

1992

Joseph Kitchen and Richard Phillips v. C.R.
England & Sons, Inc., a Utah corporation and Cal
Gas Company, Inc., a California corporation :
Petition for Writ of Certiorari

Utah Supreme Court

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Recommended Citation

Legal Brief, *Kitchen v. England*, No. 920027.00 (Utah Supreme Court, 1992).
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BRIEF

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IN THE SUPREME COURT OF THE
STATE OF UTAH

* * * * *

JOSEPH KITCHEN and)	
RICHARD PHILLIPS,)	PETITION FOR
)	WRIT OF CERTIORARI
Petitioner/)	
Appellants,)	Supreme Court No. 900071
)	
vs.)	
)	District Court No.
C. R. ENGLAND & SONS, INC.,)	870902515
a Utah corporation and)	
CAL GAS COMPANY, INC., a)	Judge Frank G. Noel
California corporation,)	
)	920027
Defendants/)	
Respondents.)	

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CAL GAS COMPANY, INC., a)	Judge Frank G. Noel
California corporation,)	
)	
Defendants/)	
Respondents.)	

* * * * *

Petitioners Joseph Kitchen and Richard Phillips,
through their legal counsel, James R. Black and Susan Black
submit the following petition for writ of certiorari:

I.

PARTIES

Petitioners Joseph Kitchen and Richard Phillips brought a cause of action for their personal injuries against defendants C.R. England & Sons, Inc., a Utah corporation and Cal Gas Company, Inc., a California corporation.

II.

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IV.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Were there genuine issues of material fact in this case regarding defendant Cal Gas' negligence that should have been submitted to the jury for determination and not resolved by the trial court as a matter of law.

2. Does the doctrine of res ipsa loquitor in relation to the actions of defendant Cal Gas apply in this case?

V.

OPINION ISSUED BY THE COURT OF APPEALS

See attachment 8 of complete Court of Appeals decision in this case.

VI.

JURISDICTION OF SUPREME COURT

1. The Court of Appeals entered a decision in this matter on the _____ day of _____, 1991.

2. The Utah Supreme Court granted petitioners motion for an extension of time to file this petition. Said extension was until January 20, 1992. January 20, 1992 wa a legal holiday. Therefore, this petition was timely filed on January 21, 1992.

3. There was no cross-petition for writ of certiorari filed in this matter.

4. The Supreme Court of the State of Utah has jurisdiction to consider this petition pursuant to Rule 45 and 46 of the Utah Rules of Appellate Procedure.

VII.

PROVISIONS OF CONSTITUTIONAL,
STATUTES, ORDINANCES OR REGULATIONS

There are no specific provisions of constitution, statutes, ordinances or regulations that this matter involves, but rather the general principles of tort law.

VIII.

STATEMENT OF THE CASE

The petitioners filed this suit to recover damages they suffered on February 6, 1986, when the tractor-trailer they occupied overturned 600 feet west of Milepost 19 on Interstate 80 in Tooele County. Immediately prior to the time petitioners' vehicle overturned, a Cal Gas tanker overturned 800 feet west of milepost 19 on Interstate 80. Petitioner Kitchen was the driver of an ANR Garrett tractor with two trailers. It is his testimony that he saw the defendant Cal Gas tanker truck overturned ahead of him on the roadway. The tanker was blocking $1\frac{1}{2}$ lanes of the two eastbound lanes so petitioner began to slow his truck anticipating he could stop prior to coming into contact with the Cal Gas tanker. Traveling immediately behind the petitioners was a CR England tractor and trailers. It is the testimonies of the petitioners that as their truck

slowed down, the CR England truck hit them from behind causing them to roll over. There was no contact between the ANR Garrett truck and the Cal Gas truck. The depositions of petitioners were taken. The deposition of Richard Foreman, C.R. England's driver, was taken. The driver of the Cal gas vehicle, Blaine Beckstead, died of causes unrelated to the accident shortly after it occurred. Various expert witnesses' depositions for the parties were taken as well. These depositions plus the pleadings constitute the record in this appeal. Petitioners reached a settlement with defendant C.R. England prior to trial so no issues on appeal deal with C.R. England.

Defendant Cal Gas filed a motion for summary judgment claiming there was no proximate causation between the Cal Gas truck accident and the ANR Garrett truck accident. The trial court denied that motion. Defendant Cal Gas then filed a motion for summary judgment claiming there was no evidence of negligence on the part of the Cal Gas driver. The trial court granted Cal Gas' Motion. Hence, this appeal was filed, since it is petitioners' position there are clearly disputed factual issues that should be determined by a jury.

STATEMENT OF FACTS

1. Petitioners, Joseph Kitchen and Richard Phillips were drivers for ANR Garrett Freight lines as of February

1986. On February 6, 1986, they were transporting freight from the Los Angeles, California area to Salt Lake City, Utah. The tractor they were operating had a sleeping compartment so one of them would drive while the other slept.

2. At about midnight on February 6, 1986, they pulled into the Wendover, Utah Weigh Station. They were instructed to drop their third trailer. They were told the road further ahead had patches of black ice all the way to Salt Lake City. (Kitchen deposition p. 43 and p. 44.)

3. After the ANR Garrett truck had left the Wendover Weigh Station, it was passed by the defendant Cal Gas tanker at a rapid rate of speed. The Cal Gas truck was heading east as well. Petitioner Phillips verified what petitioner Kitchen had said.

4. Petitioners proceeded east on I-80 in the right lane of the roadway at 20 to 25 miles per hour up to the point in the road where the accident occurred. There were two eastbound lanes of traffic (Kitchen deposition, p. 49; Phillips deposition, p. 32, 33).

5. In the area where the accident took place, the roads were icy and slippery. (Kitchen deposition, p. 46; Phillips deposition, p. 10, 13.)

6. In the area of milepost 19, a white Toyota Pickup truck was traveling ahead of the ANR Garrett truck in the left-hand

lane of traffic. In the Toyota's headlights, Kitchen saw the shadow of something blocking the left and part of the right lanes of traffic ahead of him. (Kitchen deposition, p. 49, 50, 79, 121.)

7. The overturned Cal Gas truck was blocking the left lane and part of the right lane on the roadway directly ahead of Kitchen. (Kitchen deposition, p. 51 and P. 94.)

8. Perceiving the problem the Cal Gas tanker presented in the roadway ahead of him, Kitchen took his foot off the throttle, causing his vehicle to slow. (Kitchen deposition, pages 123, 124.)

9. As petitioners' vehicle slowed, petitioners felt an impact to the rear of their vehicle, which impact caused petitioners' vehicle to overturn. (Kitchen deposition page 125; Phillips deposition pages 36-38, 50-52.)

10. Foreman testified that the C.R. England vehicle did not hit petitioners' vehicle and that he saw petitioners' vehicle overturned and blocking the roadway as he approached Milepost 19 on I-80 and therefore drove off the roadway to avoid hitting it.

11. The driver of the Cal Gas truck died shortly after the accident of causes unrelated to the accident. The wife of the Cal Gas Driver who was accompanying her husband cannot be located to give her testimony according to counsel for Cal Gas.

12. After the accident, petitioner Kitchen walked the short distance up to where the Cal Gas tanker was to see if anyone needed help. (Kitchen deposition, p. 55.)

13. Section 41-6-46(1)(e) U.C.A. states in pertinent part:

SPEED RESTRICTIONS

41-6-46. Speed regulations -- Safe and appropriate speeds at certain locations -- Prima facie speed limits -- Emergency power of the governor.

(1) A person may not operate a vehicle at a speed greater than is reasonable and prudent under the existing conditions, and giving regard to the actual and potential hazards then existing, including, but not limited to when:

* * * * *

(e) special hazards exist regarding pedestrians or other traffic, or due to weather or highway conditions.

14. It is petitioner's contention the Cal Gas driver was unable to maintain proper and immediate control over his vehicle as he was driving too fast for the conditions as they then existed.

SUMMARY OF ARGUMENT

There are genuine issues of material fact involving the negligence of the Cal Gas driver that precipitated this triple truck accident. Additionally, under the doctrine of res ipsa loquitor, defendant's negligence can be inferred. Therefore, it was inappropriate for the trial court to grant defendant Cal

Gas' motion for summary judgment and for the Court of Appeals to uphold the trial court's decision.

IX.

ARGUMENT

Point I

There are genuine issues of material fact on the issue of Defendant Cal Gas' Negligence, therefore Summary Judgment was improper

The Utah Supreme Court as well as Courts throughout the United States have repeatedly emphasized the very restrictive standard of when Summary Judgment is appropriate.

In Bowen v. Riverton City, 656 P.2d 434 (Utah 1982), the Utah Supreme Court discussed the propriety of summary judgment and the approach courts must take to motions for summary judgment as follows:

Summary judgments are more frequently given in contract cases However, when it comes to determining negligence, contributory negligence, and causation, courts are not in such a good position to make a total determination for here enters a prerogative of the jury to make a determination of its own, and that is: Did the conduct of a party measure up to that of the reasonably prudent man, and, if not, was it a proximate cause of the harm done?

(See Case in its entirety in Attachment 1)

With the Bowen standard in mind, it is clear by its prior ruling on defendant Cal Gas' motion for summary judgment on the issue of proximate cause that the trial court was of the opinion

there is disputed evidence in this case. The court determined that there was a jury question as to whether the overturned Cal Gas truck was a proximate cause of the collision between the ANR Garrett truck and the C.R. England truck. Since the issues of proximate cause and negligence are so intertwined it is illogical to find there is an issue of material facts regarding proximate cause and no such dispute regarding negligence. The necessity of having a jury consider all the factual disputes in the present case is especially clear when the facts of the case are viewed in a light most favorable to the petitioners.

Since these are all disputed issues of material fact, summary judgment was inappropriately granted. This matter should be tried to a jury.

Point II

There is substantial evidence from which a jury could infer defendant Cal Gas' negligence

In earlier Memorandum on this point, defendant cited the landmark Utah Supreme Court case of Horsley v. Robinson, 112 Utah 227, 186 P.2d 592 (1947) for the proposition that "The mere occurrence of an accident, considered alone, does not support an inference that the Cal Gas driver was negligent."

It is petitioner's contention that the Horsley decision supports their position that Cal Gas negligence is an issue for jury determination. The facts of Horsley are analogous to the facts in this case in many respects. The Utah Supreme Court in

Horsley supported the trial court's submission to the jury of the issue of negligent operation of a bus that collided with an oncoming automobile which skidded into its path on an icy road. The court held that the jury could infer excessive speed for the existing circumstances without evidence of stopping distances. After making the statement upon which defendant relies, the court went on further to explain:

* * * *

But negligence may be inferred from facts and circumstances which according to human experience tend to show and from which reasonable minds might be convinced that in operating the bus as they did under the surrounding facts and circumstances the defendants should have anticipated that they were endangering the safety of their passengers. . . .

* * * *

Here the driver had driven more than 20 miles under similar road and weather conditions which he encountered at the time of the accident. He had ample time to fully realize the amount of control or lack thereof which he could exert over the bus in case of an emergency. . . . The evidence was sufficient from which the jury could find the defendants were negligent.

* * * *

It is universally recognized that negligence may be inferred from the happening of the accident and the surrounding facts and circumstances where the facts are such as to reasonably justify such inference even though there is no direct testimony to establish the exact grounds of negligence which caused the accident. (Citations omitted.)

186 P.2d at 596, 597, 599 (emphasis added). (See case in its entirety in Attachment 2.)

In the present case, as in Horsley, supra, there are issues of fact which preclude summary disposition. There can be no doubt that based on Horsley, the jury may infer negligence on the part of the Cal Gas truck driver. While the mere occurrence of an accident may not imply negligence, whether or not it is negligent to overturn a tractor/tanker on a slippery road and thereby block the traffic lanes is a question of fact to be determined by a fact finder. As in Horsley, the trier of fact could infer from the accident and the surrounding facts that the Cal Gas driver was driving too fast for the existing conditions and failed to keep proper control of his vehicle.

In the case of Kelly v. Montoya, 470 P.2d 563, (Ct. of App., New Mexico, 1970). The New Mexico Court specifically stated that blocking a highway in violation of statute may cause other persons to have accidents. (Utah has a similar statute embodied in Utah Code Ann. 41-6-103 (1953) as amended.) Issues of fact as to foreseeability, proximate cause, and negligence were to be resolved by the trier of fact. (See case in its entirety in Attachment 3.)

In Weber v. Springville City, 725 P.2d 1360 (Utah 1986) the Court described four elements of a negligence action. Each of those four elements as applied to the present facts creates an issue for the jury. First, does a driver of a truck have a duty

of care to maintain control over his vehicle so as not to block the traffic lanes of the highway, especially in winter driving conditions? Second, did the Cal Gas truck driver breach that duty when he overturned his truck and left it laying in the road blocking the eastbound lanes? Third, did the accident of the defendant Cal Gas truck case petitioners' injuries in whole or in part and fourth, did petitioners suffer damages as a result thereof? The proper body to resolve these issues is the jury.

In the case of Hall v. Blackham, 417 P.2d 664 (Utah 1966), another often cited decision, the court rendered a decision on appeal by petitioners from the portion of a jury verdict in favor of one of the defendants in the case, Deleeuw.

Petitioners had alleged that Deleeuw handed a sandwich to another defendant, the driver of the car which collided with petitioners' decedent's car, and that the handling of the sandwich to the driver distracted his attention. 417 P.2d 15 665. The jury was asked two questions regarding Deleeuw: was he negligent, and, if he was, was his negligence a proximate cause of the accident. The jury answered both questions in the negative. 417 P.2d at 667.

The decision stands for the proposition that negligence and proximate causation are questions for the jury. They are not questions for the Court on a motion for summary judgment.

Harris v. Utah Transit Authority, 671 P.2d 217 (Utah 1983), considered a jury instruction which directed a verdict on

petitioner's negligence and, in effect, directed a verdict on the issue of proximate cause. 671 P.2d at 219. After a discussion of the law of superseding causation, in which the Court pointed out that it has adopted the rule stated in Restatement (Second) of Torts, § 447, on the issue of superseding causation, the Court stated,

In the present case, the disputed instruction was erroneous because it failed to submit the proximate cause issue to the jury for determination. . . .

Where the evidence is in dispute, including the inferences from the evidence, the issue should be submitted to the jury.

* * *

We do not mean to imply that rulings by the trial court which decide a factual contention as a matter of law are never appropriate. But the right to trial by jury is a basic principle of our system that cannot be allowed to be eroded by improper intrusions on the jury's prerogative.

671 P.2d at 220 (citations omitted.)

Also, of relevance to the present case, the Harris Court stated that a person's negligence is not superseded by the negligence of another if the subsequent negligence of another is foreseeable. The Court adopted the Restatement Rule which it applied as follows:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinary negligent.

(671 P.2d at 219)

Although the factual issues presented in Harris were opposite of the facts in the present case, the court's discussion of intervening and/or superseding causation is significant and instructive:

Instruction no. 14 appears to have been based on the rule stated in Hillyard v. Utah By-Products Co., 1 Utah 2d 143, 151, 263 P.2d 287, 292 (1953); and restated in . . . Anderson v. Parson Red-E-Mix Paving Co., 24 Utah 2d 128, 467 P.2d 45 (1970).

. . . [T]he test in Hillyard is two-pronged: (1) where a motorist sees a stationary object in the road and negligently fails to avoid it, his negligence is, as a matter of law, a superseding cause, but (2) if the motorist negligently fails to see the stationary object in time to avoid it, the issue of whether the motorist's negligence is a superseding cause is for the jury.

The strong drift away from deciding the issue of superseding causation in automobile accidents as a matter of law is evident in Jensen v. Mountain States Telephone and Telegraph Co., Utah, 611 P.2d 363 (1980), and Watters v. Query, Utah 588 P.2d 702 (1978). Indeed, Jensen all but overruled the first prong of Hillyard sub silentio.

* * *

[T]he first prong of Hillyard cannot stand analysis from a theoretical point of view. There is no valid distinction between one who negligently fails to keep a proper lookout and rear-ends another car and one who keeps a proper lookout but negligently fails to avoid a collision. The two situations are similar to the doctrines of assumption of risk and contributory negligence--which are now treated for the most part simply in terms of whether a defendant failed to act as a reasonably prudent person under the circumstance.

* * *

Finally, the unsound distinction made in Hillyard serves to frustrate the purpose of the Comparative Negligence Statute by precluding the kind of comparison of fault that a jury ought to make.

The allocation of liability should be made on the basis of the relative culpability of both parties. To do that the jury must assess the reasonableness or unreasonableness of the second driver's actions in light of all the circumstances, including whatever action it takes to avoid a collision, his initial speed, the initial speed of the first car, road conditions, traffic conditions, and the like.

To avoid further confusion in the doctrine of superseding causation in cases such as this, we hereby overrule the first prong of the Hillyard test as stated in Hillyard, . . . and Anderson.

671 P.2d at 221, 222 (emphasis added.)

The Harris decision, a relatively recent decision by the Utah Supreme Court, stands for the principle of trial by jury.

Following that tenet the issues of negligence and proximate cause especially in an automobile accident case are within the purview of the jury. The jury may draw inferences of the neglect of a party from the evidence as it sees fit. (See copy of the Harris decision in its entirety in attachment 4.)

In the present case, the Court ruled as a matter of law on the issue of negligence prior to the submission of any evidence to a jury. The facts as elicited from the petitioners in a light most favorable to the petitioners demonstrates negligence on the part of defendant Cal Gas. Without question, a jury could reasonably infer that Cal Gas was negligent by failing to drive at an appropriate speed; by failing to maintain proper control; by overturning and blocking almost all of the traveled portions of the roadway. The Court of Appeals decision in upholding the trial court's decision in these circumstances was erroneous.

Point III

Defendant's Negligence can be inferred

Under the doctrine of res ipsa loquitor

The Utah Supreme Court has on numerous occasions held that the doctrine of res ipsa loquitor is applicable in certain cases and juries should be so instructed where it is appropriate. It is petitioners' position that their case is one in which the doctrine should apply.

In Anderton v. Montgomery, 607 P.2d 828 (Utah Sup. Ct. 1980), petitioner brought a claim against the owners and operators of a business whose device was used to exhibit sheet metal samples. The device collapsed causing serious injuries to the petitioner. Neither party could demonstrate what caused the device to fail. The jury was instructed on the theory of res ipsa loquitor but, still returned a verdict in defendant's favor. While the Utah Supreme Court affirmed the trial court's rulings, it discussed the doctrine and its applicability which may be insightful in reference to the case on appeal.

In Anderton, the court cited approvingly the case of Lund v. Phillips Petroleum Co., 10 Utah 2d 276, 351 P.2d 952 (1960) wherein the court stated:

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; and cast the burden upon the other to make proof of what happened.

(607 P.2d 833)

The Court further described the criteria under which res ipsa loquitor could be implemented:

(1) that the accident was of a kind which, in the ordinary course of events, would not have happened had due care been observed; (2) that the plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the injury; and (3) that the agency or instrumentality causing the injury was under the exclusive management or control of the defendant.

(607 P.2d 833)

Of most importance in reference to this present case, the Utah Supreme Court emphasized that the application of the doctrine to a given situation was a question of fact to be determined by the jury:

It is to be noted that the weighing of evidence presented to establish the above elements, like all other questions of fact, is within the province of the jury; where the trial court determines that the evidence, viewed in a light most favorable to the plaintiff, could establish the prerequisites to the application of the doctrine, an instruction to that effect is proper. It then becomes the jury's responsibility to apply, or refuse to apply, the doctrine based on its factual findings regarding the circumstantial prerequisites.

(607 P.2d 834)

The Anderton court in a footnote made comments that are especially relevant to the present case regarding the application of res ipsa loquitor and the principles of comparative negligence:

This is not to say that any contributory negligence on plaintiff's part prevents the application of the doctrine, such that it may not be used in those cases where plaintiff is seeking partial recovery under Utah's comparative negligence statute (U.C.A., 1953, 78-27-37). The requirement here is that plaintiff's use of the agency or instrumentality not be primarily responsible for the injury, not that his actions be free from negligence of any kind. (Note that the comparative negligence provision bars partial recovery under any type of proof where plaintiff's negligence equals or exceeds that of the defendant.) See 58 Am.Jur.2d Negligence § 481. p. 58.

(underlining added) (607 P.2d 833) (See Anderton in its entirety in Attachment 5.)

Another recent Utah Supreme Court decision discussing res ipsa loquitor is Nixdorf v. Hicken, 612 P.2d 348 (Utah Sup. Crt. 1980). In Nixdorf, a patient brought a medical malpractice action against a doctor and hospital because a surgical needle was left in her body after surgery. At the trial in this matter, petitioner did not introduce expert testimony to show that the defendants care was below the standard of care but, relied instead on the doctrine of res ipsa loquitor. The trial court granted the defendant's motion for a directed verdict because of petitioner's failure to present expert testimony. The Utah Supreme Court reversed and remanded the matter for a new trial. The Court reaffirmed the proposition that in a medical malpractice action expert testimony is not always necessary if the standard of care owed petitioner is within the common knowledge and experience of a layman. Then, the Court surmised the petitioner met her burden through the application of res ipsa loquitor. The Court stated:

When the appropriate evidentiary basis is presented a plaintiff may employ the doctrine of res ipsa loquitor to carry this burden. This doctrine establishes an inference of negligence from the circumstances incident to the operation. It is a procedural rather than substantive rule of law which carries the plaintiff past a motion for nonsuit where the circumstantial evidence introduced by the plaintiff is sufficient to support the application of the doctrine and its inference of negligence.

(612 P.2d 352) (See case in its entirety in Attachment 6.)

A key case is Kusy v. K-Mart Apparel Fashion Corp., 681 P.2d 1232 (Ut. Sup. Crt. 1984). The petitioner suffered personal injuries when the pallet on which he was standing broke causing him to fall. The jury returned a verdict in favor of the defendant. Petitioner appealed on several grounds including the refusal to give petitioner's proffered instruction regarding res ipsa loquitor.

The Supreme Court reversed and remanded the matter instructing the trial court to decide whether petitioner made a prima facie showing of the res ipsa loquitor elements and, if so, the jury should receive petitioner's proffered instruction.

The Court in Kusy reaffirmed Anderton, in its description of the elements of res ipsa loquitor. It noted in reference to the third element that "The control necessary for a res ipsa instruction is control exercised at the time of the negligent act." (681 P.2d 1235) The Utah Supreme Court also held in Kusy that a petitioner could sustain and be allowed instructions on theories of res ipsa loquitor and negligence in the same lawsuit as long as the exact cause of the accident was not known. The jury based on the circumstances could infer negligence. (See a copy of Kusy in its entirety in Attachment 7.)

In the case under consideration, petitioners are entitled to present their claims under the theories of negligence and res ipsa loquitor. Petitioners can establish all the elements

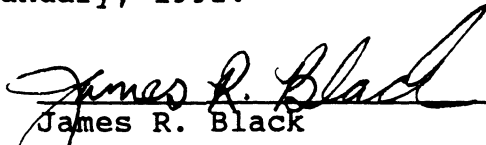

necessary for res ipsa loquitor: 1) the Cal Gas tanker truck rollover is the kind of accident that does not happen if due care has been observed, 2) the petitioners had no use or hadn't operated the Cal Gas tanker and, therefore, could not be said to be primarily responsible for their injuries and 3) the Cal Gas tanker was under the exclusive control of defendant.

Since the petitioners can make a prima facie showing of the above elements, the jury could infer defendant Cal Gas' negligence. The application of the res ipsa loquitor doctrine is a question of fact so is within the exclusive province of the jury. Thus, it was improper to grant defendant's Motion for Summary Judgment.

CONCLUSION

Based on the foregoing, petitioners respectfully request the Utah Supreme Court to grant their petition for writ of certiorari.

Dated this 21st day of January, 1992.


James R. Black

Susan Black

ATTACHMENTS

1. Bowen v. Riverton City, 656 P.2d 434 (Utah 1982)
2. Horsley v. Robinson, 112 Utah 227, 186 P.2d 592 (1947)
3. Kelley v. Montoya, 470 P.2d 563, (ct. of App., New Mexico 1970)
4. Harris v. Utah Transit Authority, 6571 P.12d 217 (Utah 1983)
5. Anderton v. Montgomery, 607 P.2d 828 (Utah 1980)
6. Nixdorf v. Kicken, 612 P.2d 348 (Utah 1980)
7. Kusy v. K-Mart Apparel Fashion Corp., 681 P.2d 1232 (Utah 1984)
8. Phillips, Kitchen v. C.R. England and Sons, Inc. et al., 174 Utah Adv. Rep 14 (Utah 1991)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANTS was hand-delivered on the 21st day of January, 1992, to the following:

Mr. Stewart M. Hanson
Mr. Fred R. Silvester
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Susan Black

ber of years of the husband's employment. The wife is entitled to one-half of that portion pursuant to the award of the trial judge in this case, which our modification is intended to sustain.

We therefore affirm in part, reverse in part and remand to the trial court so that the order may be amended to conform with this opinion. No costs or fees are awarded.

HALL, C.J., and STEWART, OAKS and HOWE, JJ., concur.



**Kristine H. BOWEN and Cynthia Bowen,
an infant by Nathaniel Bowen, her
guardian ad litem, Plaintiffs and Appel-
lants,**

v.

**RIVERTON CITY, a municipal corpora-
tion, Sterling R. Draper and Enoch
Smith Sons Company, Defendants and
Respondents.**

No. 17732.

Supreme Court of Utah.

Nov. 4, 1982.

In a personal injury action, the Third District Court, Salt Lake County, James S. Sawaya, J., granted summary judgment for city and subsequently, pursuant to motions and stipulations in consolidated actions, dismissed all claims, counterclaims and cross claims with prejudice except for claim against city, and plaintiffs appealed. The Supreme Court, Stewart, J., held that: (1) appeal was timely filed, and (2) whether city fulfilled its duty to maintain city streets in safe condition was question of fact for jury, precluding summary judgment.

Reversed and remanded for trial.

1. Appeal and Error ⇐430(1)

Since failure to file timely notice of appeal is jurisdictional, Supreme Court lacks jurisdiction to hear appeal if notice was not timely filed. Rules Civ.Proc., Rules 42(a), 73(a).

2. Appeal and Error ⇐344, 428(2)

Trial court's April 13 order, entered pursuant to stipulation of counsel in both consolidated actions, was final judgment in each case for purpose of calculating timeliness of appeal, and thus plaintiffs, who on May 12, 1981, filed notice of appeal, timely filed appeal from trial court's grant of summary judgment on January 26 for city.

3. Judgment ⇐181(2, 3)

Summary judgment is proper only if pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that moving party is entitled to judgment as matter of law.

4. Judgment ⇐185(2)

If there is any doubt or uncertainty concerning questions of fact, doubt should be resolved in favor of opposing party on motion for summary judgment and thus court must evaluate all evidence and all reasonable inferences fairly drawn from evidence in light most favorable to party opposing summary judgment.

5. Judgment ⇐180

Summary judgment is appropriate only in the most clear-cut negligence cases.

6. Municipal Corporations ⇐757(1)

City has nondelegable duty to exercise due care in maintaining streets within its corporate boundaries in reasonably safe condition for travel and may be held liable for injuries proximately resulting from its failure to do so.

7. Municipal Corporations ⇐798

In fulfilling its nondelegable duty to maintain streets, it is necessary for cities to maintain traffic signals in reasonably safe, visible and working condition.

