitchen slowed the ANR Truck by removing his foot from the throttle, to let the Toyota into the right-hand travel lane. Appellants' Brief, p. 3.

17. The cause of the Plaintiffs' injuries was the overturning of their truck following the collision with the CR England Truck. Record at 4, ¶11.

#### SUMMARY OF THE ARGUMENT

In their Complaint For Damages, the Plaintiffs claim that the negligence of Cal Gas caused their injuries.

In the arguments that follow, Cal Gas will show that, based on the undisputed material facts, the Plaintiffs cannot establish two of the four elements of a negligence claim.

Cal Gas will first show that the record in this case will not allow the Plaintiffs to demonstrate that Cal Gas breached a duty of care owed to them. This is so, even if the Plaintiffs attempt to establish a breach of duty through circumstantial evidence by invoking the doctrine of res ipsa loquitur.

Second, Cal Gas will show that the record in this case will not allow the Plaintiffs to prove that the conduct of Cal Gas was the proximate cause of their injuries.

The Plaintiffs' factual allegations are nothing more than assumptions and gross speculation, which is insufficient to get to a jury. Because the record in this case cannot support a showing that Cal Gas breached a duty owed to the Plaintiffs or a showing that the conduct of Cal Gas was the proximate cause of the Plaintiffs' injuries, Cal Gas is entitled to a judgment as a matter of law. This Court should therefore affirm the summary judgment entered by the District Court.



## ARGUMENT

### I.

#### THE STANDARD FOR GRANTING SUMMARY JUDGMENT

Rule 56, Utah Rules of Civil Procedure, provides:

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

When determining whether a grant of summary judgment in favor of a defendant is proper, the question the court must answer is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and [whether] the [defendant] is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). In examining a motion for summary judgment, the court views the facts in the case in the light most favorable to the party opposing the motion. Barlow Society v. Commercial Security Bank, 723 P.2d 398, 399 (Utah 1986). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no

genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).<sup>4</sup>

In determining what facts are material, the Court must look to the substantive law. Id. at 248. The United States Supreme Court has stated the standard for materiality as follows:

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Id.

Rule 56 further provides that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Utah R. Civ. P. 56(e). Accordingly, the party opposing the motion for summary judgment "must do more than simply

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<sup>4</sup> Rule 56, Utah Rules of Civil Procedure, is identical in all relevant respects to Rule 56, Federal Rules of Civil Procedure. Where Utah procedural rules are substantially similar to their federal counterparts, this Court has looked to the federal courts' interpretation of the federal rules in construing the corresponding state procedural rules. See, e.g., Prowswood, Inc. v. Mountain Fuel Supply Company, 676 P.2d 952, 958 (Utah 1984).

show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 586 (1986). Indeed, the trial court must grant summary judgment where there is insufficient evidence to warrant giving the case to a jury at trial and the movant is entitled to a judgment as a matter of law. Anderson, 477 U.S. at 250.

A party moving for summary judgment has the ultimate burden of demonstrating the absence of a genuine issue of material fact. However, where, as here, the non-moving party will bear the burden of persuasion on the issues at trial, the moving party can satisfy its initial burden of production in either of two ways. First, the moving party can offer affirmative evidence that negates an essential element of the non-moving party's cause of action. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) ("A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial"). Second, the moving party may affirmatively show that even if the record contains some evidence that supports the non-moving party's claim, there is nonetheless insufficient evidence to allow the non-moving party to meet the standard of proof applicable to each element of his cause of action at trial on the merits. Robinson v. IHC, Inc., 740 P.2d 262, 264 (Utah App. 1987); see Celotex, 477 U.S. at 325.

The United States Supreme Court has declared that:

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses..., but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex, 477 U.S. at 327. Accordingly, the District Court's grant of summary judgment in favor of Cal Gas must be viewed "not as a disfavored procedural shortcut," id., but as the proper application of the Utah Rules of Civil Procedure, which were promulgated "to secure the just, speedy, and inexpensive determination of every action." Utah R. Civ. P. 1(a); see Celotex, 477 U.S. at 327.