BOWEN v. RIVERTON CITY

Cite as, Utah, 656 P.2d 434

Utah 435

8. Judgment ⇐181(33)

Whether city, which was arguably negligent in not conducting immediate inspections of signs where road maintenance work was done, and which after receiving notice that stop sign was down sent individual to repair sign rather than calling police to regulate traffic until sign could be raised, fulfilled its duty to maintain city streets in safe condition was question of fact to be determined by jury, precluding summary judgment in action arising from automobile collision at intersection.

9. Municipal Corporations ⇐798

Municipality has duty to respond in reasonable fashion once it is on notice of defective sign or signal.

John G. Mulliner, Orem, Gary B. Ferguson, Salt Lake City, for plaintiffs and appellants.

Raymond Berry, Salt Lake City, for defendants and respondents.

STEWART, Justice:

In this personal injury action, plaintiffs appeal an adverse summary judgment on the ground that there are issues of material fact which should be tried by a jury. Riverton City, the defendant, seeks affirmance of the summary judgment and, in the alternative, argues that plaintiffs failed to file a timely notice of appeal and that the appeal should therefore be dismissed. We reverse the summary judgment and remand for a trial on the merits.

At approximately 1:08 p.m. on Saturday, April 9, 1978, two cars collided at the intersection of 12600 South and 2700 West in Riverton, Utah. The vehicle driven by plaintiff Kristine Bowen was westbound on 12600 South. The other vehicle, driven by Sterling Draper, was travelling north on 2700 West. Traffic on 2700 West is required to stop and yield the right of way to traffic on 12600 South. However, on the day of the accident, the stop sign regulating northbound traffic on 2700 West was lying on the ground and the Draper and Bowen automobiles collided in the intersection.

Prior to the accident, a passing motorist noticed the sign was down and notified Riverton City at 12:50 p.m., approximately eighteen minutes before the accident. A Riverton City employee responded to the notice of the fallen sign, but arrived after the accident.

On November 29, 1978, the Bowens filed suit (Bowen suit) against Sterling Draper, Riverton City, and Enoch Smith Sons Company, a construction company that had worked on the intersection the day prior to the accident. On January 25, 1979, Draper filed suit (Draper suit) against Kristine Bowen, Riverton City, and Enoch Smith Sons Company. The Bowen suit alleged that Riverton City was negligent in maintaining the stop sign and in responding negligently when it received notice of the downed stop sign. Crossclaims and counterclaims were subsequently filed by the defendants. On motion of Riverton City, the trial court ordered the Bowen and Draper cases consolidated pursuant to Utah R.Civ.P. 42(a).

On January 26, 1981, the trial court granted summary judgments for Riverton City in both the Draper and the Bowen actions. On January 27, 1981, summary judgment was granted in favor of Enoch Smith Sons Company, a defendant in the Draper action, and against all other parties. On February 2, 1981, the Bowens, as plaintiffs in the Bowen action and as crossdefendants in the Draper action, filed a "notice of intent to appeal" the summary judgment entered in favor of Riverton City. On March 25, 1981, pursuant to stipulation, the trial court awarded Bowens a money judgment against Sterling Draper in the Bowen action. On April 13, 1981, counsel for Sterling Draper, Florence Draper, Kristine Bowen, and Cynthia Bowen stipulated and agreed that all claims, counterclaims and crossclaims set forth in the Bowen and Draper actions could be dismissed with prejudice, except for claims against Riverton City, since such claims, counterclaims and crossclaims had been fully compromised and settled. On the same day the parties remaining in the Bowen and Draper actions

moved for an order dismissing the actions since all matters but for the claims against Riverton City had been compromised and settled. On April 13, 1981, pursuant to the motions and stipulations filed by the parties in both actions for dismissal with prejudice and in an order bearing the heading and numbers of both the Bowen and Draper actions, the court ordered that all claims, counterclaims and crossclaims, except for the claim of Kristine Bowen against Riverton City, be dismissed with prejudice. On May 12, 1981, Bowens filed a notice of appeal in the Bowen suit.

Riverton City claims that the final judgment in the Bowen suit was rendered March 25, 1981, and since the notice of appeal was not filed within the jurisdictional one-month period from that time, this Court lacks jurisdiction to entertain this appeal.¹ The Bowens, on the other hand, argue that the final judgment in these cases was not entered until the order dated April 13, 1981. Since the Bowens filed their notice of appeal within one month from that date, they contend the appeal is properly before this Court.

[1] Since failure to file a timely notice of appeal is jurisdictional, this Court lacks jurisdiction to hear an appeal if notice was not timely filed. *In re Ratliff*, 19 Utah 2d 346, 431 P.2d 571 (1967); *Anderson v. Anderson*, 3 Utah 2d 277, 282 P.2d 845 (1955).

[2] Without deciding whether consolidated actions should be treated as a single action for purposes of appeal,² we shall deal with the actions in this case as separate and distinct for determining the timeliness of appeal. Nevertheless, we hold the April 13 order, entered pursuant to the stipulation of counsel in both actions, is the final judgment in each case for the purpose of calculating the timeliness of the appeal. Calculating the timeliness of the appeal as of the entry of that order dismissing all claims,

counterclaims, and crossclaims in both actions, we hold the Bowens timely filed this appeal.

The next issue is whether summary judgment was appropriately awarded to Riverton City in this action. The Bowens assert that Riverton City was not only negligent in maintaining the stop sign but also responded negligently upon receiving notice that the sign was down.

[3-5] Summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *In re Williams' Estates*, 10 Utah 2d 83, 348 P.2d 683 (1960). If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment. *Durham v. Margetts*, Utah, 571 P.2d 1332 (1977); *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62 (1964). Although summary judgment may on occasion be appropriate in negligence cases, it is appropriate only in the most clear-cut case. *FMA Acceptance Co. v. Leatherby Insurance Co.*, Utah, 594 P.2d 1332 (1979). See *Preston v. Lamb*, 20 Utah 2d 260, 436 P.2d 1021 (1968). In *Singleton v. Alexander*, 19 Utah 2d 292, 294, 431 P.2d 126, 128 (1967), this Court stated:

Summary judgments are more frequently given in contract cases . . .

However, when it comes to determining negligence, contributory negligence, and causation, courts are not in such a good position to make a total determination for, here enters a prerogative of the jury to make a determination of its own, and that is: Did the conduct of a party meas-

1. Utah R.Civ.P. 73(a) provides in part: "[T]he time within which an appeal may be taken shall be one month from the entry of the judgment or order appealed from A party may appeal from a judgment by filing with the district court a notice of appeal"

2. See generally *State ex rel. Pacific Intermountain Express Inc. v. Dist. Court of Second Judicial Dist.*, Wyo., 387 P.2d 550 (1963); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2386 (1971).

ure up to that of the reasonably prudent man, and, if not, was it a proximate cause of the harm done?

[6-8] In evaluating the facts of this case in a light most favorable to the Bowens, we hold that summary judgment in favor of Riverton City was improperly awarded. The city has a nondelegable duty to exercise due care in maintaining streets within its corporate boundaries in a reasonably safe condition for travel, *Murray v. Ogden City*, Utah, 548 P.2d 896 (1976); *Sweet v. Salt Lake City*, 43 Utah 306, 134 P. 1167 (1913); *Bills v. Salt Lake City*, 37 Utah 507, 109 P. 745 (1910), and the city may be held liable for injuries proximately resulting from its failure to do so. *Nyman v. Cedar City*, 12 Utah 2d 45, 361 P.2d 1114 (1961). See also U.C.A., 1953, §§ 41-6-22 and 63-30-8. In fulfilling this duty, it is necessary for cities to maintain traffic signals in a reasonably safe, visible, and working condition. *Smith v. City of Preston*, 97 Idaho 295, 543 P.2d 848 (1975). Whether the city fulfilled its duty to maintain the city streets in a safe condition in the instant case is a question of fact to be determined by the jury. See *Shugren v. Salt Lake City*, 48 Utah 320, 159 P. 530 (1916).

In Riverton City's answers to the Bowens' interrogatories, it stated that visual inspections were made by city personnel of all traffic signs within Riverton City on an annual basis to insure that the signs were in place. It is arguable that Riverton City was negligent in not conducting immediate inspections of signs where road maintenance work was done. Reasonable persons might differ as to whether the annual inspections conducted by Riverton City were sufficient under the circumstances. Enoch Smith workers present at the intersection the day before the accident stated that the sign was loose and blowing in the wind.

[9] Riverton City argues that the eighteen minutes between its receipt of notice and the accident was insufficient time to take corrective action. Of course, a jury might so find. But clearly, a municipality has a duty to respond in a reasonable fashion once it is on notice of a defective sign or

signal. *Gaspard v. Stutes*, La.App., 380 So.2d 201 (1980); *Bergen v. Koppenal*, 97 N.J.Super. 265, 235 A.2d 30 (1967), app'd 52 N.J. 478, 246 A.2d 442 (1968). In *Lochbaum v. Bowman*, La.App., 353 So.2d 379, 381 (1978), the court stated:

[T]here was no attempt [by the highway department] to notify law enforcement personnel to direct traffic until repairs could be accomplished. The Department's radio operator simply notified the service man on call, who got dressed, went to the office to pick up tools, and finally arrived on the scene after the accident had occurred.

We conclude that the Department was negligent both in failing to properly maintain the traffic signal at the intersection and in failing to take steps when notified of the malfunction to alert the proper authorities so that traffic at the intersection could be directed manually until repairs could be accomplished.

After notice was received in the instant case, Riverton City responded by sending an individual to repair the sign rather than calling the police to regulate traffic until the sign could be raised. Whether it should, and if so could, have responded more effectively and quickly is a matter for trial.

Reversed and remanded for trial. No costs.

HALL, C.J., and OAKS, HOWE and DURHAM, JJ., concur.



HORSLEY v. ROBINSON et al.

No. 6940.

Supreme Court of Utah.

Nov. 6, 1947.

1. Appeal and error ⇨ 989

The reviewing court is not concerned with preponderance of evidence, but only with question of whether there is substantial evidence to support verdict. Const. art. 8, § 9.

2. Carriers ⇨ 297

The driver of passenger vehicle owes passengers duty to operate vehicle within such rate of speed as a reasonable prudent person would operate under the existing circumstances.¹

3. Carriers ⇨ 295(1)

The operator of bus must exercise a proportionate increase in care to avoid injury to his passengers where road and weather conditions make driving hazardous.

4. Carriers ⇨ 320(17, 21)

In action for injuries received by bus passenger when bus collided with oncoming automobile which skidded into path of bus on icy highway, evidence relating to speed of bus and distance between bus and automobile when automobile went out of control was sufficient for jury on question of negligence in operation of bus. Utah Code 1943, 57-7-113(a).²

5. Carriers ⇨ 316(4)

In action for injuries sustained by bus passenger when bus collided with oncoming automobile which skidded into path of bus on icy highway, where there was evidence from which jury could infer that bus was traveling at excessive speed under the circumstances, it was unnecessary that plaintiff introduce evidence of distances in

which bus could be stopped at various speeds and under various circumstances.

PRATT, J., dissenting.

Appeal from District Court, Third Judicial District; Salt Lake County; C. E. Henderson, Judge.

Action by Erma D. Horsley against B. H. Robinson and others, doing business as the Utah Transportation Company, and another to recover for injuries sustained in a collision between the company's bus and an automobile. Judgment for the plaintiff against the company and the company appeals.

Judgment affirmed.

Moyle, McKay, Burton & White and R. A. Burns, all of Salt Lake City, for appellants.

Hanson & Hanson, for defendant.

Judd, Ray, Quinney, & Nebeker, all of Salt Lake City, for respondent.

WADE, Justice.

The defendant, Utah Transportation Company, appeals from a \$5,175 verdict in favor of plaintiff Erma Horsley for damages suffered in an accident while riding as a passenger for hire in a bus operated by the transportation company between Hill Field and Salt Lake City. The same jury returned a verdict of no cause for action in favor of the defendant Reinhardt.

There was an aisle down the center of the bus with seven double seats on each side and one long seat for five persons across the rear end, thus seating 33 persons besides the driver. In the accident plaintiff was thrown forward causing her throat to strike against the back of the seat in front of her and thereby causing injuries which affected her voice.

The accident occurred about 5:25 p. m. on January 23, 1944, in Davis County a

¹ Paul v. Salt Lake City Ry. Co., 30 Utah 41, 83 P. 563.

² Cederloff v. Whited, Utah, 169 P.2d 777; Hart v. Kerr, Utah, 175 P.2d 475; Nikeropoulos v. Ramsey, 61 Utah 465, 214 P. 304; Dalley v. Mid-Western Dairy Products Co., 80 Utah 331, 15 P.

2d 309; Haarstrich v. Oregon Short Line R. Co., 70 Utah 552, 262 P. 100; O'Brien v. Alston, 61 Utah 368, 213 P. 791; Green v. Higbee, 66 Utah 539, 244 P. 906; Morrison v. Perry, 104 Utah 151, 140 P.2d 772.

short distance north of the Salt Lake-Davis County Line on highway 91, the main highway between Ogden and Salt Lake City. The paved portion thereof consists of four 10 foot traffic lanes with a 13 foot shoulder on each side. At the time of the accident the shoulders were lined with snow banks which substantially reduced their width, the highway was covered with ice, and slush and a sleet of snow and rain was falling, thus rendering driving conditions very hazardous. While the bus was proceeding southward at a speed between 20 and 50 miles per hour in the outside west traffic lane on the driver's extreme right-hand side of the highway in the proximity of a long and very gradual curve and on a slightly down hill slope, the defendant Reinhardt was approaching driving his car from the opposite direction at from 20 to 30 miles per hour in the east traffic lane next to the center of the highway, when suddenly Reinhardt's car went out of control and swung around so that it was facing to the south in the outside west traffic lane and directly in the course of the oncoming bus. While the car was moving slowly toward the south the left front side of the bus ran into the rear right side of the car thereby shoving it down the highway a distance of from 30 to 50 feet where it was stopped by colliding with another car on the highway. By the impact with the Reinhardt car the bus was turned slightly to the west where it ran into another automobile which was parked on the west shoulder which deflected its course toward the east and it finally came to a stop in the snow bank on the east side of the highway about 75 feet from the parked car.

The terms "between distance" and "distance between" used throughout this opinion to indicate the distance between the bus and the Reinhardt car when it first became discernible that the latter was out of control, and the term "due care speed" used to indicate a reasonable speed in view of the surrounding circumstances, were suggested by Mr. Justice Wolfe. The word "control" is used herein in its ordinary sense to mean the ability of the driver to stop or reduce the speed of his vehicle within a reasonable distance and to guide the same in the desired course.

186 P 2d 592

From the evidence it is clear that when the Reinhardt car commenced to turn it was within full view of the driver of the bus but that he did not slacken his speed prior to the collision nor apply his brakes until within 5 or 10 feet of the Reinhardt car. From these facts one of three things or a combination thereof must have caused the accident: (1) the Reinhardt car went out of control and into the course of the bus when it was so near thereto that there was no time for the bus driver to do anything to avoid the accident, (2) the driver of the bus, although he had sufficient time and had the bus under sufficient control to avoid the accident failed to see that the Reinhardt car was turning into his course in time to avoid the accident, or seeing it in time failed to exercise the necessary control to avoid the accident, or (3) the bus driver, although he had sufficient time after the Reinhardt car commenced to turn into his course to avoid the accident had he had the bus under control did not have the bus under sufficient control to avoid the accident.

If the Reinhardt car went out of control and into the course of the bus when it was so near thereto that the driver did not have time to avoid the accident then defendants were not negligent and plaintiff cannot recover. *Cederloff v. Whited*, Utah, 169 P 2d 777, *Hart v. Kerr*, Utah, 175 P 2d 475. If the second proposition above stated was the cause of the accident then clearly the defendants were negligent and such negligence proximately caused the accident because clearly the driver owes a duty to keep a proper lookout and see substantial objects on the road in front of him and to take the necessary steps to avoid colliding therewith and if he failed to do so he is liable for the damages resulting therefrom. However, I am not sure that the evidence would justify the jury in finding that such was the cause of the accident. If the accident was caused by the third set of facts above set out then the jury could from the evidence find facts sufficient to sustain a finding that the driver negligently operated the bus at such a speed that he was unable to maintain sufficient control thereof to avoid the accident. So it is necessary to analyze the evidence and determine what

facts the jury could reasonably find therefrom

The controlling facts for the jury to determine are (1) At what rate of speed was the bus travelling at the time of the accident? (2) How far was the between distance? (3) Did the driver have sufficient control over the bus to stop it within the between distance? And from those facts the jury would have to determine whether the defendants were guilty of negligence which proximately caused the accident and injuries. The jury had before it evidence that the bus was traveling as slow as 20 and as fast as 50 miles per hour.

From all the evidence how fast could the jury reasonably find the bus was traveling? The testimony adduced by the defendants fixed its speed at from as slow as 20 to slightly faster than 25 miles per hour, and plaintiff fixed it at 50 miles per hour. The fact that the bus struck the Reinhardt car and shoved it from 30 to 50 feet where it was stopped when it hit a parked car, and the fact that after striking the Reinhardt car the bus swerved to the right into another parked car and was deflected to the left across the highway where it was stopped by a snow bank about 75 feet from the parked car indicates that it was traveling with considerable speed. The evidence would sustain a finding by the jury that the bus was traveling as fast as 40 miles per hour.

What is the maximum which the jury, from the evidence, could find the between distance was? Plaintiff testified that that distance was a Salt Lake City block (660 feet), Reinhardt estimated it at less than 300 feet and the bus driver estimated it at 75 to 100 feet. These were all interested witnesses but six passengers on the bus at the time of the accident were called by the defendants who testified at various distances ranging from 30 feet to 330 feet. All of them except one fixed it at 150 feet or less. The sixth witness was a Mrs. Sessions who when on direct examination by defendants' counsel without leading was asked what that distance was answered twice that it was about a half a Salt Lake City block (330 feet). Later defendants' counsel led her into estimating that distance at about the width of a Salt Lake

City street (100 feet). Apparently she did not recognize that this testimony was in conflict with her previous statement. From the position the Reinhardt car was struck and the testimony of all the witnesses, it had turned completely in the opposite direction and was traveling slowly toward the south, the same direction that the bus was going. This would require some time. From all of the evidence we conclude that the jury could have reasonably found that the between distance was as far as 330 feet.

It is argued that since there is no evidence of the distance required to stop the bus under the then existing conditions at any given rate of speed the evidence is not sufficient from which the jury could find the defendants guilty of negligence which proximately caused the accident. If plaintiff must, in order to make a case, show that the driver could have stopped the bus within the between distance then her evidence is clearly insufficient to justify a finding in her favor, because the evidence does not justify such a finding.

On the contrary the evidence points definitely to the fact that the driver did not have the bus under sufficient control so that he could either bring it to a stop, reduce its speed or steer it to one side sufficiently to avoid the accident within the in between distance. And this is true even though, that distance was as far as 330 feet.

The following facts quite definitely point to that conclusion. The icy highway covered with snow and slush with a sleet of snow and rain falling, the fact that the Reinhardt car went completely out of control while traveling from 20 to 30 miles per hour, one witness testified that as he approached the scene of the accident from the north he slowed his car down and put it in intermediate gear in order to insure that he could sufficiently control it so that he could safely stop and pick up passengers, the rate of speed at which the bus was traveling which the jury could reasonably find to be as fast as 40 miles per hour, the slightly down hill slope of the highway, the fact that the driver, according to his own testimony saw the Reinhardt car when it commenced to turn and that thereafter, as the jury could reasonably find, he traveled as far as 330 feet without applying

his brakes until within 5 or 10 feet of that car and without appreciably decreasing his speed prior to the impact therewith, point almost conclusively to the fact that the driver did not have the bus under sufficient control to bring it to a stop or to turn it to one side sufficiently to avoid the collision. The jury would be amply justified in so finding.

Here the jury was only required to return a general verdict and we do not know how the jury determined the controlling questions of fact. Had the jury been required to answer special interrogatories covering these questions, and had they answered them in the manner we have above indicated they reasonably could find from the evidence no one would contend that the evidence was not sufficient to sustain such a finding. Since the trial court is not required to submit special interrogatories and therefore we do not know how the jury in fact did determine the controlling issues we must presume that they found the facts necessary to support their verdict if the evidence was sufficient to sustain such a finding. Thus we must view the evidence in its most favorable aspect to support the verdict which the jury has rendered and if from the evidence the jury could reasonably find facts necessary to sustain their verdict it must be sustained. This is true, even though had we been the triers of the facts we would have found them differently, or even though we may not believe that the jury did in fact so find or, even though we believe that such a finding would be against the great preponderance of the evidence.

[1] Under a general verdict we cannot be assured what facts the jury found or that they found the facts necessary to sustain their verdict. So it is universally held under the common law system, as it must be in order to give stability to jury verdicts, that the appellate court must sustain the verdict where the evidence is sufficient to support a finding of the necessary facts to do so. Otherwise, the appellate court would be required to reverse every verdict where in its opinion the great preponderance of the evidence is against a finding of the necessary facts to support it, even though the evidence is such that reasonable

minds might conclude from the evidence that such necessary facts happened. To do so would be to review the evidence no matter what we call it. The question of what were the facts and where is the preponderance of the evidence is for the jury and not for the court to determine. Our problem is only to determine whether there is sufficient evidence to sustain the verdict. In doing so our standard is: Could a reasonable mind be convinced by the evidence of the necessary facts to support the verdict? If so, it must be sustained.

That this court is not authorized to review the facts found by the jury is expressly provided by our Constitution, Article 8, Section 9, where it is provided "In cases at law the appeal shall be on questions of law alone." Since we cannot review the facts, whatever we think of where the preponderance of the evidence is, is immaterial. If we were to review the evidence and reverse this case because we think the preponderance of the evidence on a material issue is against the plaintiff, we do so in violation of that constitutional provision. We cannot avoid violation of this constitutional provision by holding that since we have no assurance that the jury did find that the between distance was 330 feet, we may assume that they found it to be much less and reverse the judgment on that ground; because this requires us first to find that the preponderance of the evidence is against the plaintiff on this question, and thus requires us to review the evidence for that purpose, which the Constitution forbids us to do.

If the jury found the between distance was as far as 330 feet, that the bus was traveling as fast as 40 miles per hour and that the driver did not have sufficient control thereof so that he could stop or turn sufficiently to one side so that he could avoid the accident within that distance, then under the existing circumstances the jury could reasonably find that he was guilty of negligence which proximately caused the accident.

The contention that the defendants were not negligent if the bus could not be stopped within the between distance is based on the assumption that the rate of speed at which the bus was traveling was reasonable

regardless of whether the driver was able to control it under the existing conditions when traveling at such rate, and that the question of how much control the driver could maintain over the bus at such rate of speed is immaterial in determining whether such rate of speed is reasonable under the existing road conditions. What is a reasonable rate of speed under existing conditions must always be determined very largely on how much control the driver can maintain while driving at such rate.

[2] The driver of a vehicle carrying passengers for hire, owes them a duty to operate his vehicle within such rate of speed as a reasonably prudent person would operate under the existing conditions. Under those conditions an increase in speed would proportionately decrease the control of the operator over his vehicle, and increase the danger to his passengers. Reasonable prudence requires that the driver shall not foreseeably expose his passengers to danger of serious bodily harm. If the operator drove the bus at such a fast rate of speed that he should realize that he could not have sufficient control thereof to avoid serious danger to his passengers under the existing road and weather conditions then he was negligent regardless of how slowly he must operate his vehicle in order to assure reasonable safety to his passengers.

[3] Where the road and weather conditions make driving hazardous, reasonable prudence requires a proportionate increase in the care of the driver to avoid injury to his passengers. No rate of speed can be fixed which will be reasonable under all conditions and circumstances. On a clear dry road burdened with little traffic a person could with reasonable prudence operate a vehicle much faster than he could when traveling over a highway covered with slick ice on top of which was slush while a sleet of snow and rain was falling, and where the highway was burdened with heavy traffic. The duty of the operator is to drive his vehicle at such a rate of speed that he can sufficiently control the same so that he does not foreseeably jeopardize the safety of his passengers. He is under this duty regardless of the size and weight of his vehicle and the road and weather con-

ditions. Where the road and weather conditions are bad he must in order to avoid being negligent, reduce his speed to a rate at which he can operate it with reasonable safety.

Here we are only concerned with the defendants' duty to their passengers not with their duty to the public generally nor with their last clear chance duty to Reinhardt. The rules above stated apply to the public generally and especially to a passenger for hire, since a carrier owes to its passengers for hire a duty to exercise greater care for their safety than it owes to the public generally. *Paul v Salt Lake City Ry Co*, 30 Utah 41, 83 P 563.

The mere happening of the accident of course does not prove that the defendants were negligent. Nor does the fact that the rate of speed at which they traveled brought them at the scene of the accident at the time that the Reinhardt car went out of control and into the course of travel of the bus, because that is something that they could not anticipate and guard against. That seems to be the point which is cleared up by the cases of *Whalen v Dunbar*, 44 R I 136, 115 A 718, and *O'Malley v Eagan*, 43 Wyo 233, 2 P 2d 1063 77 A L R 582. But negligence may be inferred from facts and circumstances which according to human experience tend to show and from which reasonable minds might be convinced that in operating the bus as they did under the surrounding facts and circumstances the defendants should have anticipated that they were endangering the safety of their passengers.

It is argued that on an icy highway it is impossible to drive so as to avoid the possibility of all collisions, that the road and weather conditions might be such that even at 5 miles per hour a bus of the size and weight of this one might slide 100 feet or more regardless of anything the driver could do about it. Of course, if this bus had been traveling at the rate of 5 miles per hour the collision with the Reinhardt car would not have injured the plaintiff because, at that rate the bus, being driven against a small car moving in the same direction would not create sufficient jar to injure the passengers. On the other hand, if the conditions were such that the driver

could anticipate that if he drove at the rate of 5 miles per hour he would not be able to stop his bus within 100 feet and that he would thereby seriously jeopardize the safety of his passengers then it would be negligence for him to proceed at such rate of speed. Suppose conditions were such that the driver could anticipate that if he moved at the rate of 5 miles per hour he would slide 100 feet before he could stop and that in so doing he would be apt to slide over the side of the highway and his bus would overturn or slide onto a railroad track where he would be struck by an approaching train, would anyone contend that he could proceed even at that rate of speed without being guilty of negligence?

[4] If the bus under normal road and weather conditions were operated on a highway burdened with heavy traffic, at such an excessive rate of speed that it could not be stopped or turned to one side sufficiently to avoid crashing into another car which came into its course of travel when the bus was 330 feet away and continued slowly in the same direction the bus was traveling, the driver of the bus would clearly be guilty of negligence in driving too fast. The defendants would also be negligent if they operated the bus under normal conditions with such defective steering and braking equipment, on a highway burdened with heavy traffic, so that it could not be stopped or steered to one side sufficiently to avoid a collision with a vehicle which came into its course 330 feet away in the manner that the Reinhardt car did in this case. Here the driver had driven more than 20 miles under similar road and weather conditions which he encountered at the time of the accident. He had ample time to fully realize the amount of control or lack thereof which he could exert over the bus in case of an emergency. The driver must know that this highway would be burdened with much traffic, he as a reasonable prudent man must anticipate that vehicles would be constantly crossing and coming into his course of travel. Under such conditions he must anticipate that it would be highly dangerous for him to operate the bus at such a rate of speed that he could not stop or turn to one side sufficiently to avoid a collision with the

Reinhardt car if it came into his course of travel 330 feet away. The evidence was sufficient from which the jury could find the defendants were negligent.

To this effect, the law is well established in this state: Section 57—7—113, U.C.A. 1943, provides:

“(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care

* * * * *

“(c) The driver of every vehicle shall, * * * drive at an appropriate reduced speed * * * when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.”

This statute requires that a driver shall not drive at a speed greater than is reasonable and prudent in view of the existing conditions and hazards on the highway, that his speed shall be controlled so as to avoid colliding with other vehicles entering or upon the highway in a lawful manner, and that the speed shall be appropriately reduced when special hazards exist with respect to other traffic or by reason of weather conditions. In other words, since the greater the speed the less control the driver has over his vehicle and a longer distance is required within which to stop, and his ability to guide his vehicle is decreased, and since his control will also be decreased when traveling on icy roads covered with slush when a sleet of snow and rain is falling, he must under such conditions according to this statute decrease his speed so that he can drive with reasonable safety to others using the highway and, according to our cases, he even owes greater care to his passengers.

In *Nikoleropoulos v. Ramsey*, 61 Utah 465, 214 P. 304, the defendant was driving his car at night during a heavy rain storm at about 12 miles per hour, in the distance

the lights of oncoming cars reflected on the wet pavement into his eyes so that at the time of the accident he was unable to see the plaintiff walking on the pavement in front of him until he was within 6 feet and then it was too late to avoid running him down. We held that defendant was negligent as a matter of law, no matter how dark and stormy the night or how bad the visibility, if he drove at such a rate of speed that he was unable to avoid running plaintiff down within the distance plaintiff could be seen walking ahead of defendant's car on the highway. To the same effect see: *Dalley v. Mid-Western Dairy Products Co.*, 80 Utah 331, 15 P.2d 309; *Haarstrich v. Oregon Short Line R. Co.*, 70 Utah 552, 262 P. 100; *O'Brien v. Alston*, 61 Utah 368, 213 P. 791.

The *Nikoleropoulos v. Ramsey* case is in substance a holding that it is negligence to operate a vehicle on the highway at any time without having it under sufficient control so that others using the highway will not be unreasonably endangered thereby, regardless of how slow it is required to travel to accomplish that end. If that is the rule where visibility is involved, it follows that the same rule applies where the lack of control which endangers others is the result of slippery roads and stormy conditions. This would be especially true where a passenger for hire is involved. As above pointed out, if the lack of control which caused the danger to the passengers was the result of excessive speed, or defective steering apparatus and faulty brakes, then he would clearly be negligent. Under the above case the fact that the lack of control was the result of bad weather and road conditions, would not exonerate him from negligence.

Here the situation is slightly different than it was in the cases cited in that the Reinhardt car was out of control and moving from one side to the other in an uncertain manner. Under such circumstances a driver might try to pass to one side only to have the skidding car swerve into his path which he expected to be free. However, here as in the cases cited, the driver could be certain to avoid the collision by stopping the bus before it reached the skidding car.

Since the car was traveling away from the bus had the bus been stopped, no collision could have occurred. There is also the difference that in the cases cited, the driver was traveling at nighttime, when the driver's ability to see objects on the highway was limited by darkness, and here there was no such limitation on the driver's ability to see. Since his ability to see was not so limited, his duty to keep his car under control on that account was not so great. In view of these circumstances the driver was not, as a matter of law, guilty of negligence, which proximately caused the accident. But in view of the fact that the jury might have concluded that the car commenced to turn into the path of the bus when it was 330 feet away, and that the weather conditions were such that at the rate of speed the bus was traveling it could not be stopped, slowed down, or brought under control in time to avoid the accident, the jury could reasonably conclude from their own experience and practical judgment, of what an ordinary prudent person would do, that the driver was negligent in driving at such a rate of speed, and that such negligence was the proximate cause of the accident.

If the jury found that when the Reinhardt car commenced to turn into the path of the bus, it was as much as 330 feet away, it being clear from the evidence that the visibility was such and the highway was free from obstructions so that the driver could clearly see the car when it commenced to turn; that the slippery condition of the highway had been the same all the way from Hill Field to the place of the accident a distance of more than 20 miles, thus giving the driver ample opportunity to know how fast he could safely drive and still keep it under proper control; that the accident occurred on a main highway where the driver must anticipate heavy traffic conditions; and in view of the fact that the transportation company owed to its passengers a special degree of care for their safety, the jury might reasonably conclude that the driver was operating the bus at such a fast rate of speed that he could not control it sufficiently to avoid the accident. If the jury so found they could rea-

sonably conclude therefrom that he was guilty of negligence which proximately caused the accident and plaintiff's injury.

This is a finding of negligence from the surrounding facts and circumstances and not merely from the happening of the accident alone. It is universally recognized that negligence may be inferred from the happening of the accident and the surrounding facts and circumstances where the facts are such as to reasonably justify such inference even though there is no direct testimony to establish the exact grounds of negligence which caused the accident. *Green v. Higbee*, 66 Utah 539, 244 P. 906; *Morrison v. Perry*, 104 Utah 151, 140 P.2d 772, which is the last opinion in that case which supercedes the one cited in appellant's brief.

[5] The defendants' negligence is based, not on the premise that the driver could have stopped within the between distance, but on the opposite premise that by reason of excessive speed under the existing conditions he could not stop within that distance, and has thereby foreseeably endangered his passengers. Evidence of the distance required to stop the bus at various rates of speed would be necessary only where it supplies proof of some essential element of negligence which would otherwise be lacking. Here the essential elements necessary to establish negligence on account of lack of a due care rate of speed requires a showing that the bus was being operated at such a fast rate of speed that the driver should have realized that it was out of control to such an extent as to endanger the safety of his passengers. Evidence of the distance required to stop the bus at various rates of speed would tend to show either that the driver did or that he did not have the ability to stop the bus within the in-between distance. If it showed that the driver could stop the bus within the between distance then it would defeat a claim of negligence on this theory, but would conclusively establish negligence on the grounds that had he used due care he would have stopped the bus within that distance and thereby avoided the accident. If it showed that the driver could not stop the bus within that distance then it would

establish one of the necessary elements of this type of negligence, but, as previously pointed out, that element was amply shown by the evidence which was introduced. No complaint is made that such fact was not sufficiently established. The complaint seems to be that such fact was established and that the defendants were thereby exonerated from negligence.

A comparison with other distances will help us to visualize how far 330 feet is. It is 110 yards, one-half of a Salt Lake City block, one-sixteenth of a mile, nearly four times the distance between the poles of an ordinary utility pole line. These distances are familiar to every one who has lived a long time in this state. It is a long and dangerous distance for a bus to travel on a highway burdened with traffic without the ability to stop or reduce its speed sufficiently to avoid a collision such as this.

The distance within which the bus could be stopped at a given rate of speed is an evidentiary fact and not an ultimate one. The value of evidence thereon would be that the ultimate facts which are controlling in this case might be inferred therefrom. That fact would have some bearing on the question of what was a due care rate of speed but it certainly is not controlling on that question.

Here, as above pointed out, there are three sets of facts which were very largely determinative of what was not a due care speed under the existing conditions. They are: (1) How far was the between distance? (2) How fast was the bus traveling? (3) Did the driver have sufficient control over the bus so that his speed was a due care speed? Both of the first two questions were answered by direct evidence, and the question of the distance required to stop the bus when traveling at various speeds would have no bearing on either of them. That evidence would only tend to show whether or not the bus was out of control. Here the evidence is ample to show that the bus was out of control, so that it could not be stopped or its speed reduced sufficiently to avoid the accident. Such evidence was not necessary in order for plaintiff to make a prima facie case, and this court is not authorized to require

the plaintiff to produce it. Especially is this true where as here the missing evidence has no tendency to establish the disputed questions of fact in the case.

Although the smoother the road surface the greater the distance required to stop the bus at a given speed it does not follow that a driver can, without being negligent, drive at such a rate of speed over a smooth road that the safety of his passengers will be thereby jeopardized. What is due care under the existing conditions is determined by the driver's duty to his passengers, and that duty is that he must not foreseeably jeopardize their safety, he has that duty whether driving over a smooth icy road or over a normal dry pavement. To this effect the statute and cases cited are positive. The evidence here was sufficient since the jury could reasonably find that the bus was traveling at 40 miles per hour, that the between distance was 330 feet, and that the bus was out of control so that it could not be stopped or its speed reduced sufficiently to avoid this accident within that distance.

It must be kept in mind that here our problem is whether the evidence is sufficient to sustain the verdict, not whether the evidence in question is admissible. Had defendants offered to prove the distance which would be required to stop the bus under the surrounding circumstances at a given rate of speed and such offer had been rejected we would have had a different problem. Since the evidence was sufficient to make a prima facie case for plaintiff it is sufficient to sustain a verdict in her favor and that is all we can require her to do. She is not required to produce evidence which will tend to defeat her claim. If there are other material facts which defendants wanted to prove they were at liberty to introduce evidence thereof but they certainly cannot defeat plaintiff's claim merely on the ground that she has failed to produce all the material evidence. This is especially true where as here the defendants are in a better position to supply the missing evidence than is plaintiff. They, no doubt, have as their employees many experienced drivers of buses similar to this one whom they could call to give evidence on the distance required to stop the bus under the then existing conditions

and the driver who was then operating the bus at the time of this accident was in a better position to know these facts than any one else.

We have carefully considered the other assignments of error and find no merit in them. The judgment of the trial court is affirmed with costs to the respondent.

McDONOUGH, C. J., concurs in the opinion of Mr. Justice WADE as elucidated by the opinion of Mr. Justice WOLFE.

WOLFE, Justice (concurring).

I concur.

While there is much in the reasoning of the main opinion with which I am in accord, there are a number of statements with which I do not agree. Rather than enter into a critical analysis of those statements pointing out wherein I think they are incorrect, I believe a more constructive contribution can be made by an elucidation of some of the concepts applicable to speed cases and in pointing out the peculiar nature of the bus driver's responsibilities to his passengers in view of the situation which confronted him—that is, the sudden and unexpected sliding of the Reinhardt car athwart the right of way of the bus—as compared to the duty of the driver generally to drive at a due care speed when no emergency confronted him.

I shall preface the main part of my opinion by a brief consideration of the phrase "control of a car", or its equivalent, "car under control", and its counterpart, "out of control". I am convinced after some years in the practice and on the bench that these phrases are often used without sufficient thought as to their conceptional content in view of the facts of the particular situations claimed to involve negligence.

Ordinarily the word "control" applied to the operation of a moving mechanical object such as a car when used in the phrase "under control" as distinguished from "out of control", means that the operator has the power to make the car respond to his will which in the case of an automobile means that it will respond to his steering and to his action to accelerate or decelerate by manipulating the throttle or brake.

"Out of control" usually means that the car can no longer be depended upon to respond to the driver's efforts to guide or slow it. I go to some pains to describe these terms because I think that they are often used in a different and perhaps inexact sense. "Out of control" is the opposite of "under control" but excess speed is not the counterpart of "under control". Cars going at high speed may be under control in the sense that they are not out of control. We have an excellent example of a car "out of control" in the movements of the Reinhardt car. In many cases a pleader will use the phrase "failed to have proper control of the car" as meaning that the driver was going so fast as not to be able to slow down for eventualities although there was no inability of the driver to steer the car, apply brakes or decelerate the car. The only reason he could not do so in time to avoid an accident was that he was going too fast. Such allegation is synonymous with "excess speed" which in turn may be included in the still more inclusive phrase "driving without due care under the circumstances" or equivalent phrases. The pleader tends to multiply stigmata of delict in order to make defendant's conduct seem as reprehensible as possible. For the purpose of framing issues it is well to particularize as to the nature of the failure to exercise due care. In this case also we must fasten on what we mean when we use the phrases "under control" and "out of control".

In his opinion Mr. Justice Wade states definitely that he uses the word "control" to "mean the ability of the driver to stop or reduce the speed of his vehicle within a reasonable distance and to guide the same in the desired course". I take this to be somewhat equivalent to what I shall call "due care speed", which I define as the speed which a driver should not exceed, in view of the likelihood of eventualities—not to avoid all collisions which no driver could do—but to enhance the possibility and probability of avoiding collisions. "Due care speed" is that speed at which a prudent and careful driver should drive in view of the prevailing weather and road conditions, and in view of the condition and responsiveness of the braking apparatus

on his machine and his duty to passengers, and to other traffic on the highway.

It should be said at the outset that I do not wish to be understood as saying that the jury must necessarily fix upon a speed that would be a maximum due care speed under a given set of circumstances. The speed at which a person was going might be considered as "too fast"—to use the popular vernacular—without the jury having to consult and agree or even have in mind a process or definite figure as being the upper limit of due care speed.

Therefore, in order not to confuse speed with "control" used in the sense of ability to manipulate the car, I shall use instead of the word "control", the phrase "due care speed" and shall use the term "excess speed", to mean speed in excess of due care speed. Speed seems, even under Mr. Justice Wade's interpretation of the word "control", to be the essence of "keeping control" or of "control" although at one place in his opinion he seems to confuse the meaning with "out of control".

[5] In this case both sides introduced testimony as to the rate of speed at which the bus was travelling at the time the Reinhardt car went out of control and skidded into its path. Both sides also presented testimony as to the distance between the bus and the Reinhardt car at the time the Reinhardt car went out of control. This distance is hereinafter referred to as the "between distance". In addition to this, there was some evidence of circumstances surrounding the collision from which inferences of speed might have been made. Neither side offered evidence of the distances which would be required to stop the bus, travelling at various speeds, under the road and weather conditions prevailing at the time of the collision. I shall hereafter refer to such distances as "stopping distances". Appellant contends that the failure of plaintiff to introduce such evidence amounts to a failure of proof. Appellant's position is that without such evidence the jury could not determine what was a reasonable speed, and therefore could not say whether or not the bus was travelling at an excessive speed. This question is fraught with considerable difficulty.

As background, and for better understanding of the problem involved, I believe it would be helpful first to consider the duty of the bus driver to Reinhardt. His duty in this respect would be purely one of last clear chance. Even if he were travelling too rapidly in view of the skidding hazards his speed would not have been the proximate cause of the accident. His duty would arise only when he perceived or should have perceived the Reinhardt car spinning toward his path and then it would have been his duty to avoid the collision if, and only if, under all the circumstances, taking into account the speed at which he was going, he had had ample opportunity to stop or slow up sufficiently to go around the Reinhardt car if there was room for doing that without endangering his passengers. A driver is not ordinarily required to anticipate that another will have gotten out of his proper path of travel and that he, the driver, must drive so as to create for some other a last clear chance opportunity. A driver of a car does not carry with him an anticipatory last clear chance obligation. Such obligation arises only after the operator of the vehicle is or should be aware of the position of the other, who, being in a position of danger, is unaware of his peril, or, if aware, unable timely to extricate himself from it. *Graham v. Johnson*, Utah, 166 P 2d 230, on rehearing, 172 P 2d 665. Nor would he be compelled to apply his brakes suddenly on an icy pavement if there were danger of his skidding off the road by so doing. The high care with which he was charged as operator of a public transport vehicle at the moment of discovery might require that he release the throttle and let the momentum of the car in part deplete itself before he applied the brakes. That might also have been the best thing to have done for the safety of his passengers even in this case. Or conditions may have been such that a due care speed would be one in which he had not gathered momentum and therefore could apply his brakes instantaneously. Due care speed may revolve around the time it takes to run out momentum before brakes can be applied with safety. The difference between the case of the bus driver's duty toward Reinhardt and the

passengers lies then in this. That as to Reinhardt, whose car suddenly spun in his path, the bus driver's speed cannot be the proximate cause of the accident (laying aside the case where the oncoming driver was going in excess of the legal speed, a case which I desire to reserve until it comes before us properly for consideration), but only failure to take advantage of the opportunity to avoid the collision if it reasonably presented itself, taking into account the bus driver's speed, whilst as to passengers the bus driver has the duty to drive with the care that a reasonably prudent person would have exercised under like circumstances, and that means a due-care speed in view of slippery pavements and eventualities which may arise therefrom. As to passengers, if the driver exceeds a due-care speed he carries such negligence with him although it may or may not have proximately caused an accident. In many instances, negligence does not result in accidents. As to Reinhardt, the duty arose only after the bus driver did or could have seen Reinhardt's predicament. Reinhardt could not contend that had the bus driver been going slower there would have been more distance within which to stop, for by the same token, had the driver been going faster he might have passed the point where Reinhardt spun onto his pathway before the spin began. No person who gets himself into a dangerous position whether by negligence or without fault can contend that, had the oncoming party been going slower, he would have had a greater last clear chance to stop. The last clear chance duty is one which arises out of the scene as the defendant finds it, it does not take into account antecedent conditions. If it did the plaintiff might argue that had the defendant been proceeding at a due-care speed, he would even have arrived at the scene of danger before he, the plaintiff, extricated himself from such danger and thus argue that in such wise the excessive speed was the proximate cause.

[2,3] - But as to a passenger in the bus, the last clear chance doctrine is not applicable as a last clear chance concept. There would be the same obligation as in the last clear chance doctrine to do everything to avoid the accident consistent with safety.

toward his passengers but that would be in addition to the continuing duty to drive at a due care speed in view of possible eventualities and before they arose, and would therefore be a part of the bus driver's duty toward his passengers. The duty toward such passengers is to exercise continuous high care that they be not injured by the driving. And that means that the driver must drive as a prudent person would drive in view of his duty toward passengers, which I have designated for shortness "due care driving", or "due care speed". This means that the speed must be adapted to the hazards such as ice, snow, traffic and the like and, to an extent, to the likelihood of eventualities. Of course, no one can drive on an icy day so as to avoid all possible collisions. The Reinhardt car might have skidded directly in front of or even into the side of the bus no matter how slowly it was going, or even if it were stopped. Consequently, the collision itself does not prove excess speed. Such conclusion must come from the evidence or from inferences from other facts, although by taking into consideration such other facts the fact of the collision, or the force of it, may themselves be facts from which, in view of the total picture, inferences could be made.

When a car, through loss of control or other reason, suddenly and unexpectedly spins away from its side of the highway into the pathway of another vehicle coming from the opposite direction, we must be careful not to load onto the driver of the other vehicle, even as to a passenger, the duty to avoid the danger of the spinning car unless there is some negligence on the part of the driver of the vehicle remaining on its own right of way, which negligence proximately caused the injury to the passenger.

[1] It is conceded that it is the duty of the appellate court to sustain a verdict where there is substantial evidence to support it. I shall not enter into the matter of the appellate court's duty when the evidence is claimed to preponderate so plainly against the verdict as to show an abuse of discretion in the trial court in refusing to set the verdict aside as arrived at arbitrarily or through bias or prejudice or pal-

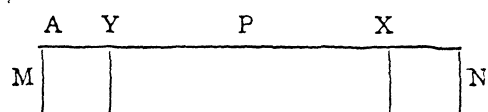
pable failure to follow the court's instructions. I think it unnecessary to bring those matters into this case.

Returning now to the real problem of the case, I think it may be analyzed by breaking it into two parts. I shall first consider the sufficiency of the evidence of between distances to prove excess of due care speed. I shall then consider the direct testimony of speed, and whether or not it is sufficient to justify an inference of excess speed.

There must be some minimum between distance, which is so great that all reasonable minds would conclude that if a vehicle were proceeding along the highway at so great a speed that it could not be stopped within such distance, then such vehicle was travelling at an excess of due care speed. I shall call this distance x . Let us assume that the between distance is one mile. All reasonable minds would conclude that a bus that could not be stopped within one mile was being driven at an excess of due care speed. One mile is either x distance or x plus.

There must also be some maximum between distance so short that all reasonable minds must conclude that a vehicle travelling at a due care speed would not be able to stop within such distance. I shall call this distance y . Let us assume that the between distance is 10 feet. All reasonable minds would say that a bus travelling at maximum due care speed could not stop within such distance. Ten feet is either y distance or y minus.

Perhaps these concepts can be better explained by a simple illustration.



Let the line M N represent the highway. The bus is travelling from M toward N. From point A to point Y is y distance. From point A to point X is x distance. P represents any point between Y and X and p is the distance from A to P. Thus P represents every point between Y and X, and p represents every distance greater than y and less than x . When the bus arrives at point A, the Reinhardt car skids onto the west side of the highway into the

path of the bus. If when the bus is at point A, the Reinhardt car is at point X or at any point beyond X, the bus, if travelling at a due care speed, can be stopped in time to avoid collision. If the bus cannot be stopped in time to avoid the collision, all reasonable minds will agree that it is travelling at excess of due care speed.

If when the bus is at point A, the Reinhardt car is at point P, reasonable minds may differ as to whether or not a bus travelling at due care speed would be able to stop in time to avoid the collision. In other words, reasonable minds may differ as to whether or not a bus travelling at a due care speed would be able to stop within distance p, or stated conversely, whether or not a bus unable to stop within the distance p was travelling at a due care speed. The closer P is to X, or the more closely p approximates x, the greater the number of reasonable minds which would conclude that a bus not able to stop within p was travelling at an excess speed, and conversely the nearer P is to Y, or the more closely that p approximates y, the fewer the reasonable minds that would conclude that because a bus was not able to stop within p it was travelling at an excess of due care speed.

If when the bus is at point A, the Reinhardt car is at point Y or any point between A and Y, if the bus is travelling at the maximum due care speed, all reasonable minds will agree that the bus could not stop in time to avoid the collision. A bus travelling at less than the maximum due care speed might be able to stop within y distance, and of course, it would be the duty of the driver to stop if possible. A failure to stop under such circumstances would make the operator of the bus liable—not because he was negligent in travelling in excess of due care speed—but because he failed to utilize the last clear chance to avoid the collision.

With these concepts in mind, I think certain general rules can be laid down as regards the necessity of introducing evidence of the various distances required to stop a vehicle travelling at different rates of speed under the conditions prevailing at the time of the collision. These rules are intended to apply only where the plaintiff

introduces no direct evidence of speed, but leaves speed to be inferred by the jury from the evidence of between distance alone.

(a) Where the evidence is conclusive that the between distance was x or greater than x, evidence of stopping distance would be immaterial. The defendant was travelling at an excess speed as a matter of law.

(b) Where the evidence is conclusive that the between distance was y or less than y, defendant is entitled to a directed verdict, since he would not be able to aver the accident even though travelling at a due care speed. From the between distance alone, no reasonable mind could infer excess of due care speed, and therefore there would be no evidence of excess speed to go to the jury.

(c) Where the evidence adduced by plaintiff tends to show that the between distance was x or greater, and the evidence adduced by defendant tends to show that the between distance was p, the burden is on defendant to show the stopping distances. The reason for this rule is: Plaintiff, having produced evidence that the between distance was x or greater has put in proof, which if uncontradicted, entitles him to a directed verdict (absent contributory negligence). Defendant, by adducing evidence that the between distance was p has not completely rebutted plaintiff's proof, since reasonable minds might conclude that even within distance p a bus travelling at due care speed could be stopped. In other words, in order to completely rebut plaintiff's evidence, defendant must not only show that the between distance was less than x (i.e., p), but also that a bus travelling at a due care speed could not be stopped within distance p. This does not mean that if defendant fails to offer evidence of stopping distances that plaintiff is entitled to a directed verdict. What I do mean is that defendant assumes the risk of failure to produce such evidence, and if the jury finds for plaintiff, defendant cannot complain that the proof is insufficient. And, of course, where defendant offers proof that the between distance was p, but fails to offer proof of the stopping distances, plaintiff may on rebuttal

fail show the stopping distances to prove that a bus driven at a due care speed would be able to stop within distance p . In short, either party may offer evidence of the stopping distances, but neither may complain that the other failed to produce such proof.

(d) Where the evidence adduced by both parties is that the between distance was p , either party may introduce evidence of the stopping distances, but neither is bound to do so. Plaintiff may offer such evidence to show that a bus driven at a due care speed could be stopped within p , or defendant may offer such evidence to show that a bus driven at due care speed could not be stopped within distance p . However, in the event of an adverse verdict neither can complain that the other failed to offer the requisite proof.

(e) Where plaintiff's evidence shows that the between distance was p , and defendant's evidence shows that the between distance was y , the risk of failure to provide evidence of stopping distances is on plaintiff, but failure to furnish this evidence is not failure of proof, and plaintiff is entitled to go to the jury. And, of course, defendant may offer evidence of stopping distances as rebuttal to plaintiff's evidence. This is the converse of rule (c).

(f) Where plaintiff's evidence is that the between distance was x , or greater, and defendant's evidence is that the between distance was y , or less, either party may, but neither party must, produce evidence of the stopping distances.

Other situations may be conceived where some of plaintiff's witnesses put the between distance at x or greater, while others put it at p , and where some of defendants' witnesses put the between distance at y or less, and others put it at p . Without segregating all of the possible combinations of evidence, I think it may be said that in these cases either party may offer evidence of the stopping distances, but neither is bound to do so.

Summarizing briefly, there is no situation in which the failure of either party to prove stopping distances will be so fatal to his case as to take it from the jury. Only where the evidence conclusively establishes the between distance as x or

greater, or at y or less, will the case be taken from the jury. In all other situations there is sufficient evidence to go to the jury. Either party may offer evidence of stopping distances, either in support of his case in chief, or in rebuttal to the evidence of the adverse party. In most cases it will be advantageous for one side or the other to offer such evidence. But if both sides neglect to offer such evidence, neither can complain that the other failed to do so.

I think we may analyze speed in the same manner as we have analyzed between distance. Let r represent the minimum rate of speed which all reasonable minds will agree is in excess of due care speed under prevailing conditions. Let s represent the maximum rate of speed which all reasonable minds will agree is a due care speed under prevailing conditions. And let k represent all speeds between s and r . Reasonable minds would differ as to whether a bus travelling at k speed was at due care or excess speed. We may now parallel rules (a) to (f) announced above. Where the evidence is undisputed that the bus was travelling at r speed or greater, or at s speed or less, evidence of stopping distances would be of no value since excess of due care speed, or due care speed would be proved as a matter of law by direct evidence of speed. But where the evidence shows that the bus was travelling at k speed, or where there is a conflict in evidence as to whether the bus was travelling at r speed, k speed, or s speed, evidence of stopping distances may be introduced by either party, either in support of his case in chief or in rebuttal of the evidence produced by the other side. But neither party has the duty to offer such evidence, and neither can complain, in the event of an adverse verdict, that the other party failed to prove his case.

As heretofore noted, in this case, as in most cases, there was evidence both of between distances and speed. The evidence of speed varied from 25 to 50 miles per hour. The evidence of between distance varied from 30 to 330 feet.

Most, if not all, of the between distances testified to would fall within the p distance range. Whether the extreme estimates would fall within the x or y dis-

tances is a question which I think we need not now determine. There was substantial evidence that the between distance was p, and from this the jury could infer that the bus was travelling at an excess speed. If a bus travelling at an extremely or moderately slow rate of speed could not be stopped within the between distances testified to then defendants ought to have come forward with proof to that effect. Not having done so, they cannot now complain that there was not sufficient evidence of excess of due care speed.