This Court has recognized that although a claim in negligence ordinarily raises questions that ought to be resolved by the trier of fact, where the facts material to an essential element of a cause of action in negligence are undisputed, and only one reasonable conclusion may be drawn from those facts, the entire issue of negligence may be disposed of in summary judgment proceedings. See, e.g., Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983); FMA Acceptance Co. v. Leatherby Insurance Co., 594 P.2d 1332, 1335 (Utah 1979).

## II.

THE RECORD IN THIS CASE CONTAINS NO EVIDENCE  
THAT CAL GAS BREACHED ITS DUTY OF REASONABLE CARE

In Utah, a plaintiff asserting a cause of action in negligence must prove the following four elements of the tort by a preponderance of the evidence: "(1) A duty of reasonable care owed by the defendant to the plaintiff; (2) a breach of that duty; (3) the causation, both actually and proximately of injury; and (4) the suffering of damages by the plaintiff." Williams v. Melby, 699 P.2d 723, 726 (Utah 1985); White v. Blackburn, 787 P.2d 1315, 1319 (Utah App. 1990).

To establish their cause of action in negligence, the Plaintiffs first must show that Cal Gas owed them a duty of care. Beech v. University of Utah, 726 P.2d 413, 415 (Utah 1986); Williams v. Melby, 699 P.2d 723, 726 (Utah 1985). The duty owed by one party to another is entirely a question of law to be determined by the court. Ferree v. State of Utah, 784 P.2d 149, 151 (Utah 1989).

The Plaintiffs argue that it was the duty of the driver of the Cal Gas Truck to maintain control over his vehicle so as not to allow it to overturn and thereby block the traffic lanes of Interstate 80. Appellants' Brief, p. 16. In a correlative argument, the Plaintiffs assert that the Cal Gas Truck driver breached his duty

to them when he "overturned his truck and left it laying in the road blocking the eastbound lanes[.]" Id.

The Plaintiffs' argument overstates the Cal Gas Truck driver's duty. One who drives a vehicle does not have a "duty" to operate the vehicle faultlessly such that he will be held strictly liable for any shortcoming in those operations, fault notwithstanding. The only duty he has is to exercise reasonable care under the circumstances. In other words, to establish their claim for negligence, the Plaintiffs had to show, by a preponderance of the evidence, that the driver of the Cal Gas Truck either failed to do what a reasonable and prudent truck driver would have done under the circumstances, or that he did what such a truck driver under the circumstances would not have done. See Meese v. Brigham Young University, 639 P.2d 720, 723 (Utah 1981). Thus, when offering their evidence, the Plaintiffs had to do more than point to a Cal Gas Truck later found overturned and beg the question whether negligence caused its wreck. As this Court made clear in Horsley v. Robinson, 112 Utah 227, 186 P.2d 592, 596 (Utah 1947), the mere occurrence of a vehicle accident, considered alone, does not support the inference that the vehicle's driver was negligent. Indeed, in Utah, one operating a motor vehicle is presumed to be exercising due care, if for no reason other than to safeguard his own well-being. DeMille v.

Erickson, 23 Utah 2d 278, 462 P.2d 159, 161 (Utah 1969), cert. denied, 397 U.S. 1079 (1970). While this presumption is rebuttable, it can be overcome only by inferences well rooted in the circumstances of the accident. Id.

Perhaps in recognition of the rules in Horsley and DeMille, the Plaintiffs have tried to spin a web of facts and circumstances that they believe will allow a finder of fact to infer that the Cal Gas Truck's driver's negligence must have caused the Cal Gas Truck to overturn. For example, the Plaintiffs claim in their deposition testimony that before they had driven one mile east from the Port of Entry, and while traveling at 20 to 25 miles per hour, they were passed by the Cal Gas Truck. Kitchen Deposition, pp. 48, 46; Phillips Deposition, pp. 10-11. The inference that the Plaintiffs would like this court to draw from this statement is, of course, that the Cal Gas driver was operating his vehicle in an unreasonable manner prior to his accident. The trial court recognized that the probative value of this testimony, if any, was clearly outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Moreover, as even a cursory review of the facts in this case reveals, any such inference regarding either the conduct of the Cal Gas driver when his truck overturned or the circumstances that attended his accident is unfounded. By Kitchen's own testimony, the surface of Interstate

80 near the Port of Entry--where the Cal Gas Truck passed the ANR Truck--was wet, but was not icy. The record contains no evidence that the speed of the Cal Gas truck, though greater than that of the ANR Truck, was unreasonable in such conditions.

In addition, Kitchen testified during his deposition that his rate of speed while traveling east on Interstate 80 was 20 to 25 miles per hour and that the distance between the point at which the Cal Gas Truck passed him and the point at which the Cal Gas Truck overturned was eighteen miles. The unavoidable implication of these two undisputed facts is that neither Kitchen nor Phillips had any opportunity to observe the Cal Gas driver operate his vehicle for approximately forty-five minutes before they encountered the overturned Cal Gas Truck. Thus, Kitchen's reference to the episode of one truck safely passing another gives rise to no well grounded inference about the Cal Gas Truck driver's conduct before his truck overturned eighteen miles farther east, forty-five minutes later, and in quite different road conditions.<sup>5</sup>

Not only are there no facts to show that the Cal Gas Truck overturned as a result of the Cal Gas driver's negligence, but there are also no facts establishing that the Cal Gas Truck was overturned before the ANR

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<sup>5</sup> During his deposition, Kitchen also testified that at the point at which the Cal Gas Truck was found overturned, Interstate 80 was subject to black ice.



Truck overturned. No one saw the Cal Gas Truck overturned before the accident, and there was no expert testimony to suggest facts from which one could infer the sequence of events.

It is clear from the Plaintiffs' ungrounded assumptions about the facts and circumstances of the Cal Gas Truck's accident that at trial they intend to invite the finder of fact to speculate on the reasonableness of the Cal Gas Truck driver's conduct immediately before his vehicle overturned and on the timing of the accident. This formula for establishing a breach of a duty of care has been expressly rejected by this Court. In DeMille v. Erickson, 462 P.2d 159 (Utah 1969), the Court held that in a trial on the merits of a negligence claim, the evidence on the defendant's breach of a duty of reasonable care must be comprehensive enough to allow the finder of fact no reason or opportunity to speculate on the circumstances immediately preceding the allegedly negligent conduct. While justifiable inferences from circumstantial evidence are permissible, resort to sheer conjecture about the conduct of the Cal Gas Truck driver may not be offered as a substitute for a showing by a preponderance of the evidence that the truck driver's conduct was negligent. Lindsay v. Gibbons & Reed, 27 Utah 2d 419, 497 P.2d 28, 31 (Utah 1972). So, while

there is always the possibility that the Cal Gas Truck overturned because its driver was negligent,

for a decision imposing liability to respond in damages, this is not enough. What is required is evidence, which means some sort of proof; and it must be evidence from which reasonable persons may conclude that, upon the whole, it is more likely that the event was caused by negligence than that it was not. As long as the conclusion is a matter of mere speculation or conjecture, or where the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct a jury that the burden of proof has not been sustained.

W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts, § 39, at 242 (5th ed. 1984 & Supp. 1988) (footnotes omitted).

Even when the facts of this case, and the permissible inferences drawn from those facts, are considered in a light most favorable to the Plaintiffs, there is no evidence that Cal Gas breached its duty to the Plaintiffs. Cal Gas is therefore entitled to the summary judgment it seeks on the Plaintiffs' claim of negligence.