As to the evidence of speed, I think that the jury might have concluded that even the minimum speed testified to—25 miles per hour—was an excess of due care speed, considering the weight of the bus and the stored energy such a heavy vehicle would have going at a speed of 25 miles an hour and the adverse road and weather conditions prevailing at the time of the collision. Here again, defendant cannot complain that plaintiff did not produce evidence of stopping distances. Defendant could have come forward with evidence that a bus travelling at 25 miles per hour could be stopped in a relatively short distance under the conditions then prevailing, if such were the fact. Having failed to do so, he cannot now complain that plaintiff as failed to prove his case.

[4] I conclude that there was both direct evidence of speed and evidence of between distance from which a jury could infer that the bus was travelling at excess speed. In addition to this, there was the further evidence that after the bus struck the Reinhardt car it struck a parked automobile and then careened across the road, and finally came to rest at a point about 75 feet from the parked automobile. This was an additional circumstance from which a jury might infer that the bus was travelling at an excessive speed.

For the foregoing reasons, I concur.

PRATT, Justice (dissenting).

In dissenting I'm going to write the case as I view it in its details.

The pertinent facts are these: The plaintiff was a passenger for hire on a bus operated by the defendant, Utah Transpor-

tation Company. On the day of the accident plaintiff boarded the defendant's bus at Hill Field, Utah, her place of employment, for the purpose of being transported to Salt Lake City. She took a seat on the left side of the defendant's bus about three rows behind the driver. The bus left Hill Field at approximately 4:20 p. m. It was snowing and raining at the time and the highway along which the bus proceeded was covered with slush and ice. It was a four lane highway each lane being 10 feet wide, and it was paved. The road shoulders were about 13 feet wide but cut down considerably by snow banks. The bus while proceeding south in the outside traffic lane on the west side of the highway about 1,800 feet north of the Salt Lake County line ran into the right rear of the defendant Reinhardt's automobile. Just prior to the collision defendant, Reinhardt, had been driving his automobile north about 20 or 30 miles per hour on the highway in the lane of traffic next to the center line on the east side of the highway. For some unexplained reason his car went into a spin and spun from the east side of the highway into the outside lane on the west side and directly into the path of the defendant, Utah Transportation Company's oncoming bus. Reinhardt's car was facing in a southeasterly direction and still moving at the moment of impact. It was knocked down the highway some 30 to 50 feet before it came to rest. After the first impact with Reinhardt's car the bus ran into another automobile which was parked on the west shoulder of the highway before being brought to a full stop at a point about 75 feet from where it hit the parked automobile. The bus weighed 7,000 pounds, had a 186 inch wheel base, and was 6 feet 10 inches wide. Its capacity was 33 persons.

It was in the first impact with the defendant Reinhardt's car that the plaintiff received her injury.

There is considerable variance in the evidence presented as to how far the company's bus was from Reinhardt's car when the latter was spinning toward the west side of the road and into the path of the bus, and also as to the speed of the bus at that time. The defendant Reinhardt, who

was called as a witness for the plaintiff estimated the distance to be about 300 feet. The bus driver estimated the distance to be between 75 and 100 feet. Five passengers testified that they saw the Reinhardt car prior to the impact and their estimates ranged from 150 to 90 feet. One witness fixed the distance from the curve where the accident could first be seen as 200 feet. Mrs. Horsley the plaintiff, hesitatingly testified to a much greater distance, i. e. about 660 feet, one city block, but only after her counsel suggested she estimate by comparison with a city block. Her testimony on this point stands by itself.

Mrs. Horsley estimated that the bus was going 40 to 50 miles per hour. The bus had a maximum speed governor of 38 miles per hour which was locked at that speed. Several other passengers estimated the speed to be about 25 to 26 miles per hour approximately the speed the bus driver said he was driving immediately prior to the accident. It is undisputed that the bus driver did not apply the brakes on the bus until he was within 5 to 10 feet of the Reinhardt car. The bus did not slow up any appreciable amount from the time Reinhardt's car could have been seen until the collision. The bus was proceeding down a slight incline at the time of the accident. It had taken the bus about an hour and 10 minutes to travel approximately 22 miles.

The real controversy in this case is one of speed, and also as to whether or not the speed of the bus was the proximate cause of the injury to plaintiff. Failure to keep a proper lookout is unsupported by the evidence. The alleged failure to slacken speed and the alleged failure to apply the brakes are bound up in the question of speed and the question of proximate cause between speed and injury.

The question is: Did the evidence link speed and injury together by a chain of proximate cause? I believe not. Plaintiff has failed to establish the speed as a proximate cause of the collision. The case of *O'Mally v. Eagan*, 43 Wyo. 233, 2 P.2d 1063, 77 A.L.R. 582, at page 588, discusses the necessity of proof of proximate cause very clearly. That court says in effect that one should be able to point out from the

evidence just how the defendant could have avoided the accident by the use of proper care—proper speed in this case. If plaintiff can point that out in the evidence in the present case she has established a foundation for the jury's verdict. I cannot overemphasize the fact that the jury's verdict must have support in the evidence and such support is not found merely in the fact that the jury may have chosen to conclude that any one of the speeds testified to was unreasonable, simply because they believed it so, or by the fact that they chose to believe that such speed proximately caused the collision. There must be evidence to support their conclusions whatever those conclusions may be. We quote from *Whalen v. Dunbar*, 44 R.I. 136, 115 A. 718, at page 720, a quotation quoted and approved in *O'Mally v. Eagan*, (cited above): "If it should be conceded that the defendant's automobile at the time the emergency was created was proceeding at a rate of speed in excess of the statutory limit, there was no testimony of probative value showing or tending to show that the accident would not have happened if the defendant's automobile had been proceeding at the rate of 25 miles per hour, or even at a much less rate of speed, or that the speed of the defendant's automobile in any way entered into the cause of the collision."

To arrive at the verdict it did in the present case the jury must have found that the defendant bus company's driver could have stopped this bus upon the road as it then was within the space and time available to him after Reinhardt's car first became visible in its spin, had he been going at a reasonable rate of speed. But what was that reasonable speed; how was it to be determined so that it would show how the bus could have been stopped in time? There is no testimony as to the distance required to stop that bus at any given speed. Bus driving is not so common to all of us that each of us is qualified to express an opinion as to such a required distance. Three hundred feet distance or 75 feet distance on an inclined icy road at 50 miles per hour or at 25 miles per hour with a bus weighing 7,000 pounds and an automobile spinning toward the bus are not a set of

facts which on their face indicates that the bus could or could not have been stopped in any particular distance—or, for that matter, that the collision could or could not have been avoided by the bus driver. Such circumstances leave nothing but speculation as to what could have been done with the bus at such speed or at other speeds. In the absence of evidence of the average human reaction time, the approximate coefficient of friction on the road under the conditions existing on the day of the accident, and the braking distances of vehicles, or in the absence of testimony of expert drivers as to what can be done with a motor vehicle of that size and weight, the jury cannot through the application of logic and reason determine whether or not a bus proceeding at a reasonable speed could have stopped in time to avoid a collision. Unless the jury can say from the evidence (not just say) that the collision would not have occurred, but for that speed, they are not justified in returning a verdict for plaintiff. The jury concluded that the transportation company's negligence was the only negligence that was the proximate cause of the collision. Even though it be considered that Reinhardt's skidding was an unavoidable accident so far as his responsibility is concerned, it does not follow that such a skidding may not have been an independent intervening cause between the alleged negligence of the transportation company and the collision. To take it out of that classification there must be evidence connecting the alleged negligence of the transportation company as a proximate cause, to the collision.

To hand the jury various speeds and various distances and ask them to select which is reasonable and which is unreasonable without giving them an evidentiary standard upon which to base their selection, is to ask them to speculate. In the majority of cases it will result in their reasoning backward from the resultant accident that the speed at which they conclude the driver was going must have been unreasonable or else the accident would not have happened. Such reasoning by its very nature assumes the proximate cause element and the question of what was the proper method under the circumstances of operating the bus upon an icy road is just skipped over.

What is there in the record upon which a comparison can be made to enable the jurors to arrive at the conclusion of excess or of non excess speed? I say again, bus driving is not a thing of common knowledge. It must be founded on expert testimony—of which there is none in the record. It can't be assumed that any speed is excessive and the burden placed on defendant to defeat that assumption. The plaintiff's prima facie case calls for proof of negligence and proof of proximate cause neither of which must be assumed. Proof of facts which cannot be measured, for lack of a unit to measure them, accomplish nothing.

I am of the opinion that the motion for a directed verdict in favor of the defendant Transportation Company should have been granted.

LATIMER, Justice, not participating.

81 N.M. 591

George G. KELLY, Plaintiff-Appellant,

v.

Lawrence MONTOYA, John S. Ward, Dar-
vel D. Richins, Richins Bros., Inc., and
Norbert E. O'Connor, Defendants-Appel-
lees.

No. 429.

Court of Appeals of New Mexico.

May 8, 1970.

Truck passenger brought an action against various defendants for injuries sustained in multiple-vehicle accident. The District Court of Sandoval County, Waldo Spiess, J., entered a summary judgment in favor of the defendant vehicle drivers and the passenger appealed. The Court of Appeals, Wood, J., held that depositions in action by truck passenger for personal injuries sustained when truck crashed into vehicles of two defendants who had stopped their vehicles at scene of prior collision between vehicles driven by two other defendants on highway during sandstorm presented issues of fact as to negligence because of violation of statute prohibiting the leaving of vehicles on highway, foreseeability and proximate cause precluding summary judgment.

Reversed and remanded for trial.

Man, J., dissented and filed opinion.

1. Judgment \Rightarrow 185(2)

In deciding motion for summary judgment, trial court must view matters presented and considered by it in most favorable aspect they will bear in support of right to trial on issues.

2. Trial \Rightarrow 139(1)

Conflict in testimony of a single witness is to be resolved by trier of fact.

3. Judgment \Rightarrow 186

It is not function of trial court to weigh evidence in considering motion for summary judgment as such motion should be granted only when facts are undisputed.

4. Judgment \Rightarrow 185.3(21)

Depositions in action by truck passenger for personal injuries sustained when truck crashed into vehicles of two defendants who had stopped their vehicles at scene of prior collision between vehicles driven by two other defendants on highway during sandstorm presented issues of fact as to negligence because of violation of statute prohibiting the leaving of vehicles on highway, foreseeability and proximate cause precluding summary judgment. 1953 Comp. \S 64-18-49(a).

5. Negligence \Rightarrow 10

Foreseeability is an element of negligence.

6. Automobiles \Rightarrow 173(2)

Statute prohibiting leaving of vehicles upon highway is for benefit of persons using highway, and since it is foreseeable that blocking highway may cause other persons to have accident a violation of statute is negligence per se. 1953 Comp. \S 64-18-49(a).

7. Negligence \Rightarrow 56(1.7, 1.12)

"Proximate cause" is that which produces the injury and without which the injury would not have occurred.

See publication Words and Phrases for other judicial constructions and definitions.

8. Negligence \Rightarrow 62(1)

For an intervening act to be an "independent cause" the intervening act must be sufficient in and of itself to break natural sequence of first negligence.

See publication Words and Phrases for other judicial constructions and definitions.

9. Negligence \Rightarrow 56(1.10), 61(1)

"Proximate cause" of injury need not be last act, or nearest act to injury, but may be one which actually aided in producing the injury, and proximate cause need not be the sole cause but it must be a concurring cause.

10. Judgment \Rightarrow 185(2)

Party moving for summary judgment has burden of establishing that there is no

material issue of fact to be determined by factfinder and is entitled to judgment as a matter of law, and burden is not on opposing party to prove prima facie case.

Avelino V. Gutierrez, Albuquerque, for appellant.

Jackson O. Akin, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for appellee Montoya.

J. J. Monroe, Iden & Johnson, Albuquerque, for appellee Ward.

Frank H. Allen, Jr., Modrall, Seymour, Sperling, Roehl & Harris, Albuquerque, for appellee Richins.

Eugene E. Klecan, Albuquerque, for appellee O'Connor.

OPINION

WOOD, Judge.

[1] Plaintiff was injured in a multi-vehicle accident. The trial court granted defendants' motion for summary judgment. Summary judgment is not proper where there is the slightest issue as to a material fact. In deciding a motion for summary judgment, the trial court must view the matters presented and considered by it in the most favorable aspect they will bear in support of the right to a trial on the issues. *Perry v. Color Title of New Mexico*, 81 N.M. 143, 464 P.2d 562 (Ct.App.1970). We reverse the summary judgment discussing: (1) statutory violation; (2) foreseeability; (3) proximate cause and independent intervening cause; and (4) the burden of the party opposing summary judgment.

The accident occurred on a highway east of Deming, during daylight, but also during a sand storm. The wind was strong and gusting. Because of the sand and wind gusts, visibility varied from zero to two hundred feet.

The first accident occurred when Montoya and Ward, both across the center line of the highway, collided. There is evidence that a vehicle, or two, stopped on the

highway behind Ward's vehicle. Next to stop was Richins (defendants Richins and Richins Bros., Inc.). O'Connor stopped behind Richins. Kenosha (Kenosha Auto Transport Corporation and Woodburn) stopped behind O'Connor.

The second accident occurred when Baumer (Baumer Foods, Inc. and Logan) ran into the rear of Kenosha. Kenosha in turn, collided with O'Connor and Richins, and O'Connor collided with Richins.

Plaintiff, a passenger in the Baumer truck, sued for personal injuries. His claim against Kenosha and Baumer has been settled. The trial court granted summary judgment in favor of Montoya, Ward, Richins and O'Connor. Plaintiff appeals.

When we refer to "testimony" or "evidence," we refer to that which appears in the depositions.

Statutory violation.

Plaintiff says there are several issues of negligence. We need consider only one of them. Section 64-18-49(a), N.M.S.A.1953 (Repl.Vol. 9, pt. 2) provides in part:

"* * * [N]o person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, * * *."

There is testimony that the highway at the accident scene had good eight foot shoulders, that the descent from the shoulders to the bar ditch was not steep, that vehicles drove onto the shoulder and into the bar ditch area and beyond. There is testimony that both the Montoya and Ward vehicles were driveable after their accident, and that some ten minutes elapsed between the two accidents.

Richins and O'Connor do not dispute that a factual issue existed as to their violation of § 64-18-49(a), *supra*; Montoya and Ward do. These two defendants, relying on selected testimony, assert their cars were off the highway at the time of the

second collision. They assert the only testimony to the contrary is that of the investigating State Police officer; they claim this officer's testimony raised no factual issue because he admitted to uncertainty as to the location of the Montoya and Ward cars when he arrived on the scene.

Contradictory inferences may be drawn from the officer's testimony. At one place he said the vehicles were still on the road. At another place it is indicated the officer had made a sworn statement that the two vehicles were on the road. Other parts of his testimony seem to contradict this.

[2, 3] The fact that contradictory inferences exist shows that the evidence is not undisputed. The conflict in the testimony of a single witness is to be resolved by the trier of fact. *Hughes v. Walker*, 78 N.M. 63, 428 P.2d 37 (1967). The trial court could not properly resolve such conflict on a motion for summary judgment for by doing so, it would be weighing the evidence. It is not the function of the trial court to weigh the evidence in considering a motion for summary judgment; such a motion may be granted only where the facts are undisputed. *Johnson v. J. S. & H. Construction Co.*, 81 N.M. 42, 462 P.2d 627 (Ct.App.1969).

[4] There being factual issues as to the violation of § 64-18-49(a), *supra*, there are factual issues as to the negligence of each of the four defendants. *Gould v. Brown Construction Company*, 75 N.M. 113, 401 P.2d 100 (1965); *Horrocks v. Rounds*, 70 N.M. 73, 370 P.2d 799 (1962); *Williams v. Neff*, 64 N.M. 182, 326 P.2d 1073 (1958).

Foreseeability.

Defendants assert that even if they violated a statute, they could not be held negligent because of a lack of foreseeability. They rely on *Anderson v. Jones*, 66 Ill. App.2d 407, 213 N.E.2d 627 (1966). In that case Jones was in the same position as Montoya and Ward in this case. There, as here, cars had stopped on the highway after the first accident and before the second accident occurred. Anderson was in the

last car which had stopped when Zehr's car rear-ended Anderson's car. In ruling the second accident was not foreseeable, the Illinois court states:

"It is quite clear that the immediate cause of plaintiffs' injuries and damages was the force set in motion through the negligent act of Zehr. The force set in motion by Jones had spent itself. It was in repose. It was quiescent. The incident was at an end. Plaintiffs were home free save for the wrongful act of Zehr. Jones, too, is home free from responsibility unless it can be said that he should have reasonably anticipated or reasonably foreseen these or like results or that these or like results were reasonably probable. If they were, the causal connection is not broken. If they were not, Jones is effectively insulated from responsibility and the new force of Zehr is the sole and proximate cause of plaintiffs' injuries."

Defendants state that if Jones could not have foreseen the consequences of his negligence in *Anderson v. Jones*, *supra*, then they, and particularly Montoya and Ward, could not have foreseen the consequences of their asserted statutory violation in blocking the highway.

We agree that *Anderson v. Jones*, *supra*, is factually similar to our case. Is the legal result from those facts in Illinois the law of New Mexico?

[5] In New Mexico, foreseeability is an element of negligence. *Martin v. Board of Education of City of Albuquerque*, 79 N.M. 636, 447 P.2d 516 (1968); see *Tapia v. Panhandle Steel Erectors Company*, 78 N.M. 86, 428 P.2d 625 (1967). U.J.I. 12.1 defines negligence in terms of foreseeability. The committee comment to U.J.I. 11-1, citing New Mexico authority, states:

"The violation of a statute which is enacted for the benefit or protection of the party claiming injury from the violator or for the benefit or protection of a class of the public to which such person is a member is negligence per se.
* * *

[6] It seems obvious to us that a traffic statute such as § 64-18-49(a), *supra*, was enacted for the benefit of persons using our highways. Plaintiff, a person using the highway, had the benefit of such statute. Why? Because, in our opinion, it is foreseeable that violations of a traffic rule may cause accidents. "Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen. * * *" *Harless v. Ewing*, 80 N.M. 149, 452 P.2d 483 (Ct.App.1969).

Since it is foreseeable that blocking the highway may cause other persons to have accidents, a violation of the statute which prohibits such blocking is negligence *per se*. The rule, that violation of the statute is negligence *per se*, includes the element of foreseeability where, as here, plaintiff is a beneficiary of the statute violated. The holding as to foreseeability in *Anderson v. Jones*, *supra*, does not state New Mexico law, and is not applicable.

Even without the foregoing, there is a factual issue as to foreseeability in this case. The State Police officer testified: "* * * there's a lot of them stops on the roadway, and we have a lot of accidents the same way." This is evidence of the foreseeability of an accident from stopping on the highway.

There being factual issues as to a statutory violation, there were factual issues as to the negligence of each of the four defendants. The factual issue of negligence includes the factual issue of foreseeability. *Martin v. Board of Education of City of Albuquerque*, *supra*.

Proximate cause—Independent intervening cause.

Defendants contend the act of Baumer, in running into the stopped vehicles, intervened between any negligence on their part and plaintiff's injuries. The result of this intervening act, according to defendants, is to reduce their asserted negligence to a remote cause, or to a condition which did no more than make the second accident possi-

ble. Since, according to defendants, their negligence is either a remote cause, or a condition, it is not the proximate cause of plaintiff's injuries. A corollary of this premise is that Baumer's negligence is an independent intervening cause.

The Oklahoma law, on which defendants rely, supports these contentions. *Haworth v. Mosher*, 395 F.2d 566 (10th Cir. 1968); *Beesley v. United States*, 364 F.2d 194 (10th Cir. 1966); *Evans v. Caldwell*, 429 P.2d 962 (Okla.1967), *Transport Indemnity Company v. Page*, 406 P.2d 980 (Okla. 1965); *Porter v. Norton-Stuart Pontiac-Cadillac of Enid*, 405 P.2d 109 (Okla. 1965). As stated in *Beesley v. United States*, *supra*:

"The Oklahoma Supreme Court has developed a clear expression of the law of proximate cause in Oklahoma. The proximate cause of any injury must be the efficient cause which sets in motion the chain of circumstances leading to the injury * * * Where the negligence complained of only creates a condition, which thereafter reacts with a subsequent, independent, unforeseeable, distinct agency and produces an injury, the original negligence is the remote rather than the proximate cause thereof. This is held to be true though injury would not have occurred except for the original act * * * Thus the proximate cause of an event must be that which in the natural and continuous sequence, unbroken by any independent cause, produces that event and without which that event would not have occurred * * *"

Is the Oklahoma view the law of New Mexico?

The Oklahoma rule, according to the above quotation, includes the view that the second accident was unforeseeable. We have held that foreseeability is an issue included within the factual issue of negligence.

Also, according to the above quotation, the second accident was independent of the asserted negligence of defendants even though plaintiff's injury "* * * would

not have occurred except for the original act * * *."

[7,8] A partial definition of proximate cause is "* * * that which * * * produces the injury, and without which the injury would not have occurred. * * *". Thompson v. Anderman, 59 N.M. 400, 285 P.2d 507 (1955). For an intervening act to be an independent cause, Thompson v. Anderman, *supra*, states: "* * * Such intervening cause must be sufficient in and of itself to break the natural sequence of the first negligence * * *."

If plaintiff's injuries would not have occurred except for the alleged negligence of the defendants, their negligence is a proximate cause of the injuries. If, however, the second accident broke the natural sequence of defendants' asserted negligence, if the second accident is the one without which the injuries would not have occurred, the second accident was the proximate cause of plaintiff's injuries. If the second accident did break the natural sequence of events resulting from the asserted negligence of defendants, the second accident would be an independent intervening cause. If, however, plaintiff's injuries "would not have occurred except for the original act" of the defendants, the second accident was not an independent intervening cause. New Mexico law on independent intervening cause is not the same as the quoted statement of Oklahoma law.

[9] Nor is the Oklahoma view of remote cause the New Mexico law. The proximate cause of an injury, in New Mexico, need not be the last act, or the nearest act to the injury, but may be one which actually aided in producing the injury. Proximate cause need not be the sole cause, but it must be a concurring cause. Ortega v. Texas-New Mexico Railway Company, 70 N.M. 58, 370 P.2d 201 (1962). Thompson v. Anderman, *supra*, states:

"* * * Where a person by his own negligence produces a dangerous condition of things, which does not become active for mischief until another person has operated upon it by the commission

of another negligent act, which might not unreasonably be foreseen to occur, the original act of negligence is then regarded as the proximate cause of the injury which finally results."

Thus, if defendants' asserted negligence became active by the negligence of another, their negligence has greater legal effect than a "condition which made the second accident possible." Their negligence may be regarded as the proximate cause of the injury which finally results.

Being contrary to New Mexico law, Oklahoma law is not authority for the summary judgment.

Defendants rely on two other cases. Bell v. Fore, 419 S.W.2d 686 (Tex.Civ. App.1967) applies the "remote cause" or "condition" concept which is contrary to New Mexico law. In Copple v. Warner, 260 N.C. 727, 133 S.E.2d 641 (1963), the first collision between cars A and B, was caused by car B. This collision blocked the eastbound lane of the highway. Car C was proceeding west in the unblocked westbound lane. The second collision occurred when car C drove across the center line and collided with cars A and B. It was held that these facts were insufficient to show any negligence on the part of car B that was a proximate or concurring proximate cause of the second collision. The factual situation here is different, there being testimony that each of the defendants here, to some extent, was blocking the lane of travel in which the second collision in this case occurred. Neither case is authority for the summary judgment.

Was the asserted negligence of any, or each, of the four defendants a proximate cause of plaintiff's injuries? Was the second accident an independent intervening cause? Did the alleged negligence of any of the defendants concur with the alleged negligence of anyone else (Kenosha or Baumer) in causing plaintiff's injuries? If reasonable minds might differ on these issues, the matter is for the jury. Rivera v. Ancient City Oil Corporation, 61 N.M. 473, 302 P.2d 953 (1956).

Reasonable minds could differ on these issues because there are disputed facts and because the reasonable inferences from those facts are contradictory. *Harless v Ewing*, supra. For example, If it were practicable for each of the defendants to have parked their vehicles off the road between the time of the first and second collisions, and they did not do so, did the second accident result because their vehicles were on the pavement, or did it result from the speed of the Baumer truck, or the driver's failure to keep a proper lookout or his failure to properly control his truck under the existing conditions of visibility? If the Kenosha truck, with which the Baumer truck initially collided, was negligent in blocking the highway, did the alleged negligence of these defendants concur with Kenosha? There are factual issues of causation as to each of the four defendants.

Burden of the party opposing summary judgment

O'Connor reviews the testimony to show that the presence of his vehicle had no bearing on the accident. He asserts that since our Supreme Court agreed with the trial court in *Gould v. Brown Construction Company*, supra, that the issue of causation in that dust storm case was for the jury, that here we should agree with the trial court that the issue is one of law. He reminds us, relying on *Seele v. Purcell*, 45 N M 176, 113 P2d 320 (1941), the plaintiffs have the burden of proof and that where defendants have acted in an emergency, the burden on plaintiff "becomes more burdensome." He asserts this case is a similar situation and that plaintiff failed to meet that burden.

O'Connor's claims are without merit. In *Gould v. Brown Construction Company*, supra, the issues were decided by the jury after trial. Here, the trial judge decided them as a matter of law. Since reasonable minds might differ on these issues they are to be tried. In *Seele v. Purcell* supra, plaintiff was held to have failed in the burden of proof after a trial. O'Connor

would have us hold that plaintiff has failed to meet his burden without allowing him a trial.

[10] The issues here were decided on a motion for summary judgment. "A party moving for summary judgment has the burden of establishing that there is no material issue of fact to be determined by the fact finder and that he is entitled to judgment as a matter of law. * * * The burden is not on the opposing party to prove a prima facie case. * * *" *Barber's Super Markets, Inc. v. Stryker*, 81 N M 227, 465 P2d 284 (1970). Plaintiff did not have the burden in the summary judgment proceeding. O'Connor, and the other three defendants, did. They failed to meet it.

Reversed and remanded for trial.

It is so ordered.

HENDLEY, J., concurs.

OMAN, Judge (dissenting).

I agree with the majority concerning the law applicable in ruling on a motion for summary judgment. I also agree that in the light of this law there are factual issues as to whether the defendants here involved violated § 64-18-49(a), N M S A, 1953 (Repl. 9, pt. 2). The essential portion of this section of our statutes is quoted in the majority opinion.

I also agree "foreseeability" is one of the tests ordinarily to be considered and applied in determining the factual question of negligence, and that the violation of a statutory rule of the road constitutes negligence per se. However, I disagree with the majority's disposition of the "foreseeability" issue in this case, insofar as it relates to the questions of "proximate cause" and "independent intervening cause," and I disagree with the majority holding that there is a question of fact as to whether the negligence of these defendants was a proximate cause of the second accident and plaintiff's resulting injuries.

I agree with the following statements of the majority concerning the law of 'proximate

mate cause" and 'independent intervening cause'.

"A partial definition of proximate cause is '* * * that which * * * produces the injury, and without which the injury would not have occurred * * *' Thompson v Anderman, 59 N.M. 400, 285 P.2d 507 (1955). For an intervening act to be an independent cause, Thompson v Anderman, *supra*, states '* * * Such intervening cause must be sufficient in and of itself to break the natural sequence of the first negligence * * *'.