### III.

THE DOCTRINE OF RES IPSA LOQUITUR IS  
INAPPLICABLE TO THE CIRCUMSTANCES OF THIS CASE

To bridge the void between the Plaintiffs' accident and the conduct of the Cal Gas driver, the Plaintiffs have resorted to the doctrine of res ipsa loquitur. To succeed along this evidentiary tack, however, the Plaint-

iffs must show that the record in this case contains evidence sufficient to establish that (1) their injury "was of a kind which in the ordinary course of events, would not have happened had [Cal Gas] used due care," Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193, 196 (Utah 1990); (2) they did not bring their injury upon themselves by their own use or operation of the agency or instrumentality that caused their injury, Ballow v. Monroe, 699 P.2d 719, 721 (Utah 1985); and (3) the agency or instrumentality causing their injury was within the exclusive control and management of Cal Gas. Roylance v. Rowe, 737 P.2d 232, 235 (Utah App.), cert. denied, 765 P.2d 1277 (Utah 1987).

A plaintiff's recourse to res ipsa loquitur will yield only limited substantive gain. As this Court has explained,

[T]he purpose of res ipsa loquitur is "to permit one who suffers injury from something under the control of another, which ordinarily would not cause injury except for the other's negligence, to present his grievance to a court or jury on the basis that an inference of negligence may reasonably be drawn from such facts ...."

Anderton v. Montgomery, 607 P.2d 828, 833 (Utah 1980) (quoting Lund v. Phillips Petroleum Co., 10 Utah 2d 276, 351 P.2d 952 (1960)). In other words, a plaintiff who successfully invokes res ipsa loquitur does no more than marshal sufficient circumstantial evidence to permit

the inference that the defendant owed the plaintiff a duty of care and breached that duty. Robinson v. Inter-mountain Health Care, Inc., 740 P.2d 262, 264 (Utah App. 1987).

A. The Plaintiffs Cannot Show That Their Injuries Would Not Have Happened Had Cal Gas Used Due Care.

Any attempt by the Plaintiffs to establish the first element of res ipsa loquitur--namely, that their injuries were of a kind that would not have happened had Cal Gas used due care--will place them, once again, squarely at odds with this Court's holdings in Horsley v. Robinson, 186 P.2d 592 (Utah 1947), and DeMille v. Erickson, 462 P.2d 159 (Utah 1969). As Cal Gas has pointed out in Section II above, in Utah the mere occurrence of a vehicle accident, considered alone, does not support the inference that the vehicle's driver was negligent. Moreover, the driver of a motor vehicle enjoys the presumption under Utah law that he is exercising due care.

This case demonstrates the fallacy of the Plaintiffs' argument. If an overturned truck were the kind of accident that, in the ordinary course of events, would not have happened if the driver had used due care, then one would have to conclude that the Plaintiffs did not use due care, since their truck also overturned, in which case they could not meet the second element of res ipsa loquitur. Of course, the Plaintiffs do not claim that their own negligence contributed to their accident.

But without any evidence except an overturned truck, one can no more conclude that the Cal Gas driver was negligent than one could conclude that the Plaintiffs were negligent. Obviously, trucks can overturn even if the driver has used due care, and the Plaintiffs' own Complaint must concede as much.

The Plaintiffs can point to no evidence in the record that allows them to draw a well-founded inference that the Cal Gas Truck overturned either before the ANR Truck or due to negligence. At best, the Plaintiffs can hope to make the question of negligence a matter of speculation or show the possibility of a negligent cause of the accident. In either event, the Plaintiffs would fail to carry their burden of demonstrating that it is more likely than not that Cal Gas' negligence is responsible for the overturned Cal Gas Truck. Because the Plaintiffs cannot satisfy this first requirement of the doctrine of res ipsa loquitur, their effort to establish that Cal Gas breached its duty to them by circumstantial evidence must fail.

B. The Plaintiffs Cannot Show That the Instrumentality Causing Their Injury Was Within the Exclusive Control and Management of Cal Gas.

The doctrine of res ipsa loquitur

permits [a plaintiff], in lieu of linking his injury to a specific act on defendant's part, to causally connect it with an agency or instrumentality, under the exclusive control of the defendant, functioning

in a manner which, under the circumstances, would produce no injury absent negligence. However, where the agency or instrumentality is not established to be the cause of plaintiff's injury, or where it is not shown to be under the exclusive control of the defendant, the causal connection is not established, and the inference of negligent conduct giving rise thereto is nullified.

Anderton, 607 P.2d at 834 (emphasis added). Thus, when a plaintiff relies on res ipsa loquitur to establish a prima facie case of negligence, causation becomes the crucial issue. Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193, 196 (Utah 1990).

The Plaintiffs may prove causation by either tracing their injuries "to a specific instrumentality or cause for which the defendant was responsible" or showing "that the defendant was responsible for all reasonably probable causes to which the accident could be attributed." Dalley, 791 P.2d at 197 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts, § 39 at 248 (5th ed. 1984 & Supp. 1988)). However, a showing that the defendant was responsible "for all reasonably probable causes" is appropriate to those situations in which the plaintiff cannot know the precise cause of his injury. See, e.g., Dalley, 791 P.2d at 197 (a hospital patient injured while under anesthesia cannot be expected to know the incident or instrumentality responsible for her injury).

Because the Plaintiffs observed and consciously participated in the events that immediately preceded their injuries, they are capable of knowing the "specific instrumentality" that caused their accident. Consequently, they must prove causation in the context of res ipsa loquitur by showing that Cal Gas was responsible for that instrumentality. This is an impossible task, however, because the undisputed facts material to the causation of the Plaintiffs' injury establish that the following sequence of events occurred in the early hours of February 6, 1986: (1) Kitchen was in control of the ANR Truck when he first saw the reflection of something in the road, (2) Kitchen could have stopped the ANR Truck safely without using his brakes, (3) Kitchen decelerated when a Toyota truck turned into his lane of travel, (4) the CR England Truck collided with the ANR Truck from behind, (5) due to the collision, Kitchen lost control of the ANR Truck, and (6) the ANR Truck overturned, striking the side of its tractor cab against the pavement of Interstate 80. See supra, Statement of Facts ¶¶ 7-10, 12-14 and 16-17. Thus it is undisputed that the CR England Truck is the instrumentality that injured the Plaintiffs and further undisputed that the Cal Gas driver not only had no control over the CR England Truck at any time during this unfortunate chain of events, but also was never closer than 200 feet to the ANR Truck

during the entire episode. See, supra, Statement of Facts ¶15.

Because the Plaintiffs cannot show that the agency or instrumentality in the control of Cal Gas (the Cal Gas Truck) is the cause of their injury or that the instrumentality that did cause their injury (the CR England Truck) is under the exclusive control of Cal Gas, "the causal connection is not established and the inference of negligent conduct [afforded by res ipsa loquitur] is nullified." Anderton, 607 P.2d at 834.

#### IV.

THE PLAINTIFFS CANNOT SHOW THAT THE  
CONDUCT OF CAL GAS, EVEN IF NEGLIGENT,  
IS THE PROXIMATE CAUSE OF THEIR INJURY

In Anderton v. Montgomery, 607 P.2d 828, 834 (Utah 1980), this court explained that the doctrine of res ipsa loquitur

has no bearing on the issue of causation, which must be separately and independently established. As in any negligence action, a legally-recognizable causal link must be established between defendant's act or omission and plaintiff's injury. Absent such a causal relationship, defendant's conduct, negligent or otherwise, gives rise to no liability.

(Emphasis added and footnotes omitted.) So even if the Plaintiffs successfully employ the doctrine of res ipsa loquitur to show that Cal Gas breached a duty of care owed to them, they still must show that Cal Gas's alleged breach of duty was a "proximate cause" of their injury.



Butterfield v. Okubo, 790 P.2d 94, 98 (Utah App.) (without proof of proximate cause, a plaintiff's claim of negligence must fail), cert. granted, 800 P.2d 1105 (Utah 1990).