"If plaintiff's injuries would not have occurred except for the alleged negligence of the defendants, their negligence is a proximate cause of the injuries. If, however, the second accident broke the natural sequence of defendants' asserted negligence, if the second accident is the one without which the injuries would not have occurred, the second accident was the proximate cause of plaintiff's injuries. If the second accident did break the natural sequence of events resulting from the asserted negligence of defendants, the second accident would be an independent intervening cause. If, however, plaintiff's injuries 'would not have occurred except for the original act' of the defendants, the second accident was not an independent intervening cause * * *."

I disagree with the majority statement that the opinion of the Illinois Court in *Anderson v. Jones*, 66 Ill. App.2d 407, 213 N.E.2d 627 (1966) "'* * * does not state New Mexico law, and is not applicable,'" and with the majority conclusion that under New Mexico law, as above quoted from the majority opinion, reasonable minds could differ on the question of whether the negligence of defendants could have proximately concurred in causing the second accident.

I have already stated I agree the evidence here is sufficient on the issue of the defendants' negligence to avoid summary judgment. As I understand the opinion of

the Illinois court in *Anderson v. Jones*, *supra*, the negligence of Jones was conceded. The concern of the Illinois court with "foreseeability" was whether the second accident, precipitated by the "intervening cause"—the conduct of Zehr in running into the rear of plaintiff's vehicle—could have been reasonably foreseen as a result of the original act of negligence—the conduct of Jones in causing the first collision. If it could have been so reasonably foreseen, then the negligence of Zehr was not an "independent intervening cause," which could have broken the chain of causation between the negligence of Jones and the injury to plaintiff. This is consistent with the law of New Mexico. *UJI* 13-15, *Thompson v Anderman*, *supra*, cited in the above quotation from the majority opinion. See also, *Annot.*, 58 A.L.R.2d 270 (1958), and particularly § 2 [b] and cases cited therein as showing that "foreseeability" is a test to be applied in determining whether another's negligence constitutes an "intervening cause" or merely a "concurring cause."

The majority "'* * * agree that *Anderson v. Jones*, *supra*, is factually similar to our case." However, they distinguish the result reached therein from their result in the present case on the basis that "'* * * the holding as to foreseeability * * *'" by the Illinois court * * * does not state New Mexico law, and is not applicable." As above stated, I disagree with this and can see no reason to arrive at a result directly opposite that reached by the Illinois court in a concededly similar factual situation now before us.

The majority, however, also seek to support their result by asserting that a factual issue as to foreseeability is presented by the statement of the State Police Officer that "'* * * there's a lot of them stops on the roadway, and we have a lot of accidents the same way.'"

In my opinion this statement by the State Police Officer cannot reasonably be said to raise a question on the issue of proximate causation under the undisputed

facts before us. It may possibly, as the majority suggest, raise a question as to the negligence of defendants in stopping on the highway, but this is not the issue in the case as I see it and as I have above stated.

An examination of the evidence, in the light of the above quoted law from the majority opinion as to "proximate cause" and "independent intervening cause," demonstrates clearly to me that the negligence of the defendants in stopping or parking on the main travelled portion of the highway could not constitute a proximate cause of the second collision from which plaintiff's injuries resulted.

Here the evidence is that Kenosha (Kenosha Auto Transport Corporation and its driver Woodburn) brought its tractor and trailer to rest on the highway behind the O'Connor automobile. Woodburn remained in the vehicle about 30 seconds, and then got out, where he remained for about another 30 seconds. He heard a vehicle approaching and started to get back inside the cab of his vehicle when the Baumer vehicle collided with the rear of the Kenosha vehicle.

The Kenosha vehicle consisted of a tractor and a transport trailer on which were loaded six automobiles. Across the rear of this trailer there were a cluster of three red lights in about the center thereof and about four feet above the ground or road surface, a red clearance light on each side about 3'6" above the road surface, and two red flashing lights which were about 6" from the top of the trailer. All of these lights were burning and visible from the rear, except as their visibility may have been obscured by the dust.

Woodburn's visibility was about 200 feet ahead as he approached the O'Connor automobile, and during the time he remained stopped on the highway prior to the accident. He saw the O'Connor automobile and the Richins truck ahead. He admitted he could probably have driven off the highway.

The Baumer vehicle (driven by Logan), which collided with the rear of the Kenosha

vehicle, had a gross weight of between 60,000 and 65,000 lbs. Logan was familiar with the highway and was driving at about 55 miles per hour. He saw the dust ahead, but made no effort to slow down, other than to take his foot off the accelerator, until he was inside the dust and through which he could not see. He then applied his brakes and the collision with the rear of the Kenosha vehicle occurred almost immediately. He has no recollection of seeing the Kenosha vehicle prior to the collision. He alone failed to react as had all those who preceded him, in that he did not bring his vehicle to a stop before colliding with another vehicle.

Woodburn, driver of the Kenosha vehicle, admittedly had sufficient visibility and sufficient time in which to remove his vehicle from the highway.

In my opinion, the negligence of these two drivers was not only sufficient to break the natural sequences of the negligence of the other defendants in stopping on the highway, but in fact did so, and was the proximate cause of the second collision. If the negligence of the remaining defendants could be said to have proximately caused Woodburn to stop on the highway, their negligence was at rest once Woodburn had stopped and had sufficient time to remove his vehicle from the highway. So long as he remained stopped or parked on the highway, when he could admittedly have gotten off the highway, the presence of his vehicle prevented a direct collision by an approaching vehicle with the vehicles ahead, and his negligence in so remaining on the highway interrupted the natural sequence of events which might have followed from the negligence of those stopped ahead of him. His negligence and the negligence of Logan, which, as already stated, consisted of conduct unlike that followed by all the other drivers in approaching the dust, produced a result different than that which could reasonably have been foreseen by the other defendants. The negligence of Woodburn and Logan was not only the immediate cause of the

second collision, but was the efficient producing cause thereof, and without which the plaintiff would not have been injured

As already stated, I believe the New Mexico law compels the same result reached by the Illinois court in the factually similar case of *Anderson v Jones*, supra. I agree with the majority that the Oklahoma rule, as quoted from *Beesley v United States*, 364 F2d 194 (10th Cir 1966), appears to be somewhat different from the New Mexico rule, in that it is stated the original act is not a proximate cause of the injury even though the injury would not have occurred except for the original act. However, the New Mexico and Oklahoma definitions of proximate cause are almost identical in their wording. See *UJI 1210*, *Haworth v Mosher*, 395 F2d 566 (10th Cir 1968), *Beesley v United States*, supra. Proximate cause is defined in *UJI 1210* as follows:

"The proximate cause of an injury is that which in a natural and continuous sequence [unbroken by any independent intervening cause] produces the injury, and without which the injury would not have occurred. [It need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury]"

Regardless of whether negligently stopping on a highway be called "negligence" or a 'condition,' the stopping must be a proximate cause of the resulting injuries before there can be liability for the stopping. Here we are concerned only with the issue of negligence in stopping on the highway, when it was practicable to stop off the highway. There are factual issues as to whether the different defendants now before us were on or off the highway, and, if on the highway, whether it was practicable for them to have gotten off the highway. However, the negligence of Woodburn in not removing the Kenosha vehicle from the highway, when it was practicable for him to do so, and the negligence of Logan, in his operation of the Baumer vehicle, were the concurring proximate causes of this second accident. This second accident would not otherwise have occurred. The negligence of each of the defendants in this appeal in stopping on the highway was at most a remote cause which in no way proximately contributed to the second accident and plaintiff's resulting injuries. In addition to the foregoing cited cases, compare § 4, and cases therein cited, of *Annot*, 58 A L R 2d 270 at 284.

For the reasons stated, I respectfully dissent.

exception to the hearsay rule. The statement was not an admission which could be used against the defendant, but a self-serving statement made by the defendant long after the crime was committed and of questionable reliability.

[3] Defendant also urges that the trial court erred in failing to give a requested instruction on criminal trespass as a lesser included offense of burglary. The Court has recently fully explored the lesser included offense doctrine in *State v. Baker*, Utah, 671 P.2d 152 (1983). Since all the evidence in this case is consistent only with the burglary charge and there is no evidence consistent with criminal trespass, we affirm on the basis of *State v. Baker*, *supra*.

Affirmed.

HOWE, Justice (concurring and dissenting):

I agree with the Per Curiam opinion as to the exclusion of defendant's statement. I cannot agree however that "all the evidence in this case is consistent only with the burglary charge and there is no evidence consistent with criminal trespass." The only evidence which the majority opinion relies on is that a security box had been moved from the head of a bed to the center and the lock on the box was exposed. Nothing was taken. I do not think that evidence necessarily shows an attempt to commit theft and excludes trespass. The instruction on the lesser included offense of criminal trespass should have been given.



Matthew C. HARRIS and Gary C. Harris, Plaintiffs and Appellants,

v.

The UTAH TRANSIT AUTHORITY and Lester Lorenzo Loosemore, Defendants and Respondents.

No. 17042.

Supreme Court of Utah.

Oct. 7, 1983.

Action was brought against bus driver and bus company for personal injuries sustained in collision between bus and another vehicle. The Second District Court, Weber County, Ronald O. Hyde, J., entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Stewart, J., held that: (1) instruction to jury that driver of other vehicle was negligent as a matter of law and that if jury found that he saw bus stopped on highway or if he negligently failed to see bus, then his negligence was sole proximate cause of collision, was erroneous; (2) exclusion of bus company maintenance records, made subsequent to accident, introduced to show that taillights were defective at time of accident was erroneous; and (3) combined errors warranted reversal.

Reversed and remanded.

1. Negligence ⇐62(3)

A person's negligence is not superseded by the negligence of another if the subsequent negligence of another is foreseeable.

2. Automobiles ⇐245(15, 50)

In action for injuries sustained by jeep passenger in collision between jeep and rear end of bus, issue of whether jeep driver was negligent and issue of proximate cause of the accident were for the jury.

3. Trial ⇐142, 143

Where evidence is in dispute, including inferences from evidence, issue should be submitted to jury.

4. Negligence ⇐136(25)

Whether the negligence of an actor who observes, or negligently fails to observe, a dangerous condition created by a prior actor's negligence and who negligently fails to avoid the dangerous condition supersedes the negligence of the prior actor is a question for the jury; overruling *Hillyard v. Utah By-Products Co.*, 1 Utah 2d 143, 263 P.2d 287 (1953); *McMurdie v. Underwood*, 9 Utah 2d 400, 346 P.2d 711 (1959); *Valesquez v. Greyhound Lines, Inc.*, 12 Utah 2d 379, 366 P.2d 989 (1961); *Anderson v. Parson Red-E-Mix Paving Co.*, 24 Utah 2d 128, 467 P.2d 45 (1970).

5. Negligence ⇐131

Evidence of repairs made after an accident is inadmissible to prove negligence; however, evidence of subsequent repairs is admissible for other purposes, such as proving physical conditions that existed at time of accident, if defendant disputes the earlier condition, and if only way of establishing the earlier condition is by evidence of subsequent repairs.

6. Evidence ⇐351

Bus maintenance records made subsequent to collision between another vehicle and rear end of bus were admissible to show that bus taillights were defective prior to accident.

7. Appeal and Error ⇐1027

An error is reversible if there is reasonable likelihood that a more favorable result would have been obtained by complaining party in the absence of the error

8. Appeal and Error ⇐1056.1(3), 1064.1(3)

In action for injuries resulting from collision with bus based on theory that bus driver negligently drove bus and that bus company negligently maintained taillights, erroneous instruction to jury that driver of jeep that collided with bus was negligent as a matter of law and that, if jeep driver saw bus or should have seen bus, his negligence was superseding cause of accident, together with erroneous exclusion of bus maintenance record introduced to show defect in lights prior to accident, were sufficiently prejudicial to warrant reversal.

Merlin R. Lybbert, Paul C. Droz, Salt Lake City, for plaintiffs and appellants.

Timothy R. Hanson, Salt Lake City, for defendants and respondents.

STEWART, Justice:

Plaintiff Matthew Harris brought this action for personal injuries sustained in a collision between a bus owned and operated by defendant Utah Transit Authority (UTA) and a jeep in which the plaintiff was a passenger. The driver of the bus, Lester Loosemore, is also a defendant. The trial court ruled as a matter of law that Rodney Talbot, the driver of the jeep, was negligent, and the jury found that UTA and Loosemore were not negligent and that Talbot was the sole proximate cause of the accident. Judgment was entered for the defendants, and plaintiffs appeal.

The accident occurred on the morning of March 7, 1977. Talbot, Harris, and Kevin Lucia, another passenger of Talbot, were on an errand for their high school teacher. The collision occurred at the "T"-intersection of 1700 North and Washington Boulevard in North Ogden, Utah. At the point of the collision, Washington Boulevard has four traffic lanes, two north bound and two south bound. The impact occurred in the outside south-bound lane. A bus of defendant UTA stopped to pick up a passenger, and was positioned with its right rear outer wheel four inches off the pavement and was obstructing a portion of the outside travel lane. The day was dry and clear, and the driving conditions were good. The jeep was in good mechanical condition and traveling within the speed limit and with the flow of traffic at between 40 and 50 miles per hour.

Talbot did not recall seeing the bus ahead of him until just before the collision occurred. Upon seeing the bus, he glanced in his rear-view mirror, swerved left and braked to avoid the bus. In the course of this maneuver, the right side of the jeep struck the left rear corner of the bus and

pinched Harris' right arm between the bus and the jeep, effectively severing the arm between the shoulder and the elbow.

I. JURY INSTRUCTIONS

A. Proximate Cause and Superseding Cause

Plaintiffs urge that the trial court erred in directing the jury to find as a matter of law that Talbot, the driver of the jeep, was negligent and that if because of his negligence he failed to observe the bus, then he was the sole proximate cause of the accident. Instruction no. 14 stated in part:

[Y]ou are instructed that the driver of the Jeep, Rodney Talbot, was negligent as a matter of law, and if you find that he observed the bus stopped upon the highway, or, under the circumstances should have observed the bus, but because of his negligence failed to do so in time to avoid the accident, then you are instructed that the negligence on his part was the sole proximate cause of the collision.

The instruction directed a verdict on two crucial contested issues of fact and in addition was confusing. First, the instruction directed the jury that Talbot was negligent as a matter of law. In addition, even though the instruction did not specify in what manner Talbot was negligent as a matter of law, it nevertheless stated that if Talbot: (1) knew the bus had stopped or (2) should have observed that the bus was stopped and failed to do so in time to avoid the accident, then Talbot's negligence was the "sole proximate cause of the collision." Second, the instruction in effect directed a verdict on proximate cause, apparently on the theory that Talbot's negligence was a superseding cause.

[1] The law of superseding causation is, as a general proposition, more easily stated than applied. A person's negligence is not superseded by the negligence of another if the subsequent negligence of another is foreseeable. This Court in *Jensen v. Mountain States Telephone and Telegraph Co.*, Utah, 611 P.2d 363 (1980), adopted the rule

stated in the Restatement (Second) of Torts § 447 (1965):

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

The same general rule is stated by Professor Prosser as follows:

The risk created by the defendant may include the intervention of the foreseeable negligence of others. . . . [T]he standard of reasonable conduct may require the defendant to protect the plaintiff against 'that occasioned negligence which is one of the ordinary incidents of human life and therefore to be anticipated.'

Prosser, *The Law of Torts* § 44 at 274 (4th ed. 1971) (footnotes omitted).

This Court has applied that rule on several occasions. *E.g.*, *Jensen v. Mountain States Telephone and Telegraph Co.*, *supra*; *Watters v. Querry*, Utah, 588 P.2d 702 (1978), *appeal from proceedings after remand*, 626 P.2d 455 (1981). See *Skollingsberg v. Brookover*, 26 Utah 2d 45, 484 P.2d 1177 (1971). Cf. *Collier v. Frerichs*, Utah, 626 P.2d 476 (1981). Accord *Hennigan v. Atlantic Refining Co.*, 282 F.Supp. 667 (E.D. Pa.1967); *Grainy v. Campbell*, 493 Pa. 88, 425 A.2d 379 (1981); *Strobel v. Chicago, Rock Island & Pacific R.R. Co.*, 255 Minn. 201, 96 N.W.2d 195 (1959). See also Annot., *Negligence Causing Automobile Accident, or Negligence of Driver Subsequently Approaching Scene of Accident, As Proximate Cause of Injury by or to the Approaching*

Car or to Its Occupants, 58 A.L.R.2d 270, § 2[b] (1958).

In *Watters v. Querry*, *supra*, the defendant Hemingway slowed abruptly on the freeway while changing lanes. Plaintiff Watters slowed to avoid hitting Hemingway, and was in turn rear-ended by defendant Querry. On appeal, this Court held that an instruction, essentially similar to instruction 14 in the instant case, constituted reversible error. The instruction stated that if the driver of a car should have observed and avoided a dangerous condition created by another car in front of him and did not, that driver's negligence was an "independent intervening cause, and, therefore the first driver cannot be a proximate cause of the collision." 588 P.2d at 703 (emphasis in original). This Court held:

The more fundamental test is whether under the particular circumstances he should have foreseen that his conduct would have exposed others to an unreasonable risk of harm; and this includes situations where negligent or other wrongful conduct of others should reasonably be anticipated. . . . The difficulty with the instruction about which plaintiff complains is that, as applied to the instant situation, it would seem to exculpate defendant Hemingway (who created a dangerous situation) if it is found that the defendant Querry (the latter actor) was negligent, whether or not the latter's conduct was foreseeable. If the principle of law just discussed is properly applied to the evidence in this case, it appears to us that there is a legitimate question as to whether a jury could reasonably find that defendant Hemingway, in making the alleged abrupt stop, should have foreseen that, in traffic such as there was on that highway, some momentarily inattentive driver following her would not have been able to react and brake quick enough to avoid collision with her car or the car behind hers.

588 P.2d at 704.

Later, when *Watters* was again appealed from an order entered after the remand in the first case, we reaffirmed the rule. Cit-

ing *Jensen v. Mountain States Telephone and Telegraph Co.*, *supra*, this Court stated:

[T]he first actor cannot excuse himself from liability arising from his negligent acts merely because the later negligence of another concurs to cause injury, if the later act were a foreseeable event.

626 P.2d at 458.

[2] In the present case, the disputed instruction was erroneous because it failed to submit the proximate cause issue to the jury for determination. *Jensen v. Mountain States Telephone and Telegraph Co.*, *supra*. In other words, the jury should have decided whether Loosemore stopped the bus in such a way that it was foreseeable that "some momentarily inattentive driver following [him] would not be able to react and brake quick enough to avoid collision." *Watters v. Querry*, *supra*, 588 P.2d at 704.

[3] Where the evidence is in dispute, including the inferences from the evidence, the issue should be submitted to the jury. *Little America Refining Co. v. Leyba*, Utah, 641 P.2d 112 (1982); *FMA Acceptance Co. v. Leatherby Insurance Co.*, Utah, 594 P.2d 1332 (1979). See also *Bowen v. Riverton City*, Utah, 656 P.2d 434 (1982); *Jensen v. Mountain States Telephone and Telegraph Co.*, Utah, 611 P.2d 363 (1980).

We do not mean to imply that rulings by the trial court which decide a factual contention as a matter of law are never appropriate. But the right to trial by jury is a basic principle of our system that cannot be allowed to be eroded by improper intrusions on the jury's prerogative. In the instant case, the issue of Talbot's negligence and proximate cause should have gone to the jury. If, as plaintiff contends, Loosemore stopped the bus too rapidly, or failed to drive out of the lane of traffic, or had faulty brake lights, he may have contributed to a rear-end collision by a momentarily inattentive driver, which would not have been so "extraordinary" as to be unforeseeable.

Cite as 671 P.2d 217 (Utah 1983)

B. The Rule in *Hillyard v. Utah By-Products Co.*

[4] Instruction no. 14 appears to have been based on the rule stated in *Hillyard v. Utah By-Products Co.*, 1 Utah 2d 143, 151, 263 P.2d 287, 292 (1953); and restated in *McMurdie v. Underwood*, 9 Utah 2d 400, 346 P.2d 711 (1959); *Valesquez v. Greyhound Lines, Inc.*, 12 Utah 2d 379, 366 P.2d 989 (1961); *Anderson v. Parson Red-E-Mix Paving Co.*, 24 Utah 2d 128, 467 P.2d 45 (1970). *Hillyard*, *supra*, stated the rule as follows:

In applying the test of foreseeability to situations where a negligently created pre-existing condition combines with a later act of negligence causing an injury, the courts have drawn a clear-cut distinction between two classes of cases. The first situation is where one has negligently created a dangerous condition [such as parking the truck] and a later actor observed, or circumstances are such that he could not fail to observe, but negligently failed to avoid it. The second situation involves conduct of a later intervening actor who negligently failed to observe the dangerous condition until it is *too late* to avoid it. In regard to the first situation it is held as a matter of law that the later intervening act does interrupt the natural sequence of events and cut off the legal effect of the negligence of the initial actor. This is based upon the reasoning that it is not reasonably to be foreseen nor expected that one who *actually becomes cognizant* of a dangerous condition in ample time to avert injury will fail to do so.¹⁷ On the other hand, with respect to the second situation, where the second actor fails to see the danger in time to avoid it, it is held that a jury question exists, based on the rationale that it can reasonably be anticipated that circumstances may arise wherein others may not observe the dangerous condition until too late to escape it.¹⁸ The distinction is basically one between a situation in which the second actor has sufficient time, after being charged with knowledge of the hazard, to avoid it, and one in which the second actor negligently

becomes confronted with an emergency situation.

¹⁷ *Kline v. Moyer*, 325 Pa 357, 191 A 43, 111 A L R 406 (1937)

¹⁸ *Ibid*

1 Utah 2d at 151, 263 P.2d at 292 (emphasis in original) In other words, the test in *Hillyard* is two-pronged. (1) where a motorist sees a stationary object in the road and negligently fails to avoid it, his negligence is, as a matter of law, a superseding cause, but (2) if the motorist negligently fails to see the stationary object in time to avoid it, the issue of whether the motorist's negligence is a superseding cause is for the jury.

The case most heavily relied on in *Hillyard* to support the first prong of the rule there stated has been overruled *Kline v. Moyer*, 325 Pa 357, 191 A 43 (1937), was expressly overruled by *Grainy v. Campbell*, 493 Pa. 88, 425 A.2d 379 (1981), which rejected the rule of superseding cause in *Kline* and adopted the rule stated in § 447 of the Restatement (Second) of Torts See also *Hennigan v. Atlantic Refining Co.*, 282 F.Supp. 667, 678-79 (E.D.Pa.1967) (explaining Pennsylvania's modifications to *Kline v. Moyer*).

The strong drift away from deciding the issue of superseding causation in automobile accidents as a matter of law is evident in *Jensen v. Mountain States Telephone and Telegraph Co.*, Utah, 611 P.2d 363 (1980), and *Watters v. Querry*, Utah, 588 P.2d 702 (1978) Indeed, *Jensen* all but overruled the first prong of *Hillyard sub silentio* The approach taken in *Jensen* and *Watters* is also consistent with a number of other Utah cases in which this Court has held that a motorist who collides with a stationary vehicle on the highway is not guilty of negligence as a matter of law without respect to the totality of the circumstances. See *Collier v. Frerichs*, Utah, 626 P.2d 476 (1981); *Fretz v. Anderson*, 5 Utah 2d 290, 300 P.2d 642 (1956); *Nielsen v. Watanabe*, 90 Utah 401, 62 P.2d 117 (1936).

Finally, the first prong of *Hillyard* cannot stand analysis from a theoretical point of view. There is no valid distinction between

one who negligently fails to keep a proper lookout and rear-ends another car and one who keeps a proper lookout but negligently fails to avoid a collision. The two situations are similar to the doctrines of assumptions of risk and contributory negligence—which are now treated for the most part simply in terms of whether a defendant failed to act as a reasonably prudent person under the circumstances. *Moore v. Burton Lumber & Hardware Co.*, Utah, 631 P.2d 865 (1981); *Jacobsen Construction Co. Inc. v. Structo-Lite Engineering, Inc.*, Utah, 619 P.2d 306 (1980). Although *Moore* and *Jacobsen* did not deal with proximate cause, that is not significant. What is significant is that the distinction between the first and second prongs of *Hillyard* is artificial and unjustifiable basically for the reasons stated in *Moore*. In addition, whether a defendant's conduct fits under the first or second prong in *Hillyard*, conduct under either prong is generally foreseeable from the point of view of the person who first creates the hazard.

Finally, the unsound distinction made in *Hillyard* serves to frustrate the purpose of the Comparative Negligence Statute by precluding the kind of comparison of fault that a jury ought to make. The allocation of liability should be made on the basis of the relative culpability of both parties. To do that the jury must assess the reasonableness or unreasonableness of the second driver's actions in light of all the circumstances, including whatever action it takes to avoid a collision, his initial speed, the initial speed of the first car, road conditions, traffic conditions, and the like.

To avoid further confusion in the doctrine of superseding causation in cases such as this, we hereby overrule the first prong of the *Hillyard* test as stated in *Hillyard*, *McMurdie*, *Valesquez*, and *Anderson*.

II. EXCLUSION OF EVIDENCE

Plaintiffs also urge that the court erred in excluding the bus maintenance records made subsequent to the accident. The records were offered for the purpose of demonstrating that the tail lights of the bus

were not functioning at the time of the accident and that UTA was therefore negligent.

[5] The law is well settled that evidence of repairs made after an accident is inadmissible to prove negligence. Rule 51, Utah R.Evid.; *Potter v. Dr. W.H. Groves Latter-day Saints Hospital*, 99 Utah 71, 103 P.2d 280 (1940). However, evidence of subsequent repairs is admissible for other purposes, such as proving the physical conditions that existed at the time of an accident, if the defendant disputes the earlier condition, and if the only way of establishing the earlier condition is by evidence of subsequent repairs. *Lawlor v. County of Flathead*, 177 Mont. 508, 582 P.2d 751 (1978); *Heldman v. Uniroyal, Inc.*, 53 Ohio App.2d 21, 371 N.E.2d 557 (1977); *Leeth v. Roberts*, 295 Ala. 27, 322 So.2d 679 (1975) (dictum); *McCormick on Evidence* § 295 at 668 & n. 23 (2d ed. 1972); Annot., *Admissibility of Evidence of Repairs, Change of Conditions, or Precautions Taken After Accident*, 64 A.L.R.2d 1296, § 6[d] (1959). See also 2 Wigmore, *Evidence* § 283 (Chadbourn rev. 1979).

[6] Although the alleged malfunctioning of the brake lights of the bus might have been caused by the accident itself, the plaintiff's theory was that the lights were defective prior to the accident and that that defect was a causative factor. Under the circumstances, whether the lights were malfunctioning and whether they contributed to the accident were questions of fact for the jury. In short, it was error to exclude the proffered evidence.

III. REVERSIBLE ERROR

[7, 8] Since instruction no. 14 and the exclusion of UTA's maintenance records were erroneous, the issue must be addressed whether those errors were sufficiently prejudicial to constitute grounds for reversal. An error is reversible if there is a reasonable likelihood that a more favorable result would have been obtained by the complaining party in the absence of the error. *Moore v. Burton Lumber & Hardware Co.*,

Cite as 671 P.2d 217 (Utah 1983)

Utah, 631 P.2d 865 (1981); *Shurtleff v. Jay Tuft & Co.*, Utah, 622 P.2d 1168 (1980); *Rowley v. Graven Brothers & Co.*, 26 Utah 2d 448, 491 P.2d 1209 (1971). See also *Rivas v. Pacific Finance Co.*, 16 Utah 2d 183, 397 P.2d 990 (1964); *Hales v. Peterson*, 11 Utah 2d 411, 360 P.2d 822 (1961).