A proximate cause of an injury is "one which, in natural and continuous sequence (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the injury." Mitchell v. Pearson Enterprises, 697 P.2d 240, 245-46 (Utah 1985) (quoting State v. Lawson, 688 P.2d 479, 482 n.3 (Utah 1985)).

To establish this essential element of the tort of negligence, the Plaintiffs must introduce "substantial evidence" that the conduct of Cal Gas was responsible for their injuries. Mitchell, 697 P.2d at 246. Substantial evidence is that "which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved." Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89, 92 n.2 (Utah App. 1988) (quoting Wasson v. Brewer's Food Mart, Inc., 7 Kan. App. 2d 259, 640 P.2d 352, 356-57 (1982)). Moreover, it is evidence that affords a trier of fact no opportunity to speculate about the link between the conduct of Cal Gas and the injury of the Plaintiffs. As this Court has noted, "when the

proximate cause of an injury is left to speculation, the claim fails as a matter of law." Mitchell, 697 P.2d at 246.

Because the burden of proof at trial on the question of proximate cause lies with the Plaintiffs, the party against whom summary judgment is sought, Cal Gas may secure the summary judgment it seeks if it shows that the record in this case lacks "substantial evidence" that absent Cal Gas' allegedly negligent conduct, the Plaintiffs' injury would not have occurred. Robinson v. IHC, Inc., 740 P.2d 262, 264 (Utah App. 1987); see Celotex, 477 U.S. at 325.

The facts in the record material to the causation of the Plaintiffs' injuries by the overturned Cal Gas Truck are these:

1. Kitchen first saw an object in the highway from a distance of no less than one-quarter mile. Kitchen Deposition, p. 53.

2. When he saw the object, Kitchen was driving the ANR Truck at 20 to 25 miles per hour. Kitchen Deposition, p. 50.

3. Kitchen took his foot off the throttle because a Toyota pickup signaled and moved from the passing lane to the travel lane. When he did so, the ANR Truck was immediately struck from the rear by the CR England Truck. Kitchen Deposition, pp. 49-52.

4. Immediately before the ANR Truck was struck from the rear by the CR England Truck, Kitchen was in control of the ANR Truck. Kitchen Deposition, p. 79.

5. If the CR England Truck had not struck the ANR Truck, Kitchen could have brought the ANR Truck to a halt short of the Cal Gas Truck without applying his brakes. Kitchen Deposition, pp. 128 and 52. All he needed to do was take his foot off the throttle, and the ANR Truck would have come to a stop without striking the Cal Gas Truck. Kitchen Deposition, p. 128.

6. The ANR Truck never struck anything. Kitchen Deposition, p. 93. In fact, when the ANR Truck overturned after the collision with the CR England Truck, it was still 200 feet away from where the Cal Gas Truck was found. Appellants' Brief, p. 2.

7. The cause of the turnover of the ANR Truck was the lane change by the Toyota and the rear-end collision with the CR England Truck that occurred when Kitchen slowed the ANR Truck by removing his foot from the throttle. Appellants' Brief, p. 3.

8. The cause of the Plaintiffs' injuries was the overturning of the ANR Truck following the collision with the CR England Truck. Record at 4, ¶11.

All of these material facts are undisputed. As the citation associated with each makes clear, they are all set out in documents submitted by the Plaintiffs or

derived from testimony offered by the Plaintiffs. Moreover, they offer an accurate, comprehensive summary of the facts in this case material to the causal relationship between the overturned Cal Gas Truck and the injuries sustained by the Plaintiffs.