Plaintiffs tried the case on the theory that Loosemore was negligent in five different respects in the manner in which he drove the bus. Plaintiff also contended that UTA was negligent in its maintenance of the bus' electrical system. The error in instruction no. 14 in directing a verdict on proximate cause combined with the exclusion of evidence was clearly prejudicial on the theory based on improper maintenance of the bus.

Furthermore, we cannot conclude that the errors in instruction no. 14 relating to Talbot's negligence and to proximate cause and the error in the exclusion of evidence were harmless in assessing whether there was negligence in the operation of the bus, even though the jury found Loosemore not negligent. Absent those errors it is reasonably possible that the jury would have found Loosemore's operation of the bus negligent in view of instruction no. 11, which is set out in the margin, and a proximate cause of the accident.¹ Whether the brake and turn lights were working clearly bore on the reasonableness of the manner in

which Loosemore stopped the bus and where he stopped.

Plaintiff adduced evidence which made the reasonableness of Talbot's conduct and that of defendants turn to a significant degree upon whether the rear bus lights were malfunctioning as well as upon whether Loosemore stopped too swiftly and failed to pull completely out of the traffic lane when he stopped.

Although there was much disputed testimony concerning the operation of the rear signal and tail lights, no witness saw the brake lights at the time of the accident or immediately thereafter. The evidence revealed that the bus had experienced several electrical failures in the lighting and related systems prior to the accident, and the proffered evidence indicated that there had been numerous and continued problems with the electrical system after the accident.

One of Harris' witnesses, an expert in the field of accident reconstruction, testified that without functioning brake lights a slowing or stopping maneuver is very difficult to perceive in the rear driver's "cone of perception" until he is relatively close to the stopping vehicle. The expert testified that from the point Talbot perceived the bus and reacted, he made the best possible effort to avoid the accident. A driver of a vehicle behind Talbot testified that she was not

1. Instruction no. 11 stated:

It was the duty of the defendant, Lester Lorenzo Loosemore, to use reasonable care, under the circumstances, in driving the bus, to avoid danger to himself and others, and to observe and be aware of the condition of the highway, including its width and shoulders, the traffic thereon, and other existing conditions; in that regard, he was obligated to use reasonable care in respect to:

(a) To use reasonable care to keep a look-out for persons, other vehicles and other conditions reasonably to be seen or anticipated;

(b) To keep the bus under reasonably safe and proper control;

(c) Not to stop the bus upon the paved or main traveled part of the highway when it is practical to stop the bus off such paved or main traveled part of the highway;

(d) Not to suddenly stop or decrease his speed without first ascertaining that he could do so with reasonable safety, and, if other

vehicles are to be affected by such movement, not without first giving an appropriate signal to the driver to the rear that such movement is to be made; either by the extension of the hand and arm downward or by appropriate signal lamps, either such signal to be given continuously;

(e) Not to turn from a direct course or from one lane to another without first ascertaining that such movement can be made with reasonable safety, and, if other vehicles are to be affected by such movement, not without giving an appropriate signal continuously for at least the last three seconds preceding the beginning of the turn or change, either by the appropriate extension of arm and hand or by appropriate signal lamps.

Failure of the defendant, Loosemore, to operate the bus in accordance with any of the foregoing requirements of law would constitute negligence on his part. [Emphasis added.]

aware that the bus had stopped until "suddenly the space between the jeep and the bus, and myself and the jeep was getting narrow." Another driver of a vehicle behind Talbot stated, "I didn't realize the bus was slowing down or stopping. We didn't have any indication it was stopping."

In sum, the exclusion of the maintenance records bore directly on whether the turn and brake lights were properly functioning and may have been of critical importance with respect to plaintiff's theories of negligence, both as to maintenance and manner of operation of the bus, and with respect to proximate cause. The errors were not harmless because there is a reasonable likelihood that the jury's verdicts would have been different in the absence of error.

Reversed and remanded for a new trial. Costs to appellants.

HALL, C.J., and OAKS, HOWE and DURHAM, JJ., concur.



Calvin N. HALL and Rita M. Hall,
Plaintiffs and Respondents,

v.

Perry C. FITZGERALD, et al.,
Defendants and Appellants.

No. 18371.

Supreme Court of Utah.

Oct. 7, 1983.

Vendors brought action against purchasers to foreclose real estate contract. The Fourth District Court, Utah County, Allen B. Sorensen, J., granted summary judgment in favor of vendors, and purchasers appealed. The Supreme Court, Oaks, J., held that: (1) vendors fulfilled their contractual responsibility to convey "title" to purchasers by delivering warranty deed to

subject property, even though vendors were themselves purchasing property under real estate contract and therefore never possessed legal title; (2) denial of purchasers' motion to set aside judgment on ground of newly discovered evidence was not abuse of discretion; and (3) questions as to whether remand was required because, prior to foreclosure sale, trial court entered personal judgment against purchasers for any deficiency owing after sale and whether vendors would be unjustly enriched if there was deficiency judgment were moot and would not be adjudicated.

Affirmed.

1. Judgment ⇐181(11)

Allegations or denials in pleadings are not sufficient basis for opposing summary judgment.

2. Vendor and Purchaser ⇐128

Although, in real estate transaction, "title" most often refers to estate in fee simple, clear of all encumbrances or interests of any other person, contract by its terms, or circumstances leading up to and surrounding transaction, may show that parties intended another meaning; under such circumstances, "title" can refer to wide array of estates or interests, including legal title, equitable title, or mere right of possession.

3. Vendor and Purchaser ⇐128

Where, under uniform real estate contract, equitable title would have been passed to purchasers when contract was signed, "title" required to be passed to purchasers by paragraph of contract was not usual unencumbered fee simple estate with participation by no other person, inasmuch as vendors would have no such title to give, but would, at most, refer to legal title retained by vendor.

4. Vendor and Purchaser ⇐129(1)

Although vendors, who were themselves purchasing property under real estate contract, never possessed legal title to property sold to purchasers, vendors ful-

panion were apprehended. The juvenile was then taken to the Provo Police Station, and his mother notified at 12:05 a. m. The mother had no transportation and asked the juvenile's aunt to go to the Police Station.

A Detective Baum investigated the circumstances at the school, and then interrogated the juvenile at the Police Station, having arrived there at approximately 1:00 a. m. He there read the juvenile his "*Miranda*"² rights, and wrote down the juvenile's statement. The juvenile signed the statement at 2:45 a. m., January 6, 1979, and was released.

At the hearing in Juvenile Court, defense counsel objected to the admission of the written statement and to Detective Baum's testimony concerning the juvenile's statement on the ground that a juvenile is incapable of voluntarily waiving his constitutional rights. The Court overruled this objection, saying:

Pending a ruling by the Appellate Courts on this question in Utah, there has been a fairly uniform position of the trial courts of the juvenile system, so if the evidence appears to show a knowledgeable understanding of the rights being given and that there's no evidence showing involuntariness, that the simple fact of minority, at least at the age of this respondent, does not automatically incapacitate him from the legal waiver or a separate waiver. So I will overrule your objection, but note it for the record.

On appeal, the juvenile cites this ruling as error, and urges this Court to adopt a rule which would exclude a juvenile's admissions or confessions made without the counsel of his attorney or his parents. In addition, the juvenile contends that the police interrogation was in violation of Section 78-3a-29, and that such violation renders the juvenile's statements inadmissible.

[1] We have dealt with both of these questions at length in *State v. Hunt*, 607 P.2d 297 (1980). We there held that the purpose of Section 78-3a-29 was not to govern police interrogation of juveniles, and

that the admissibility of the juvenile's confessions or admissions depends upon whether the juvenile made a knowing and voluntary waiver of his constitutional rights in light of the total circumstances of his case.

[2] Here, the Judge determined that this confession was voluntary, and that the juvenile had waived his rights. The evidence supports this determination. The juvenile testified in his own behalf, but the only evidence he gave of any "coercive" tactics on the part of the police was that the officer told him to sign the confession because he (the officer) wanted to go home and go to bed. The juvenile admitted, however, that he knew the statement would be used against him in court. We do not believe any coercion existed here which would render this confession involuntary. It was given by a juvenile, 17 years of age, who, according to the record was not unfamiliar with the process of the criminal law.

Affirmed.

CROCKETT, C. J., and MAUGHAN, HALL and STEWART, JJ., concur.



Kerby R. ANDERTON, Plaintiff
and Appellant,

v.

Terry MONTGOMERY and Tom Montgomery, dba Vernal Hide & Fur Company, Defendant and Respondents.

No. 15980.

Supreme Court of Utah.

Feb. 15, 1980.

Action was brought to recover against owners and operators of business for injuries sustained when side of device, which

2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

was used to exhibit sheet metal samples, collapsed and caused samples to crash down on plaintiff. The Fourth District Court, Uintah County, David Sam, J., dismissed action, and plaintiff appealed. The Supreme Court, Hall, J., held that: (1) certain instruction did not contradict *res ipsa loquitur* instructions given, but, rather, merely constituted a clarification thereof; (2) instruction dealing with unavoidable accident did not contradict the theory of *res ipsa loquitur*; (3) unavoidable accident instruction was not superfluous, confusing, or misleading; and (4) fact that attorney-client relationship existed between defense counsel and corporation, of which a juror had once been an officer, and that such relationship was not disclosed at voir dire examination did not result in prejudicial error.

Affirmed.

1. Negligence ⇐121.2(2)

Purpose of *res ipsa loquitur* is to permit one suffering injury from something which was under control of another and which ordinarily would not cause injury except for the other's negligence, to present grievance to a court or jury on basis that an inference of negligence may reasonably be drawn from such facts, and cast the burden on the other to make proof as to what happened.

2. Negligence ⇐121.2(3)

Circumstances which, under doctrine of *res ipsa loquitur*, would permit trier of fact to infer that defendant has engaged in negligent conduct to injury of the plaintiff, are: that the accident was a kind which, in the ordinary course of events, would not have happened had due care been observed; that plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the injury; and that the agency or instrumentality causing the injury was under exclusive management or control of the defendant.

3. Negligence ⇐136(6)

Weighing of evidence presented to establish the elements which must be established before doctrine of *res ipsa loquitur* can be applied is within province of the jury.

4. Negligence ⇐136(6), 138(3)

Where trial court determines that the evidence, viewed in the light most favorable to plaintiff, could have established prerequisites to the application of doctrine of *res ipsa loquitur*, an instruction to that effect is proper, and it then becomes jury's responsibility to apply or refuse to apply the doctrine, based on its factual findings regarding the circumstantial prerequisites.

5. Negligence ⇐121.2(9)

Res ipsa loquitur is an evidentiary doctrine aiding in proof of negligence; it has no bearing on issue of causation, which must be separately and independently established.

6. Negligence ⇐121.5

Res ipsa loquitur does not relieve plaintiff of his obligation of establishing causal link between defendant's act or omission and plaintiff's injury, but permits plaintiff, in lieu of linking his injury to specific act on defendant's part, to causally connect it with agency or instrumentality, under exclusive control of defendant, functioning in manner which, under the circumstances, would produce no injury absent negligence; if agency or instrumentality is not established to be cause of plaintiff's injury or if it is not shown to be under exclusive control of defendant, causal connection is not established, and inference of negligent conduct giving rise thereto is nullified.

7. Trial ⇐243

In action to recover against owners and operators of business for injuries sustained when side of device, which was used to exhibit sheet metal samples, collapsed and caused samples to crash down on plaintiff, certain instruction, by informing jury that "where the precise cause of an accident on the whole evidence is left to conjecture or speculation, and may be attributed to causes over one or more of which the defendants have no control, as to a cause for which the defendant would be responsible," liability should not be found, did not contradict *res ipsa loquitur* instructions given by trial

court, but, rather, merely constituted a clarification thereof.

8. Negligence ⚡63

Where injury arises from a set of circumstances which do not reflect a lack of due care on anyone's part, the accident has been "unavoidable" and no recovery may be had under a theory of negligence.

See publication Words and Phrases for other judicial constructions and definitions.

9. Negligence ⚡140

In action to recover against owners and operators of business for injuries sustained when side of device, which was used to exhibit sheet metal samples, collapsed and caused samples to crash down on plaintiff, instruction dealing with unavoidable accident did not contradict plaintiff's theory of *res ipsa loquitur*.

10. Trial ⚡244(4)

Though an instruction on unavoidable accident amounts to a reemphasis of principles implicit in other instructions, giving of an unavoidable accident instruction is not error if it clearly and concisely states the principle involved and does not create an imbalance in the jury instructions.

11. Negligence ⚡140

Trial ⚡229

In action to recover against owners and operators of business for injuries sustained when side of device, which was used to exhibit sheet metal samples, collapsed and caused samples to crash down on plaintiff, giving of "unavoidable accident" instruction was not superfluous, confusing or misleading under certain circumstances.

12. Appeal and Error ⚡233(2)

Where jury's question in regard to possibility of assessing 60% of injury to unavoidable accident and 40% to negligence was answered to satisfaction of both parties, plaintiff could not complain on appeal that the question posed remained as evidence of the inadequacy of trial court's instruction on unavoidable accident.

13. Constitutional Law ⚡267

Requirements of due process dictate that jury be impartial and unbiased. U.S.C. A.Const. Amend. 14; Const. art. 1, §§ 7, 10.

14. New Trial ⚡42(2)

Trial court may order new trial if it appears that juror bias has crept into the proceedings notwithstanding voir dire questioning. U.S.C.A.Const. Amend. 14; Const. art. 1, §§ 7, 10; Rules of Civil Procedure, rule 61.

15. Appeal and Error ⚡1170.1

Where, in sound discretion of trial court, an infraction of a party's rights at voir dire questioning has no material impact on party's right to impartial jury trial, no prejudicial error has occurred. U.S.C.A. Const. Amend. 14; Const. art. 1, §§ 7, 10; Rules of Civil Procedure, rule 61.

16. Appeal and Error ⚡1170.1

In action to recover against owners and operators of business for injuries sustained when side of device, which was used to exhibit sheet metal samples, collapsed and caused samples to crash down on plaintiff, fact that attorney-client relationship existed between defendant's counsel and corporation, of which a juror had once been an officer, and that such relationship was not disclosed at voir dire examination did not result in prejudicial error where neither counsel nor juror were aware of such relationship until after the trial had finished. Rules of Civil Procedure, rule 61.

George E. Mangan, Roosevelt, for plaintiff and appellant.

Stephen B. Nebeker and Paul S. Felt, of Ray, Quinney & Nebeker, Salt Lake City, for defendants and respondents.

HALL, Justice:

This appeal is taken from the dismissal of a personal injury action pursued by plaintiff Kerby R. Anderton against defendants Terry and Tom Montgomery, owners and operators of the Vernal Hide and Fur Company.

Defendants' business, located in Vernal, Utah, deals, among other things, in commercial sale of sheet metal. Plaintiff, a part-time welder, visited defendants' place of business on September 26, 1975, for the purpose of purchasing sheet metal for the construction of a metal box. Plaintiff was conducted into defendants' business yard by defendant Terry Montgomery, and shown a display device used to exhibit sheet metal samples. The display consisted of a rack, set on a pipe frame and holding sheet metal samples vertically, such that they could be turned from one side to the other, like the pages of a book. As plaintiff and another individual who had accompanied him began turning through the samples, defendant Terry Montgomery was called away by a telephone call. While plaintiff, assisted by his friend and another employee of defendants, continued to examine the samples on the rack, the right side of the pipe frame supporting the display collapsed, causing the rack bearing the samples to crash down onto plaintiff, driving the pipe through the flesh of his right hip and buttock. The accident resulted in partial, permanent impairment of plaintiff's right hip and leg.

Plaintiff thereupon instituted suit against defendants. At trial, defendants asserted that they had used the display device for some six months without any prior difficulty, but were unable to point to any specific factor which could have been responsible for the frame's collapse. Plaintiff was likewise unable to establish any specific conduct on defendant's part giving rise to the collapse. Consequently, plaintiff requested that the court instruct the jury regarding the doctrine of *res ipsa loquitur*, which instruction was given, over defendants' objection. Defendants requested an instruction explaining the nature of an "unavoidable accident" under the law, which was also given, over plaintiff's objection. The jury found neither party negligent and plaintiff was therefore denied recovery for his injuries.

Sometime subsequent to the entry of judgment, Mr. Stephen B. Nebeker, counsel for defendants, while preparing for the defense of a separate action involving a com-

pany by the name of H & S Trucking, learned that a former owner of that company, one LeRoy Dean Huber, had served on the jury in the instant case. Neither Mr. Nebeker nor Mr. Huber had been aware of their connection in this regard at the time of the former trial; Mr. Huber had denied, on voir dire, any connection or acquaintance with either counsel, and Mr. Nebeker had never dealt with Mr. Huber pursuant to his dealings with H & S Trucking, as Huber had sold his interest therein in 1973, while the litigation involving the services of Mr. Nebeker did not arise until 1974. Mr. Nebeker, however, notified the trial court immediately regarding the relationship thus discovered, whereupon a hearing was held. The trial court ruled that plaintiff's interests had not been prejudiced by reason of the relationship since, at the time of the trial, neither Mr. Nebeker nor Mr. Huber was aware that it existed.

On appeal, plaintiff first claims prejudice by reason of conflict and inconsistency in the jury instructions given by the trial court below. As previously mentioned, plaintiff requested and received instructions relating to the doctrine of *res ipsa loquitur*, and to its application in the present case. The instructions given were as follows:

Instruction No. 4

Our law recognizes a doctrine known as *res ipsa loquitur* which means: The thing speaks for itself. By reason of it, under certain circumstances, one who is injured may hold another responsible without showing the exact conduct of the other party that caused or set in motion the act that caused the injury. The doctrine of law may be applied only under special circumstances, they being as follows:

First: That the rack of sheet metal and the stand pipe that broke and collapsed upon the plaintiff, Kerby Anderton, which proximately caused the injury to him, was in the possession and exclusive control of the defendants Terry Montgomery and Tom Montgomery at the time the cause of injury was set in mo-

tion, and that it appears that the injury resulted from some act or omission incident to the manner in which the defendants maintained or constructed or exercised due care in the use of the said rack of sheet metal. This does not mean that defendants had to be present at the time of the injury or that the plaintiff could not be engaged in assisting the defendants agents in locating the desired piece of sheet metal.

Second: That the incident was one of such nature as does not or would not have happened in the ordinary course of things, if those who have control of or are responsible for the rack of sheet metal, use ordinary care.

Third: That the circumstances surrounding the causing of the occurrence were such that the plaintiff is not in a position to know what specific conduct or act or omission or failure to act, was the cause, whereas the defendants, being those in charge of their yard and the rack of sheet metal, may be reasonably expected to know, and thus to be able to explain their lack of negligence. (See *Sanone v. J. C. Penny [sic] Company*, 17 Utah 2d 46, 404 P.2d 248).

If you find all of the above conditions to exist, they may give rise to an inference by you that the defendants were negligent, which inference will support a verdict for the plaintiff, in the absence of evidence of non-negligence on the part of the defendants.

Instruction No. 4a

If you find from a preponderance of the evidence that the sheet metal which collapsed on Kerby Anderton when the stand pipe holding the same broke, was in the possession and exclusive control of the defendants, as I have explained the same to you; and, if you further find that the incident causing such an injury is of such a nature as would [not] have happened in the ordinary course of events if the rack of sheet metal had been properly constructed and or maintained; and, if you shall further find that the

plaintiff is not in a position to know what was the specific reason for the breaking of the stand pipe and the collapse of the sheet metal, whereas the defendants as the possessors of said yard, and have the exclusive right to the control of the same, may be reasonably expected to know the reason for the same, and to thus explain their lack of negligence; then upon your making such findings, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendants. The inference is a form of evidence, and if there is none other tending to overcome it, or if the inference, to your minds, preponderates over contrary evidence, it would warrant a verdict for the plaintiff. Therefore, you should consider this inference together with all of the other evidence in the case in determining your verdict.

Defendants, over plaintiff's objection, secured the submission of an instruction relating to causation, which read as follows:

Instruction No. 17

You are instructed that where the precise cause of an accident on the whole evidence is left to conjecture or speculation, and may be as reasonably attributed to causes over one or more of which the defendants has no control, as to a cause for which the defendants would be responsible, then, and in that event, there has been a failure in the required burden of proof. If you find from the evidence in this case that it is just as likely that the accident resulted from causes beyond the control of defendants as from negligence or fault, then the burden of proof as against such defendants have not been met, and such defendants are entitled to your verdict in their favor, no cause of action.

Defendants likewise requested and secured (again over plaintiff's objection) the reading of an instruction relating to the doctrine of "unavoidable or inevitable accident." The instruction stated that,

Instruction No. 19

In law we recognize what we term as unavoidable or inevitable accidents. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it. Both negligence and proximate cause, as defined in these instructions, are requisites for [finding] liability. If you find from the evidence in this case that the accident occurred without negligence on the part of defendants or was not proximately caused by any negligence on the part of defendants, you should answer interrogatory No. 3 "No".

It is plaintiff's contention that instructions 17 and 19 conflict with and contradict instructions 4 and 4a, dealing with *res ipsa loquitur*, in that they suggest the incumbency, upon plaintiff, of producing evidence of specific acts of negligence on the part of defendants, where *res ipsa loquitur* specifically obviates the necessity of doing so, permitting plaintiff to establish negligence on defendants' part by inference drawn from circumstantial evidence.

[1-4] Turning first to plaintiff's contention that instruction 17 was inconsistent with the application of *res ipsa loquitur*, we note that he correctly characterizes the underlying function and purpose of that doctrine. As previously stated by this Court, the purpose of *res ipsa loquitur* is "to per-

mit 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; and cast the burden upon the other to make proof of what happened."¹ It is often the case that a plaintiff, while suffering injury which was caused by a force or agency allegedly instigated by defendant's conduct, is unable to produce evidence pinpointing a given act or omission on the part of defendant which breached a legally imposed standard of care. Where this is the case, the law permits plaintiff to withdraw from the specific conduct constituting negligence, and concentrate upon presenting evidence probative of circumstances which would permit the trier of fact to infer that defendant had engaged in negligent conduct to the injury of the plaintiff. Such circumstances, which have been defined by law, are (1) that the accident was of a kind which, in the ordinary course of events, would not have happened had due care been observed; (2) that the plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the injury;² and (3) that the agency or instrumentality causing the injury was under the exclusive management or control of the defendant.³ It is to be noted that the weighing of evidence presented to establish the above elements, like all other questions of fact, is within the province of the jury; where the trial court determines that the evidence, viewed in a light most favorable to the plaintiff, could establish the prerequisites to the application

1. *Lund v. Phillips Petroleum Co.*, 10 Utah 2d 276, 351 P.2d 952 (1960), see also *Joseph v. W. H. Groves Latter Day Saint Hospital*, 10 Utah 2d 94, 348 P.2d 935 (1960), *White v. Pinney*, 99 Utah 484, 108 P.2d 249 (1940).

2. This is not to say that any contributory negligence on plaintiff's part prevents the application of the doctrine, such that it may not be used in those cases where plaintiff is seeking partial recovery under Utah's comparative negligence statute (U.C.A., 1953, 78-27-37). The requirement here is that plaintiff's use of the agency or instrumentality not be primarily re-

sponsible for the injury, not that his actions be free from negligence of any kind. (Note that the comparative negligence provision bars partial recovery under any type of proof where plaintiff's negligence equals or exceeds that of the defendant.) See 58 Am.Jur.2d Negligence, § 481, p. 58.

3. *Wightman v. Mountain Fuel Supply Co.*, 5 Utah 2d 373, 302 P.2d 471 (1956); *Moore v. James*, 5 Utah 2d 91, 297 P.2d 221 (1956); *Loos v. Mountain Fuel Supply Co.*, 99 Utah 496, 108 P.2d 254 (1940).

of the doctrine, an instruction to that effect is proper. It then becomes the jury's responsibility to apply, or refuse to apply, the doctrine based on its factual findings regarding the circumstantial prerequisites.⁴

[5-7] With regard to instruction 17 in the present case, however, we must observe that *res ipsa loquitur* is an evidentiary doctrine aiding in the proof of negligence; it has no bearing on the issue of causation, which must be separately and independently established.⁵ 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.⁶ *Res ipsa loquitur* does not relieve plaintiff of this obligation; rather, it permits him, 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. Instruction 17, by informing the jury that "where the precise cause of an accident on the whole evidence is left to conjecture or speculation, and may be attributed to causes over one or more of which the defendants has no control, as to a cause for which the defendant would be responsible," liability should not be found, was simply specifying that, under such circumstances, the prerequisites of the doctrine of *res ipsa loquitur* would thereby be lacking. As such, instruction 17 does not contradict the *res ipsa loquitur* instructions

given, but constitutes merely a clarification thereof.

[8, 9] For similar reasons, we are unpersuaded that jury instruction 19, dealing with unavoidable accident, contradicts the theory of *res ipsa loquitur*. Unavoidable accident, rather than being a separate legal doctrine, is simply a recognition of the fact that an incident causing injury to the plaintiff does not necessarily give rise to liability in the defendant. Where the injury arises from a set of circumstances which do not reflect a lack of due care on anyone's part, no recovery may be had under a theory of negligence, the accident having been "unavoidable."⁷ Instruction 19, therefore, merely cautioned the jury that, absent persuasive proof presented by the plaintiff (by use of the doctrine of *res ipsa loquitur* or otherwise) that defendant had engaged in negligent conduct which resulted in an injury to the plaintiff, no liability was to be found, the injury arising from an unavoidable accident.

Plaintiff next focuses on the allegedly improper use of the "unavoidable accident" instruction under any circumstances. It is plaintiff's contention that the unavoidable accident instruction, by expressly restating what is no more than a legal truism implied in instructions relating to negligence and causation, is at best superfluous, and at worst confusing and misleading to the jury.

[10] As explained above, a properly-drafted unavoidable accident instruction punctuates the necessity of finding both negligence and causation prior to assigning liability. It is true that such an instruction amounts, in essence, to a reemphasis of principles already implicit in other instructions. Such fact, in and of itself, is not prejudicial, however, unless it results in the instructions given being weighted, as a

4. *Lund v. Phillips Petroleum Co.*, supra, footnote 1.

5. See *Frumer and Friedman, Products Liability*, § 12.03[1], p. 284.

6. *Hall v. Blackham*, 18 Utah 2d 164, 417 P.2d 664 (1966).

7. *Calahan v. Wood*, 24 Utah 2d 8, 465 P.2d 169 (1970), *Woodhouse v. Johnson*, 20 Utah 2d 210, 436 P.2d 442 (1968); *Porter v. Price*, 11 Utah 2d 80, 355 P.2d 66 (1960).

whole, in favor of the defendant.⁸ As such, an unavoidable accident instruction is not error if it clearly and concisely states the principle involved, and does not create an imbalance in the jury instructions.⁹

[11, 12] Instruction 19 adequately explains the concept of unavoidable accident. The final sentence thereof, stating, "If you find from the evidence in this case that the accident occurred without negligence on the part of defendants or was not proximately caused by any negligence on the part of the defendants, you should answer interrogatory No. 3 'No,'" sufficiently links the instruction to those other theories presented to the jury to enable them to perceive its significance in context.¹⁰ It is to be noted, moreover, that the giving of instruction 19 in no way created an unfair imbalance of the instructions given to the jury. In light of the instructions already given regarding the use of circumstantial evidence under the doctrine of *res ipsa loquitur*, we deem it not only permissible but indeed proper that the need to find negligence, by one means or another, be reemphasized prior to the beginning of deliberations.