The Plaintiffs have alleged that the overturned Cal Gas Truck was the proximate cause of their injuries, i.e., the link between negligence and their injuries and the instrument without which their injuries would not have occurred. Yet the material facts disclose that by their own words and through their own actions, even the Plaintiffs recognized that the object in the roadway did not bring about their injuries. Kitchen first saw the object from a quarter of a mile away, a distance that allowed him to stop the ANR Truck without using his brakes and without losing control of his vehicle. In fact, the undisputed evidence is that Kitchen's response to the sighting of the object had every prospect of bringing the ANR Truck to a safe stop 200 feet short of a collision. Kitchen removed his foot from the accelerator only because the Toyota made a lane change, which resulted in the impact he felt from the rear.

In short, the undisputed facts material to the issue of the causation of the Plaintiffs' injuries do not offer any, let alone substantial, evidence that the conduct of Cal Gas was the proximate cause of the Plaintiffs'

injuries. The only reasonable conclusion that the material facts will permit is that the Cal Gas Truck was not implicated in the events that caused the Plaintiffs' injuries. Accordingly, this Court must conclude as a matter of law that Cal Gas was not the proximate cause of the Plaintiffs' injuries and must therefore affirm the summary judgment entered in favor of Cal Gas by the District Court.

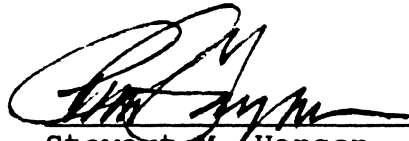
#### CONCLUSION

The record in this case demonstrates an absence of genuine issues of material fact as to two essential elements of the Plaintiffs' cause of action: a breach of the duty Cal Gas owed to the Plaintiffs and proximate causation of the Plaintiffs' injuries by the conduct of Cal Gas. After all the smoke is cleared away, the Plaintiffs are simply asking the Court to hold that negligence can be established merely by showing that an accident occurred. Unless this Court chooses to overturn years

of precedent, it must affirm the District Court's grant of summary judgment in favor of Cal Gas.

DATED this 15<sup>th</sup> day of February, 1991.

SUITTER AXLAND ARMSTRONG & HANSON



---

Stewart M. Hanson, Jr.  
Fred R. Silvester  
Charles P. Sampson  
Attorneys for Appellee,  
Cal Gas Company, Inc.

---

(Original Signature)

CERTIFICATE OF MAILING

I hereby certify that I caused to be served four true and correct copies of the foregoing BRIEF OF APPELLEE by depositing the same in the United States Mail, postage prepaid, this 15<sup>th</sup> day of February, 1991, addressed to the following:

James R. Black, Esq.  
Susan Black, Esq.  
CALLISTER, DUNCAN & NEBEKER  
Suite 800, Kennecott Building  
Salt Lake City, Utah 84133



---

(Original signature)

lrd8/apelbref.gas

## **ADDENDUM**



IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

KITCHEN, JOSEPH	:	CASE NUMBER 870902515 CV
PLAINTIFF,	:	DATE 12/01/89
VS	:	JUDGE FRANK G NOEL
	:	COURT REPORTER NOT PRESENT
C.R. ENGLAND AND SONS INC	:	COURT CLERK PAJ
DEFENDANT.	:	

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TYPE OF HEARING:  
PRESENT:

P. ATTY. BLACK, J.  
D. ATTY. CHIPMAN, J., SYLVESTER

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ORDERS

BASED UPON ARGUMENT OF RESPECTIVE COUNSEL, THE COURT ORDERS  
CAL GAS INC. MOTION FOR SUMMARY JUDGMENT IS GRANTED. THE MOTION  
IN LIMINE IS GRANTED. THE COURT FINDS THAT THERE IS NO EVIDENCE  
OF NEGLIGENCE ON THE PART OF CAL GAS. ALL EXHIBITS & DEPOSITION  
S ARE PUBLISHED. TRIAL TO BE RESET.

00030

FILED  
DISTRICT COURT

JAN 31 4 00 PM '81

*Bruce Klein*

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOSEPH KITCHEN and  
RICHARD PHILLIPS,

Plaintiffs,

v.

C. R. ENGLAND & SONS, INC., a  
Utah corporation, and CAL GAS  
COMPANY, INC., a California  
corporation,

Defendants.