Plaintiff's final point on appeal deals with the relationship existing between juror Huber and defense counsel Nebeker. Plaintiff's theory runs as follows: Mr. Huber's failure to disclose his relationship with Mr. Nebeker, even though based on total ignorance of that relationship, denied plaintiff's counsel full opportunity to question regarding the matter during voir dire. As such, plaintiff's right to voir dire was improperly curtailed, resulting in an inadequate oppor-

tunity to challenge Mr. Huber, either for cause or peremptorily. As such, plaintiff was denied the right of full information and selective processes in jury selection, and was therefore denied trial by an impartial jury. We cannot agree with plaintiff's analysis.

[13-15] Trial by jury in civil cases is guaranteed under the Utah Constitution.¹¹ Moreover, the requirements of due process dictate that the jury be impartial and unbiased.¹² It is in furtherance of these rights that voir dire examination of prospective jurors before the beginning of trial is engaged in. For the same reason, a trial court may order a new trial should it appear that juror bias crept into the proceedings notwithstanding voir dire questioning.¹³ This is not to say, however, that it is incumbent upon a trial court to order a new trial whenever information is revealed which was not discovered by voir dire questioning addressed thereto. It is impartial jury trial, not complete voir dire questioning, that is the ultimate right involved. Where, in the sound discretion of the trial court, an infraction of the latter has no material impact upon the former, no prejudicial error has occurred.¹⁴

[16] Given, in the present case, that an attorney-client relationship existed between Mr. Nebeker and the corporation of which Mr. Huber had at one time been an officer, and that such relationship was not disclosed upon voir dire examination, we are nonetheless constrained to agree with the trial court that no prejudicial error resulted

8. *Devine v. Cook*, 3 Utah 2d 134, 279 P.2d 1073 (1955)

9. *Calahan v. Wood*, *supra*, footnote 7

10. Plaintiff, attempting to show that the unavoidable accident instruction was confusing to the jury, points to a note delivered to the court inquiring after the possibility of assessing 60 percent of the injury to unavoidable accident and 40 percent to negligence. Such evidence would be more persuasive had not the trial court, in concert with counsel of both parties and by their express approval, submitted a clarifying instruction to the jury regarding the proper use of unavoidable accident. The jury's question having been answered to the satisfac-

tion of both parties, plaintiff may not now be heard to state that the question posed remains as evidence of the inadequacy of the instruction.

11. See Article I, Section 10, Constitution of the State of Utah.

12. See Article I, Section 7, Constitution of the State of Utah, Amendment 14, Constitution of the United States

13. Rule 59(a)(2), Utah Rules of Civil Procedure.

14. Rule 61, Utah Rules of Civil Procedure

therefrom. The evil to be avoided in any relationship between juror and counsel is that of improper bias or prejudice, which arises, not from the fact of the relationship itself, but only from an awareness thereof. Mr. Huber can hardly be suspected of inclining toward the representations of Mr. Nebeker due to a relationship existing between the two of them of which neither was aware until after the trial had finished. For this reason, impartiality of the jury was undiminished by the relationship, and no prejudicial error occurred.

The decision of the trial court is affirmed. Costs awarded to defendants.

CROCKETT, C. J., and MAUGHAN, WILKINS and STEWART, JJ., concur.



Torval ALBRECHT, Sherwood Albrecht, Maurice Albrecht, M. Steve Albrecht and Carl Albrecht & Sons, Plaintiffs and Respondents,

v.

URANIUM SERVICES, INC., a Utah Corporation, Defendant and Appellant.

No. 15996.

Supreme Court of Utah.

Feb. 15, 1980.

Summary judgment entered by the Seventh District Court, Emery County, Boyd Bunnell, J., quieting title to certain mining claims in plaintiffs was affirmed on appeal, 596 P.2d 1025, and petition by defendants for rehearing was granted. The Supreme Court, Wilkins, J., held that a dispute of material facts was presented so as to preclude entry of summary judgment in case.

Reversed and remanded.

Maughan, J., dissented.

Judgment ¶181(15)

A dispute of material facts on issue of whether mining operations had been conducted on mining claims was presented so as to preclude entry of summary judgment in suit to quiet title to certain mining claims.

Leonard W. Burningham, Salt Lake City, for defendant and appellant.

Tex R. Olsen, Richfield, for plaintiffs and respondents.

WILKINS, Justice:

A petition for rehearing was granted by this Court after its opinion, Utah, 596 P.2d 1025 (1979), was rendered on May 29, 1979.

Petitioner, Uranium Services, Inc. asserts the same point on rehearing as it asserted on appeal; to wit: that genuine issues of material facts have been raised by the pleadings including affidavits filed by both parties, and that the District Court erred in granting summary judgment. Respondents Albrecht again contend that the appeal was not timely filed.

This Court is still of the opinion that the appeal was timely filed, as discussed by Mr. Justice Maughan in the original opinion.

Upon reconsideration, however, this Court is of the view that a dispute of material facts has been presented and on that issue we adopt the dissenting opinion of Mr. Justice Stewart, concurred in by Mr. Chief Justice Crockett, in the original decision of this case, *Albrecht, ante*, 596 P.2d at 1027-28.

The summary judgment entered by the District Court of Emery County is therefore reversed and this case is remanded for trial on the merits. Costs to defendant, Uranium Services, Inc.

CROCKETT, C. J., and HALL and STEWART, JJ., concur.

MAUGHAN, J., dissents.

Elsa H. NIXDORF, Plaintiff
and Appellant,

v.

N. Frederick HICKEN and A. James
McAllister, Defendants and
Respondents.

No. 16151.

Supreme Court of Utah.

May 27, 1980.

Patient brought medical malpractice action based on allegation that surgeon breached his duty when he left a surgical cutting needle in the patient's body and thereafter omitted to inform the patient that the needle had been left in her body. The Third District Court, Salt Lake County, James S. Sawaya, J., granted a directed verdict in favor of defendants, and the patient appealed. The Supreme Court, Maughan, J., held that: (1) while the Supreme Court would not say that the surgeon's initial loss of the needle was negligent as a matter of law, the patient was not required to present expert testimony to establish that the continued presence of the needle in the patient's body more probably than not resulted from negligence; (2) under the circumstances, the application of the doctrine of *res ipsa loquitur* created a rebuttable inference of negligence sufficient to carry the patient's case past the motion for nonsuit; (3) the evidence presented a question for the jury as to whether the defendants were negligent in failing to disclose the presence of the needle; and (4) the trial court erred in granting a directed verdict against the patient.

Reversed and remanded.

Stewart, J., dissented in part and concurred in part and filed opinion.

1. Physicians and Surgeons ⇐ 14(4)

In malpractice actions generally, a physician is held to the standard of skill that is employed by his contemporaries in the same or similar communities.

2. Physicians and Surgeons ⇐ 18.60

In order for plaintiff to prevail in a medical malpractice action, plaintiff must establish both the standard of care required of the defendant as a practicing physician in the community and that the defendant did not employ that standard.

3. Physicians and Surgeons ⇐ 18.80(9)

Although, in the majority of medical malpractice cases, the plaintiff must introduce expert testimony to establish the standard of care, such testimony is unnecessary to establish the standard of care when the propriety of the treatment received is within the common knowledge and experience of the layman; the loss of a surgical instrument or other paraphernalia in the operating site exemplifies such treatment.

4. Physicians and Surgeons ⇐ 18.80(8)

Where surgeon lost a curved cutting needle in the operating site while repairing patient's rectocele, patient was not required to introduce expert testimony to establish the applicable professional standard of care.

5. Physicians and Surgeons ⇐ 15(12)

Where curved cutting needle became disengaged from needle holder while surgeon was repairing a rectocele, the fact that the surgeon realized that the needle was lost and attempted to locate it by palpating the suspect area did not obviate the consequences of the loss or relieve the surgeon of liability for any breach of duty arising from the initial loss of the needle.

6. Physicians and Surgeons ⇐ 15(14)

Whether or not surgeon acted negligently in leaving lost surgical needle in patient's body after unsuccessfully attempting to locate the needle was a separate question from the question whether the initial loss of the needle was a breach of duty.

7. Physicians and Surgeons ⇐ 18.60

When the appropriate evidentiary basis is presented, a patient may employ the doctrine of *res ipsa loquitur* in order to meet his burden to prove that a physician surgeon did not exercise the level of skill required by the applicable community standard of care.

8. Negligence ⇌ 121.2(2)

The doctrine of *res ipsa loquitur* is a procedural rather than a substantive rule of law which carries the plaintiff past a motion for nonsuit when the circumstantial evidence presented by the plaintiff is sufficient to support the application of the doctrine and the inference of negligence.

9. Physicians and Surgeons ⇌ 18.60

Generally, utilization of the doctrine of *res ipsa loquitur* in a medical malpractice case requires introduction of expert medical testimony to establish that the outcome more likely resulted from negligence than from some other cause.

10. Physicians and Surgeons ⇌ 18.80(9)

In certain situations, a medical procedure is so common or the outcome to the patient so affronts notions of medical propriety that expert testimony is not required to establish what would occur in the ordinary course of events and, in this type of situation, the patient can rely on the common knowledge and understanding of laymen to establish that the outcome would not have happened had the physician or surgeon utilized due care.

11. Negligence ⇌ 121.2(8)

When the instrumentality which caused the injury was in the exclusive control of defendant and plaintiff did not participate in the acts causing the injury, negligence may be inferred from the injury alone if the cause of injury is so obviously negligent that negligence may be inferred as a matter of law or if people would know from common experience that the result would not have happened without negligence or if there is expert testimony that the injury could not have occurred if proper care had been used.

12. Physicians and Surgeons ⇌ 18.60

Though the Supreme Court declined to say that surgeon was negligent as a matter of law when he allowed a needle to become disengaged from its needle holder during surgery, the ultimate fact that the needle remained present in the body of the patient was such that laymen could know from common knowledge and experience that it

was more probably than not the result of negligence and, therefore, expert testimony was not required to establish that element of the doctrine of *res ipsa loquitur*.

13. Physicians and Surgeons ⇌ 18.60

Evidence that cutting needle became disengaged from needle holder while surgeon was repairing patient's rectocele, that the needle thereafter remained present in the patient's body, that the instrumentality which caused the ultimate bad result was in the exclusive control of the surgeon and that the patient was under a general anesthetic and could not participate in or contribute in the act causing the injury provided a sufficient evidentiary foundation for applying the *res ipsa loquitur* doctrine and created a rebuttable inference of negligence sufficient to carry patient's case against surgeon past motion for nonsuit.

14. Physicians and Surgeons ⇌ 18.60

In a medical malpractice action, the defendant may introduce evidence to rebut an inference of negligence arising from the doctrine of *res ipsa loquitur*.

15. Physicians and Surgeons ⇌ 18.90

While the defendant may introduce conflicting medical testimony on the cause of the injury after the patient has presented evidence creating a rebuttable inference of negligence, this conflicting medical testimony should not be relied on by the trial judge to remove the case from the jury; rather, such testimony establishes a conflict in the evidence which it is the jury's duty to resolve.

16. Physicians and Surgeons ⇌ 18.60

In a medical malpractice action, the plaintiff has the burden to prove that the negligence of defendant proximately caused the injury.

17. Physicians and Surgeons ⇌ 18.80(7)

Proof that the negligence of defendant proximately caused the patient's injury requires some expert testimony.

18. Physicians and Surgeons ⇐18.90

Testimony of defendant surgeon, an acknowledged expert, that needle that was left in plaintiff's body after surgical procedure was in a position such that it could produce pain was sufficient to render causation a question of fact for the jury, even though there was conflicting evidence that patient's pain was due to other medical abnormalities.

19. Physicians and Surgeons ⇐18.90

In a medical malpractice action, it is not necessary that the proximate cause of injury sustained through a physician's negligence be proved with exactitude; if the injury could be attributed to two or more causes, one of which was the negligence of a doctor, it is for the jury to determine which was the proximate cause of the injury.

20. Physicians and Surgeons ⇐18.90

Evidence in medical malpractice action presented a jury question whether surgeon was negligent in failing to disclose to patient that a needle had been left in the patient's body during a surgical procedure.

21. Physicians and Surgeons ⇐15(8)

Relationship between a doctor and a patient creates a duty in the physician to disclose to the patient any material information concerning the patient's physical condition.

22. Physicians and Surgeons ⇐15(8)

The physician's duty to disclose to his patient any material information concerning the patient's physical condition stems from the fiduciary nature of the physician-patient relationship and from the patient's right to determine what shall or shall not be done with his body.

23. Physicians and Surgeons ⇐15(8)

Scope of a physician's duty to inform the patient is defined by the materiality of the information in the decisional process of an ordinary individual; if a reasonable person in the position of the patient would consider the information important in choosing a course of treatment, then the information is material and disclosure is required.

24. Physicians and Surgeons ⇐18.90

In a medical malpractice action where in plaintiff alleges that physician was negligent in failing to disclose certain material information to the patient, it is for the jury to determine what a reasonable person would consider material information in a decision concerning his well being.

25. Physicians and Surgeons ⇐18.90

Once the duty to disclose certain information to the patient is established, then the physician's total breach of that duty presents a jury question as to what damages were proximately caused by the breach.

26. Physicians and Surgeons ⇐18.80(7)

When a physician fails to disclose to his patient any information concerning a material fact, there is no question of skill or judgment and no question of practice beyond the knowledge of laymen which must be established through expert testimony in order to prove liability.

27. Evidence ⇐574

In determining the existence and extent of a physician's duty to disclose in each particular situation, the jury need not depend solely on expert testimony.

28. Physicians and Surgeons ⇐15(8)

When a physician has knowledge of a fact concerning the patient's physical condition which is material to that patient and when the physician fails to disclose the fact, the relationship between the physician and patient may render the physician's silence fraudulent.

29. Physicians and Surgeons ⇐18.110

Damages which may be shown to follow as a proximate result of physician's nondisclosure to patient of material facts concerning patient's condition include reasonable charges for discovery and repair of any resultant injury and monetary compensation for mental anguish.

Edward M. Garrett, Salt Lake City, for plaintiff and appellant.

John H. Snow, Salt Lake City, for defendants and respondents.

MAUGHAN, Justice:

The plaintiff appeals the district court's granting of a directed verdict in favor of the defendants. Following the preservation of the plaintiff's case the defendants moved pursuant to Rule 50 for a directed verdict. The court granted the motion and entered its judgment thereon. We reverse and remand the action for a new trial. All statutory references are to Utah Code Annotated, 1953, as amended.

For a period of approximately ten years, the plaintiff, Elsa H. Nixdorf, suffered from a cystocele and rectocele.¹ In June 1964 she contacted the defendant, Dr. N. Frederick Hicken, concerning the alleviation of these problems.² Although Dr. Hicken initially counseled the plaintiff on the necessity of a hysterectomy, during the subsequent operation which he performed on June 5, 1964, he elected instead to merely repair the cystocele and rectocele and amputate a portion of the plaintiff's cervix.

The repair of the cystocele was completed without incident. However, during the repair of the rectocele one of the curved cutting needles used to suture the torn diaphragm became disengaged from the needleholder. Although the doctor realized the needle remained in the operating site, his attempts to locate it by palpating the suspect area were unsuccessful and the operation was completed without recovery of the lost needle.

Following the operation, the plaintiff remained under the care of Dr. Hicken until his retirement on July 1, 1970, when his partner, Dr. A. James McAllister, assumed

the plaintiff as his patient.³ Notwithstanding the plaintiff's repeated complaints of pain in the pelvic-abdominal area, Dr. Hicken and Dr. McAllister never informed her of the presence of the needle. In fact, the plaintiff had no knowledge of the presence of the needle until 1976 when Dr. Robert Maddock, who she consulted because of lower abdominal pain, revealed its presence to her.⁴

At trial the plaintiff averred the defendant Hicken was negligent in the performance of the 1964 operation and because of his negligence, she has incurred certain damages, e. g., pain and suffering and related medical expenses. Plaintiff also averred the defendants acted negligently in not informing her of the presence of the needle.

At the conclusion of the plaintiff's case, the defendants moved pursuant to Rule 50, Utah Rules of Civil Procedure, for a directed verdict on the grounds the evidence presented by the plaintiff was insufficient as a matter of law to create a jury question on the defendants' negligence. The trial judge granted this motion on the basis of the plaintiff's failure to introduce expert testimony to establish the applicable standards of care.

[1, 2] In malpractice actions generally the physician is held to the standard of skill employed by his contemporaries in the same or similar communities. Therefore, before the plaintiff can prevail in a medical malpractice action, he must establish both the standard of care required of the defendant as a practicing physician in the community and the defendant's failure to employ that standard.

1. These terms refer to the bladder and rectum respectively and denominate a condition in which these organs protrude from the abdominal cavity through a rupture in the pelvic diaphragm and into the vaginal area

2. The other defendant, Dr. James McAllister, was a partner of Dr. Hicken at the time of the operation and following Dr. Hicken's retirement assumed the plaintiff as a patient

3. Although Dr. McAllister was not present at the original operation, the plaintiff's files contain the Operation Report which under the heading "Complications" states "A small curved cutting needle was broken while repairing the rectocele and is apparently lying in the levator ani or the gluteus muscle or fascia on the left side

4. Dr. Maddock became aware of the needle from x-rays taken of the area for use in his care of the plaintiff

In the majority of medical malpractice cases the plaintiff must introduce expert testimony to establish this standard of care. Expert testimony is required because the nature of the profession removes the particularities of its practice from the knowledge and understanding of the average citizen.

[3] However, this Court has recognized certain exceptions to the general rule requiring expert testimony.⁵ Specifically, expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman. The loss of a surgical instrument or other paraphernalia, in the operating site, exemplifies this type of treatment. We explained in *Fredrickson v. Maw*:⁶

Whether a surgical operation was unskillfully or skillfully performed is a scientific question. If, however, a surgeon should lose the instrument with which he operates in the incision it would seem as a matter of common sense that scientific opinion could throw little light on the subject.

[4-6] The loss of the surgical cutting needle by Hicken falls squarely within the perimeters of this exception to the general

rule. The guidance provided by expert testimony is unnecessary in this situation and, therefore, expert testimony should not have been required to establish the professional standard of care under the facts of the present case.⁷

Concomitant with the establishment of the community standard is the plaintiff's proof that the defendant failed to exercise the level of skill this standard requires.

[7, 8] When the appropriate evidentiary basis is presented a plaintiff may employ the doctrine of *res ipsa loquitur* to carry this burden.⁸ This doctrine establishes an inference of negligence from the circumstances incident to the operation.⁹ It is a procedural rather than substantive rule of law which carries the plaintiff past a motion for nonsuit where the circumstantial evidence introduced by the plaintiff is sufficient to support the application of the doctrine and its inference of negligence.¹⁰

We delineated the evidentiary foundation which the plaintiff must establish before employing the doctrine of *res ipsa loquitur* in *Moore v. James*¹¹ when we stated:

The rule . . . is applicable when:
(1) The accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used

5. See *Marsh v. Pemberton*, 10 Utah 2d 40, 347 P.2d 1108 (1959).

6. *Fredrickson v. Maw*, 119 Utah 385, 388, 227 P.2d 772, 773 (1951); quoting from *Wharton v. Warner*, 75 Wash. 470, 135 P. 235, 237 (1913), see also *Lipman v. Lustig*, 346 Mass. 182, 190 N.E.2d 675 (1963); *Taylor v. Milton*, 353 Mich. 421, 92 N.W.2d 57 (1958); *Ballance v. Dunnington*, 241 Mich. 383, 217 N.W. 329 (1928).

7. The trial court appeared to have overlooked the initial breach of the defendant's duty, i. e., the loss of the needle. The defendant's realization of the absence of the needle and his attempt to retrieve it does not obviate the consequences of its loss. Whether or not the defendant acted negligently in leaving the needle in the person of the plaintiff represents a separate issue. The plaintiff's failure to present a *prima facie* case on that issue does not eliminate the defendant's responsibility for the initial loss.

8. See *Talbot v. Dr. W. H. Groves' Latter-Day Saints Hospital*, 21 Utah 2d 73, 440 P.2d 872 (1968).

9. *Joseph v. Dr. W. H. Groves' Latter-Day Saints Hospital*, 10 Utah 2d 94, 348 P.2d 183 (1960). In *Joseph*, this Court set forth the basis for the application of *res ipsa loquitur* in malpractice actions when we explained: "The doctrine of *res ipsa loquitur* springs from a very practical process of drawing logical conclusions from circumstantial evidence. Its purpose is to permit one who suffers injury from something under the control of another, who ordinarily would not cause the injury except the other's negligence, to present his grievance to a court or jury on the basis of the reasonable inferences to be drawn from such facts, though he may be unable to present direct evidence of the other's negligence." 348 P.2d at 936.

10. *Turner v. Willis*, 59 Hawaii 319, 582 P.2d 710 (1978).

11. *Moore v. James*, 5 Utah 2d 91, 96, 297 P.2d 221, 224 (1956).

due care, (2) the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant, and (3) the accident happened irrespective of any participation at the time by the plaintiff.

[9] The establishment of this evidentiary basis presents a peculiar problem to a plaintiff in a medical malpractice case because of the necessity of showing what the usual outcome of a medical procedure would be when the required due care is employed. Generally, this requires the introduction of expert medical testimony to establish the fact the outcome is more likely the result of negligence than some other cause. This testimony would be necessary to provide the evidentiary basis from which the jury could conclude the result is more probably than not due to the negligence of the attending physician.¹²

[10] However, in certain situations, the medical procedure is so common or the outcome so affords our notions of medical propriety that expert testimony is not required to establish what would occur in the ordinary course of events. In this type of situation the plaintiff can rely on the common knowledge and understanding of laymen to establish this element.¹³

[11] Therefore, when the instrumentality causing the injury is in the exclusive

control of the defendant, and the plaintiff does not participate in the acts causing the injury, then negligence may be inferred from the injury alone if: (1) the cause of injury is so obviously negligent that negligence may be inferred as a matter of law; (2) people would know from common experience the result would not have happened without negligence; or (3) when a physician testifies bad results would not have occurred if proper care had been used.¹⁴

[12] While we will not say the act of the defendant in losing the needle from the needleholder was negligent as a matter of law, the bad result, i. e., the needle present in the body of the plaintiff, is such that people would know from common knowledge and experience it is more probably than not the result of negligence.¹⁵ Therefore, in the present case, expert testimony was not required to establish this element of the doctrine of *res ipsa loquitur*.

[13-15] The evidence presented at trial indicates the instrumentality which caused the bad result was in the exclusive control of the defendant at the time of the accident. Furthermore, the plaintiff was under a general anesthetic and could not participate or contribute to the act causing the injury. These facts when combined with the nature of the accident provide a sufficient evidentiary foundation for the application of the *res ipsa loquitur* doctrine in

12. See *Talbot*, supra note 8, 440 P.2d at 873

13. This Court has previously recognized this exception in *Fredrickson v. Maw*, supra note 6, 227 P.2d at 773, where we quoted "So, in this case, where a surgeon loses a metallic spring in the body of his patient, and fails to discover and remove it, it would seem that a jury would have abundant justification for inferring negligence without the aid of expert testimony" (Quoting from *Wharton v. Warner*, supra note 6, 135 P. at 237). Some courts limit the application of the doctrine of *res ipsa loquitur* exclusively to this type of situation. See *Swanson v. Hill*, 166 F Supp. 296 (N.D.N.D. 1958). This appears to be a strict application of the doctrine requiring the result to "speak for itself" without the aid of any other proof. Thus, the application of the doctrine has sometimes been explained by courts as eliminating the necessity of the plaintiff's procurement of expert testimony in the initial stages of proof

See *Dietze v. King*, 184 F Supp. 944, 946 (E.D. Va. 1960)

14. See *Tomei v. Henning*, 67 Cal.2d 319, 62 Cal. Rptr. 9, 431 P.2d 633 (1967)

15. See *Miller v. Kennedy*, 11 Wash. App. 272, 522 P.2d 852 (1974), approved and adapted, 85 Wash.2d 151, 530 P.2d 334 (1975). This case must be distinguished from the situations in which the needle is broken during the suturing. The malfunctioning of the surgical instruments presents an intervening cause for the accident beyond the control of the physician. In that situation the doctrine of *res ipsa loquitur* may still be applicable because the result is more probably than not the result of negligence, but the intervening cause may be used as a defense against the plaintiff's proof of proximate causation. The present situation is more analogous to the loss of whole instruments and other paraphernalia in the course of the operation

this case. The application of the doctrine provides a rebuttable inference of negligence which will carry the plaintiff's case past the motion for nonsuit.¹⁶

[16-19] Therefore, under the facts of this case, expert testimony was not required to establish the negligence of the defendant and the trial court erred in granting a directed verdict against the plaintiff because of the lack of that testimony.¹⁷

[20-22] The trial court also erred in not submitting to the jury the plaintiff's second cause of action, concerning the doctor's failure to disclose the presence of the needle. The relationship between a doctor and his patient creates a duty in the physician to disclose to his patient any material informa-

tion concerning the patient's physical condition. This duty to inform stems from the fiduciary nature of the relationship¹⁸ and the patient's right to determine what shall or shall not be done with his body.¹⁹

[23, 24] The scope of the duty is defined by the materiality of the information in the decisional process of an ordinary individual. If a reasonable person in the position of the plaintiff would consider the information important in choosing a course of treatment, then the information is material and disclosure required.²⁰

[25-28] Once the duty to disclose certain information is established, then the physician's total breach of that duty,²¹ as found

16. See *Moore v. James*, supra note 11, 297 P.2d at 224; *The defendant may introduce evidence* to rebut the inference of negligence established by the application of the doctrine. While the defendant may introduce conflicting medical testimony on the cause of the accident this should not be relied upon by the trial judge to remove the case from the jury's consideration. Rather, this establishes a conflict in the evidence which it is the jury's duty to resolve.

17. The plaintiff also has the burden of proving the negligence of the defendant was the proximate cause of the injury. This proof requires some expert testimony in medical malpractice cases. *Anderson v. Nixon*, 104 Utah 262, 139 P.2d 216 (1943). In the present case the defendant, an acknowledged expert, testified the position of the needle was such that it could produce pain. Although there is contradictory evidence that the pain the plaintiff suffered was due to other medical abnormalities the testimony of the defendant is sufficient to render causation a question of fact to be determined by the jury. As we explained in *Anderson*, " . . . it is not necessary that the proximate cause of an injury sustained through the negligence of a doctor be proved with exactitude. . . .", and "If the injury sustained could be attributed to two or more causes, one of which was the negligence of the doctor, it would be a question for the jury to determine which was the proximate cause of the injury." *Id.* 139 P.2d at 220. See also *Forrest v. Eason*, 123 Utah 610, 261 P.2d 178 (1953); 13 A.L.R.2d, Proximate Causation—Malpractice, Actions, Section 2, page 22.

18. *Emmett v. Eastern Dispensary and Casualty Hospital*, 396 F.2d 931 (D.C. Cir. 1967) ("We find in the fiducial qualities of that relationship [between physician and patient] the physician's duty to reveal to the patient that which in his

best interests it is important that he should know." 396 F.2d at 935.)