ORDER IN LIMINE  
AND  
SUMMARY JUDGMENT

Civil No. C87-02515

Judge Frank G. Noel

The Court having reviewed defendant Cal Gas' motion in limine to exclude evidence of speed and Cal Gas' motion for summary judgment; having considered the memoranda of defendant Cal Gas and plaintiffs Kitchen and Phillips; having heard arguments of counsel as to Cal Gas' motion for summary judgment; and having granted plaintiffs' motion to publish all discovery and having considered same;

The Court finds on the undisputed material facts viewed most favorably to the plaintiffs, no facts establish the Cal Gas driver was negligent, therefore any such finding by a jury could only be based on speculation.

000311

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendant Cal Gas' Motion in Limine is granted;
2. Defendant Cal Gas' Motion for Summary Judgment is granted and plaintiffs' claims against Cal Gas are dismissed with prejudice and on the merits.

The Court further finds pursuant to the provisions of Rule 54(b), Utah Rules of Civil Procedure, that there is no just reason for delay and hereby expressly directs entry of judgment for defendant Cal Gas on plaintiffs' claims.

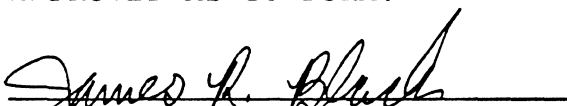
DATED this 31 day of January, 1990.

BY THE COURT:

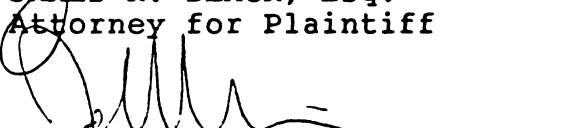


Honorable Frank G. Noel  
District Court Judge

APPROVED AS TO FORM:



JAMES R. BLACK, Esq.  
Attorney for Plaintiff



JOHN M. CHIPMAN, Esq.  
Attorney for Defendant  
C. R. England & Sons

5251b

FILED  
DISTRICT COURT

JAN 31 4 04 PM '90

BY *Brenda Klein*

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

JOSEPH KITCHEN and  
RICHARD PHILLIPS,  
  
Plaintiffs,

v.

C.R. ENGLAND & SONS, INC., a  
Utah corporation, and CAL GAS  
COMPANY, INC., a California  
corporation,  
  
Defendants.

FINAL JUDGMENT

Civil No. C87-02515

Judge Frank G. Noel

The Court having previously entered summary judgment in favor of defendant Cal Gas, and having found pursuant to Rule 54(b) Utah Rules of Civil Procedure, no just reason to delay entry of judgment for defendant Cal Gas, therefore


HEREBY ORDERS, ADJUDGES AND DECREES:

1. Plaintiffs' claims against defendant Cal Gas be dismissed with prejudice on the merits;
2. The Clerk of the Third Judicial District Court of Salt Lake County, State of Utah, enter this final judgment forthwith.

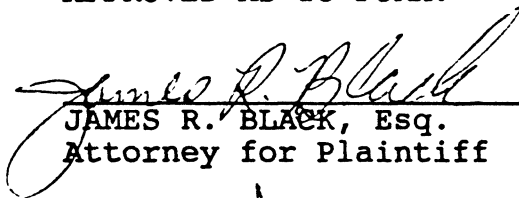
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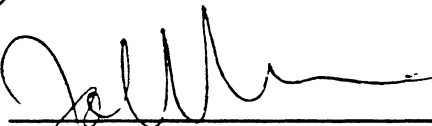
DATED this 31 day of <sup>Jan,</sup>~~December~~, 1989.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Frank G. Noel  
District Court Judge

APPROVED AS TO FORM:

  
\_\_\_\_\_  
JAMES R. BLACK, Esq.  
Attorney for Plaintiff

  
\_\_\_\_\_  
JOHN M. CHIPMAN, Esq.  
Attorney for Defendant  
C.R. England & Sons

(FRS23.14)