19. *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914); see also *Miller v. Kennedy*, supra note 15, 522 P.2d at 860. In *Miller* the court explained, "The patient is entitled to rely upon the physician to tell him what he needs to know about the condition of his own body. The patient has the right to chart his own destiny, and the doctor must supply the patient with the material facts the patient will need in order to intelligently chart that destiny with dignity."

20. The members of the jury can discern what a reasonable man would consider material information in a decision concerning his well being. Although there may be certain situations, such as the patient's incompetence or specific medical reasons for withholding material information where expert testimony may establish defense for nondisclosure, it is not essential the plaintiff's establishment of a prima facie case. See *Wilkinson v. Vesey*, 110 R.I. 606, 2 A.2d 676 (1972). ("The decision as to what or is not material is a human judgment, in our opinion, which does not necessarily require assistance of the medical profession." 110 R.I. at 688.) This objective approach has been accepted by some courts in the context of informed consent malpractice actions. See *Miller v. Kennedy*, supra note 15, 522 P.2d at 860. While analogy to the informed consent doctrine is helpful it is not dispositive. The present situation differs from that found in the informed consent context and our approach must reflect this difference. See *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1971).

21. In *Wilkinson*, supra note 20, 295 A.2d at 686, the court explained: "As explicated

in the present case, presents to the jury the question of what damages were proximately caused by the breach. Where the physician fails to disclose to his patient any information concerning a material fact, there is no question of skill and judgment, no question of practice beyond the knowledge of laymen which must be established through expert testimony²². To borrow Justice Wiest's much quoted phrase from *Ballance*,²³ even the "merest tyro" would know the nondisclosure was improper.²⁴

[29] Damages which may be shown to follow as a proximate cause of the nondisclosure include reasonable charges for discovery and removal of the needle and monetary compensation for the mental anguish following the realization of the needle's presence.²⁵

CROCKETT, WILKINS and HALL, JJ., concur.

STEWARD, Justice (dissenting in part and concurring in part):

I respectfully dissent.

The majority, in my view, misapplies a common sense rule, applicable in simple malpractice fact situations, and arrives at a result which would allow the jury to find negligence in total ignorance of whether

Dr. Hicken's conduct violated the applicable standard of care. Clearly this case falls within the scope of the rule that expert testimony in a medical malpractice case is necessary to establish proper standards of medical performance. In particular, the majority misapplies the rule that "loss of a surgical instrument or other paraphernalia, in the operating site, exemplifies [the] type of treatment" that is "within the common knowledge and experience of the layman." *Marsh v. Pemberton*, 10 Utah 2d 40, 347 P.2d 1108 (1959). In short, the plaintiff's failure to produce expert testimony as to the standard of care will necessarily mean that a verdict is based on speculation.

It is an unrealistic rule that holds in all cases abandonment of a surgical instrument or other paraphernalia in a person during the course of an operation can be considered negligence by a lay person without regard for the nature of the surgical procedures involved. It need hardly be reiterated that a physician is not a guarantor of the results of an operation. *Marsh v. Pemberton, supra*. Nor does he warrant against all accidents which may occur during surgical procedures. The basis for fastening liability on a defendant in a malpractice suit is negligence, not the occurrence of an untoward circumstance. In the instant case, the sur-

alone. Respect for the patient's right of self determination on particular therapy demands a standard set by law for physicians rather than one which the physicians may or may not impose upon themselves." 464 F.2d at 784.

Collins v. Meeker, 198 Kan. 390, 424 P.2d 488 (1967), the *Natanson* [*Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960)] rule provides that where a physician is silent and makes no disclosure whatever, he has failed in the duty owed to the patient and the patient is not required to produce expert testimony to show that the doctor's failure was contrary to accepted medical practice.

2. In determining the existence and the extent of a physician's duty to disclose in each particular situation, the jury need not depend exclusively on expert testimony. In nondisclosure cases the jury is not invariably functioning in an area of such technical complexity that it is bound to medical custom, as established through expert testimony, as an inexorable application of the community standard of reasonable care. *Canterbury v. Spence*, 464 F.2d 772, 1785 (D.C. Cir. 1972). In *Canterbury* the court in discussing the basis of disclosure required in the informed consent context explained: "Nor can we ignore the fact that to bind the disclosure obligation to medical usage is to abrogate the decision on revelation to the physician

23. *Ballance v. Dunnington*, supra note 6, 217 N.W. at 330.

24. See *Taylor v. Milton*, supra note 6; the present factual situation could also be used to establish a cause of action in fraudulent concealment. Where a physician has knowledge of a fact concerning the patient's physical condition which is material to that patient and he fails to disclose it the confidence relationship between them creates a duty to disclose which may render his silence fraudulent. See *Hudson v. Moore*, 239 Ala. 130, 194 So. 147 (1940).

25. See *Jackson v. United States*, 182 F.Supp. 907 (D.C.Md.1960); *Houston Clinic v. Busch*, 64 S.W.2d 1103 (Tex.Civ.App.1933).

gical operation was not perhaps as unusual and complex as some of the advanced procedures now being used, but it clearly was of such a nature that application of the *Marsh* rule is inappropriate, and there is no evidence in the record which indicates that Dr. Hicken was negligent at all. There is even evidence that Dr. Hicken's conduct may not have been the actual cause of the loss of the cutting instrument in the plaintiff. He testified that in operations of the type he performed on the plaintiff the surgical instrument sometimes breaks just below the eye through which the catgut thread is passed and that, given the nature of the operation, sound medical judgment often dictates leaving the instrument in the body if it cannot be readily located.

The inappropriateness of the legal rule applied by the majority is demonstrated by the testimony of Dr. Hicken. Operating inside a body cavity, he could not see what he was doing and had to orient his actions primarily by touch. He described the problems relating to the loss of the needle as follows:

A. Well, you are working down there, [inside the vagina], you have the retractors in and you have—you're bringing this [i. e., the needle] around on one side of the tissue and trying to bring it around and all at once you don't have ahold of the needle and then the thing you do, you have to bring your forceps back out, then you poke—use your lights and you look in there to see if you can see it. You put your glove finger in and you try to palpate it to see if you can feel it and as a general rule one can feel and in knowing the exact area in which you were working, one can generally feel where the suture is or the needle is. In this case, we did not find it.

Q. All right. Now, for that needle to become loose from the holder that ratchet could be disengaged, did it not?

A. Well, the ratchet could be disengaged but the needle—by far the more common way of losing a needle in this operation is, you are working up in there—see, I told you, you put your finger here as a guide to exert a little pressure

as you bring it around. You are working in a zone that has blood. There is fat. That means there is oils and it's possible for this to just rotate and slip out of the needle holder. That's the usual thing that happens.

The needle may also break off because of a defect in the needle itself or because of the forceps or other holding implements Dr. Hicken stated:

For instance, we have no way of knowing whether the needle was whole or broken. From experience in handling these things, where the thread goes through the needle it is very thin and frequently a needle will break at that part but—and you have a little—just a splinter of the eye of the needle left and separates from the main shaft of the needle and when you pull your hemostat back you have nothing. Both the eye of the needle, and the main curved needle still remains in situ. That means in position in the area in which you are working.

Loss of the needle could also occur for other reasons.

You are getting a bite of tissue—you are coming down and getting a bite of tissue—you see, here's a ratchet, it locks it. I showed you yesterday. No when you are sewing, you do not put your fingers in these openings of the ratchet. You take your hand out and put it against the palm here using this finger to give you a little force and a direction mechanism for the point of the needle and you come around like this. No sometimes you hit heavy muscles, sometimes you have thinner muscles, sometimes you have scar tissue. If the needle and things have been out too long that tissue has been irritated and there's a lot of scar tissue until you get resistance in bringing the needle through and it's very easy for the—possible the needle, being in oil and blood fatty tissue down there, too, that needle could rotate and slip out. When we bring the needle—when we bring the needle holder out it was still

and the needle wasn't in it so that's why you assume that the needle was broken or lost.

The doctor was well aware of the relative hazards of searching further for the lost needle as opposed to leaving it within the body cavity. He consciously made a medical judgment as to which course of action would result in the least risks to the patient. He testified:

Well, because this woman was elderly. She was not in the best physical condition. We had had her on the operating table for one hour and to get X-ray machines at that time—we are talking about fourteen years ago—at that time we had to get X-ray machines from the basement up into the operating room and it would take too much time to complete that sort of a procedure and the second thing is that from my experience in such cases and from being very conversant with literature on this subject, as I was a Professor and teacher in medical schools, I knew that a needle left in this particular area was not particularly harmful to the patient. It is common knowledge that we leave metal in the pelvic area very frequently. Now, for example, in some of our operations instead of using sutures and ties to tie around bleeding blood vessels, we have an instrument that we go in there and we put a metal clip on that blood vessel because it's easier to do, it's quicker to do and it is innocuous.

This testimony, in my view, destroys the necessary foundation for application of the rule that loss of a surgical instrument in a body establishes, without more, an inference of negligence. Nor do the facts provide a foundation for application of the doctrine of *res ipsa loquitur*. As this Court stated in *Joseph v. W. H. Groves Latter-Day Saints Hospital*, 10 Utah 2d 94, 348 P.2d 935 (1960):

[I]t is realized that *res ipsa loquitur* has been applied in various fields where an injury occurs which is not to be expected if proper standards of care and skill are observed. But this is done only with caution, particularly in the medical field

because of the realization that many aspects of the treatment of human ills cannot yet be regarded as exact science and a bad result may obtain even though recognized standards of care and skill are employed. [10 Utah 2d at 99, 348 P.2d at 938.] [Emphasis added.]

I recognize that there is a ring of common sense to the proposition that leaving foreign objects in a person constitutes negligence, see *Fredrickson v. Maw*, 119 Utah 385, 227 P.2d 772 (1951), but neither justice nor common sense are enhanced by the mechanistic application of a rule of law to a fact situation that is only superficially related to the type of situation the rule was intended to govern. In this case, I cannot see how a jury could possibly find negligence in light of Dr. Hicken's testimony and in the absence of any contrary expert testimony. I think the trial judge was right in directing a verdict on this issue.

I concur, however, with the majority that the defendants had a duty to inform the plaintiff of the fact that a foreign object had been left in her body.



In the Matter of the GUARDIANSHIP
of Alice KESLER.

No. 15960.

Supreme Court of Utah.

May 28, 1980.

Appeal was taken from an order of the District Court, Millard County, D. Christian Ronnow, J. pro tem., declaring ward an incompetent and appointing a guardian for her estate. The Supreme Court, Maughan, J., held that trial court should not have proceeded under repealed guardianship statutes merely because petition was filed one day prior to time statutes became a

nation, (2) has not been emphasized by either counsel or the court, and (3) has not been elicited by the prosecution.⁶

Affirmed.

STEWART, OAKS, HOWE and DURHAM, JJ., concur.



Arthur Dennis KUSY, Plaintiff
and Appellant,

v.

K-MART APPAREL FASHION CORP., a
Delaware corporation, and John Doe,
an individual, Defendants and Respondents.

No. 18360.

Supreme Court of Utah

April 24, 1984.

Action was brought in which plaintiff sought to recover for personal injuries he sustained when pallet on which he was standing allegedly broke and he fell to ground. The District Court, Salt Lake County, G. Hal Taylor, J., entered judgment in favor of defendant, and plaintiff appealed. The Supreme Court, Oaks, J., held that: (1) admission in answers to interrogatories that pallet board where plaintiff stepped broke off and plaintiff fell to ground should have been admitted for impeachment purposes, even though interrogatories were signed by someone other than testifying witness, and (2) plaintiff introduced sufficient evidence at trial to entitle him to a *res ipsa loquitur* instruction.

Reversed and remanded.

6. *Id.* at 223.

1. Evidence ⇨222(1)

Pretrial Procedure ⇨307

Admission in answers to interrogatories, which were signed by general manager of store, on behalf of corporate defendant, that pallet board where plaintiff stepped broke and plaintiff fell to ground should have been admitted for impeachment purposes in personal injury action, even though answers to interrogatories were signed by someone other than the testifying witness who implied that plaintiff had merely fallen off pallet and that pallet had not broken. Rules Civ.Proc., Rule 33(b); Rules of Evid., Rule 63(7).

2. Negligence ⇨138(2)

Before being entitled to jury instruction on *res ipsa loquitur*, plaintiff must show that accident was of a kind which, in ordinary course of events, would not have happened if due care had been observed, the plaintiff's own use or operation of agency or instrumentality was not primarily responsible for injury, and that agency or instrumentality causing injury was under the exclusive management or control of defendant.

3. Negligence ⇨138(2)

Once plaintiff makes a *prima facie* showing of elements, he is entitled to a *res ipsa loquitur* instruction.

4. Negligence ⇨138(2)

In order to determine appropriateness of *res ipsa loquitur* instruction, court must view evidence in a light most favorable to the plaintiff.

5. Negligence ⇨138(2)

Res ipsa loquitur instruction should have been given in action in which plaintiff sought to recover for his personal injuries sustained when he fell to the ground from pallet which broke under him, in light of plaintiff's testimony which would support an inference that pallet would not have broken if due care had been observed, plaintiff's testimony that he unloaded truck in usual manner, consistent with directions of manager of garden department, and fact that defendant retrieved pallets in its own

yard and brought them to truck for plaintiff's use.

6. Negligence ⇨121.2(8)

Control necessary for a res ipsa instruction is control exercised at time of negligent act.

7. Negligence ⇨138(2)

A res ipsa loquitur instruction would not be appropriate as to theory of negligent failure to inspect.

8. Negligence ⇨138(2)

Res ipsa loquitur instruction may be appropriate as to theory of negligent maintenance.

9. Negligence ⇨121.2(11)

Where res ipsa loquitur has been properly brought into a case, it will not be removed by mere prima facie showing of specific negligence, but under such circumstances the case should be submitted on both the theory of specific negligence and res ipsa loquitur.

10. Negligence ⇨121.2(11)

Res ipsa loquitur should not be removed by proof of specific negligence unless proof goes so far as to fully explain the cause of injury by positive evidence revealing of the facts and circumstances.

11. Negligence ⇨140

Unavoidable accident instruction should be given on remand of personal injury action only if evidence showed that this was an unusual and unexpected occurrence which resulted in injury and which happened without anyone failing to exercise reasonable care.

Wilford A. Beesley, Jack Fairclough, Salt Lake City, for plaintiff and appellant.

Alan L. Larson, Salt Lake City, for defendants and respondents.

1. For cases declaring the proprietor's duty to use reasonable care to maintain premises in safe condition for business invitees, see *Walker v. Union Oil Mill, Inc.*, La., 369 So.2d 1043 (1979), *Husketh v. Convenient Systems, Inc.*, 295

OAKS, Justice:

In this personal injury action, the jury found no negligence on the part of defendant K-Mart. On appeal, plaintiff claims that the trial court erred by refusing to admit into evidence defendant's answer to an interrogatory. He also cites error in the failure to give his proffered jury instruction on res ipsa loquitur and in the instruction given on avoidable accident. We reverse.

Plaintiff was employed as a truck driver. In May 1976, he delivered a load of trees and shrubbery to one of defendant's stores in Murray. In the unloading process, plaintiff requested assistance from the garden shop manager, Hunt. Hunt designated his employee, Coupe, to deliver pallets by forklift to the door of plaintiff's truck. Coupe selected pallets from a pile on the store's premises and raised them to the level of the truck's bed, approximately five feet from the ground. Plaintiff then placed from twenty-five to thirty trees on each pallet.

Plaintiff's injury occurred after he successfully unloaded two pallets of trees. He contends that he noticed some damaged boards toward the back of the third pallet Coupe delivered. Fearing that the boards might break and spill some of the trees, he requested a new pallet. Coupe refused. After plaintiff unloaded six or eight trees onto this pallet, some of its boards (not those he had originally noticed) broke under plaintiff's foot, causing him to lose his balance, fall to the ground, and break his wrist. Plaintiff alleged that defendant negligently maintained or negligently failed to inspect the pallets to insure their safety.¹

I. ADMISSIBILITY OF ANSWERS TO INTERROGATORIES

Plaintiff was the only eyewitness to testify about the accident. Coupe, the other

N.C. 459, 245 S.E.2d 507 (1978). See also *Di-Mare v. Cresci*, 58 Cal.2d 292, 373 P.2d 860, 23 Cal.Rptr. 772 (1962) (duty to inspect for latent defect).

eyewitness, was apparently out of the country. Defendant presented only one witness, Hunt. He was on the premises when the accident occurred and approached the scene immediately thereafter. Hunt testified that he did not know whether the pallet broke or whether plaintiff merely fell from the pallet. He testified that he observed no broken boards or debris on the ground when he first walked up to the scene. Thus, Hunt's testimony at least to some degree refuted plaintiff's version of the accident and implied that plaintiff had merely slipped from the pallet.

[1] While cross-examining Hunt, plaintiff's attorney sought to read one of defendant's answers to interrogatories. (The answers were signed by Michael Street, general manager of the K-Mart store, on behalf of the corporate defendant.) In that answer, defendant admitted that "the pallet board where [plaintiff] stepped broke off and plaintiff fell to the ground." The trial judge refused to allow counsel to read this answer, ruling that since the interrogatories were signed by someone other than the testifying witness, they could not be used for impeachment. This was reversible error.

Rule 33(b), Utah R.Civ.P., allows answers to interrogatories to be used at trial "to the extent permitted by the rules of evidence." Utah Rules of Evidence 63(7), in effect at the time of trial, provided that a statement made by a party would not be excluded under the hearsay rule when the statement was offered against him. See *Terry v. Panek*, Utah, 631 P.2d 896, 898 (1981).² An admission of a party, when offered against him, comes in as substantive evidence of the facts stated. *Geldert v. State*, 3 Haw.App. 259, 649 P.2d 1165, 1172 (1982). This is especially appropriate when the evidence is embodied in answers to interrogatories, since a declarant has ample time to consider such a statement and submits it under oath.

Defendant argues that the admission in the answer to the interrogatory was inap-

propriately used to impeach Hunt, since Hunt did not sign it. We disagree. Hunt was the only witness who testified on behalf of defendant. Through his testimony, Hunt gave the impression that the boards on the pallet did not break and that plaintiff had merely fallen off the pallet. Plaintiff was then entitled to introduce whatever substantive evidence he had to contradict the witness and support his own version of the facts. Specifically, "answers to interrogatories can be used by an adverse party for any purpose, including attacking the credibility of a party as a witness." *Farkas v. Sadler*, R.I., 375 A.2d 960, 964 (1977). That rule covers the proposed use of the answer to the interrogatory to impeach the witness in the circumstances of this case.

We are unable to say that the error in excluding the answer to the interrogatory was harmless in this case. Hunt's testimony implied that plaintiff had merely fallen off the pallet and that the pallet had not broken. The only evidence that the pallet had in fact broken was plaintiff's own testimony, which the jury could have viewed as self-serving. Plaintiff's credibility would have been greatly enhanced if the jury had been informed that defendant, in sworn answers to interrogatories, had given the same rendition of the facts. Failure to allow the evidence was prejudicial to plaintiff's case. We must therefore reverse and remand the case for a new trial.

For the guidance of the district court on remand, we proceed to address the issues regarding jury instructions.

II. RES IPSA LOQUITUR

Plaintiff requested jury instructions on *res ipsa loquitur*. For reasons that do not appear in the record, the trial court refused to give them. On appeal, defendant argues that plaintiff failed to make out the elements that are necessary before such an instruction is given.

2. We note that our new evidence rules are to the same effect: an admission of a party-opponent,

offered against that party, is not hearsay. Utah Rules of Evidence 801(d)(2).

[2] Res ipsa loquitur is an evidentiary rule that permits an inference of negligence on the part of a defendant under well-defined circumstances. Before being entitled to such a jury instruction, a plaintiff must show:

- (1) [T]hat the accident was of a kind which, in the ordinary course of events, would not have happened had due care been observed; (2) that the plaintiff's own use or operation of the agency or instrumentality was not primarily responsible for the injury; and (3) that the agency or instrumentality causing the injury was under the exclusive management or control of the defendant.

Anderton v. Montgomery, Utah, 607 P.2d 828, 833 (1980) (citations omitted). One of the purposes of the res ipsa instruction is to "cast the burden upon [the person who controlled the agency or instrumentality causing the injury] to make proof of what happened." *Id.* at 833, quoting *Lund v. Phillips Petroleum Co.*, 10 Utah 2d 276, 280, 351 P.2d 952, 954 (1960). It should be noted, however, that "[o]nce the elements of res ipsa loquitur have been established, it merely permits and does not compel the inference of negligence by the fact finder." *Archibeque v. Homrich*, 88 N.M. 527, 532, 543 P.2d 820, 825 (1975). See also *Brizendine v. Nampa Meridian Irrigation District*, 97 Idaho 580, 585, 548 P.2d 80, 85 (1976).

[3,4] Once the plaintiff makes a prima facie showing of the elements, he is entitled to a res ipsa instruction. The trial court should not weigh conflicting evidence of the elements; this is the jury's function. In order to determine the appropriateness of a res ipsa instruction, the court must view the evidence "in a light most favorable to the plaintiff..." *Anderton v. Montgomery*, 607 P.2d at 833.

[5] Under the standard discussed above, this plaintiff introduced sufficient evidence at the trial to entitle him to a res ipsa loquitur instruction. There was a prima facie showing of each of the three elements. First, plaintiff testified about his extensive experience utilizing pallets

during the course of his work. He testified that pallets are able to bear far greater weight than was placed on the pallet that broke here. This testimony would support an inference that the pallet would not have broken if due care had been observed, as discussed below. *E.g.*, *DiMare v. Cresci*, 23 Cal.Rptr. at 776, 373 P.2d at 864 ("[o]rdinarily steps which are part of a common stairway do not collapse when used by a tenant in a normal manner unless the landlord who has had the duty to maintain and inspect them was negligent"). Second, plaintiff testified that he unloaded the truck in the usual manner, consistent with the directions of the manager of the garden department. Third, defendant retrieved the pallets from its own yard and brought them to the truck for plaintiff's use.

Defendant argues that the first element ("kind of accident") was lacking because the jury found that neither party was negligent. This begs the question. Plaintiff's evidence entitled him to the res ipsa instruction, and he does not lose that entitlement because of what the jury found without the instruction.

[6] Defendant further argues that the third element ("exclusive management or control") was lacking, since there was testimony that some of the pallets were not owned by defendant and that pallets were always being delivered and picked up from defendant's premises. However, the issue is not ownership but control. The control necessary for a res ipsa instruction is control exercised at the time of the negligent act. *Town of Reasnor v. Pyland Construction Co.*, Iowa, 229 N.W.2d 269 (1975); *Birmingham v. Gulf Oil Corp.*, Tex., 516 S.W.2d 914, 918 (1974). It is clear from uncontradicted evidence that defendant had exclusive control of the instrumentality that caused the injury as of the time the alleged negligent act occurred.

In this case, we know from defendant's admission in its answer to the interrogatory that plaintiff's injury was caused by his fall and that his fall was caused by the breaking of the pallet. We do not know what caused the pallet to break. Similarly,

in *Kitto v. Gilbert*, 39 Colo.App. 374, 570 P.2d 544, 548-49 (1977), it was clear that plaintiff's injury resulted from inadequate anesthetization when tubing connecting him to the anesthesiology apparatus became dislodged, but it was unclear what caused the tubing to be dislodged. On those facts, it was held error to refuse a res ipsa instruction.

In this case, plaintiff alleged and sought to prove two different theories under which defendant would be responsible for the defective condition of the pallet that caused the injury: negligent failure to inspect and negligent maintenance. In support of the first theory, plaintiff elicited from Hunt an admission that the pallets were not inspected before they were provided for use by plaintiff. In support of the second theory, Hunt admitted that the pallets were stacked in an unprotected area where they were sometimes run over by motor vehicles.

At the second trial, the court must decide if a res ipsa instruction is appropriate on the basis of the evidence submitted there. Assuming plaintiff can prove that the pallet broke and caused his fall, but cannot point to the specific act that caused the pallet to break, a res ipsa instruction could be appropriate. However, if the evidence goes so far as to explain the precise cause of the break, res ipsa is no longer necessary and therefore would be inappropriate. *Crawford v. Rogers*, Alaska, 406 P.2d 189, 193 (1965); *Hugo v. Manning*, 201 Kan. 391, 395-98, 441 P.2d 145, 149-51 (1968); *Dabroe v. Rhodes Co.*, 64 Wash. 431, 392 P.2d 317, 322 (1964). See generally *Webb v. Olin Mathieson Chemical Corp.*, 9 Utah 2d 275, 285, 342 P.2d 1094, 1101 (1959).

[7] A res ipsa instruction would not be appropriate as to the theory of negligent failure to inspect. Defendant admitted at trial that it failed to inspect the pallets before providing them for plaintiff's use. This admission leaves nothing to infer about the cause of the accident so far as it pertains to this theory of responsibility. The only remaining issue is whether failure to inspect (assuming inspection would have

revealed the defect) constitutes a breach of defendant's duty to provide a safe working place for its business invitees. The res ipsa instruction has no function under this issue.

[8] A res ipsa instruction may be appropriate as to the theory of negligent maintenance of the pallets. There was evidence at trial that pallets on defendant's premises were stacked in an unprotected area where they were sometimes run over by motor vehicles. At the same time, plaintiff cannot point to an individual event or practice of defendant's that produced the defective condition in the particular pallet that broke and caused this accident. Thus, under this theory of responsibility, we have evidence of specific acts of negligent maintenance by defendant, but no clear demonstration of the cause of the defect in the pallet that broke.

[9,10] The rule we choose to follow in this circumstance is the rule articulated by the Kansas Supreme Court in *Ballhorst v. Hahner-Foreman-Cale, Inc.*, 207 Kan. 89, 99, 484 P.2d 38, 46 (1971):

[W]here *res ipsa loquitur* has been properly brought into a case it will not be removed by a mere prima facie showing of specific negligence, but under such circumstances the case should be submitted on both the theory of specific negligence and *res ipsa loquitur*. We further [hold] that *res ipsa loquitur* should not be removed by proof of specific negligence unless the proof goes so far as to fully explain the cause of the injury by positive evidence revealing all of the facts and circumstances.

(Italics in original.) Accord *Hugo v. Manning, supra*; *Fields v. Berry*, Mo.App., 549 S.W.2d 122, 124-25 (1977). See also *Harper v. Hoffman*, 95 Idaho 933, 935-36, 523 P.2d 536, 538-39 (1974) (pleading).

In the second trial of this case, plaintiff may be able (by proof of specific acts or practices of defendant) to make a prima facie showing that the defective condition of the pallet that broke was caused by defendant's maintenance (or lack of maintenance).

THORNE & WILSON, INC. v. UTAH STATE TAX COM'N Utah 1237

Cite as 681 P.2d 1237 (Utah 1984)

nance). If so, the jury might find defendant negligent on that theory even without a res ipsa instruction. But under the rule in *Ballhorst*, the prima facie showing of specific acts of negligence in respect to maintenance would not preclude an otherwise appropriate res ipsa instruction, so long as the specific evidence of negligence does not "fully explain the cause of the injury by positive evidence revealing all of the facts and circumstances." Consequently, a res ipsa instruction may be available on this theory.

On remand, the district court will determine on the evidence at the second trial whether plaintiff has made a prima facie showing of the elements necessary for the res ipsa instruction and, if so, whether the evidence of specific acts of defendant's negligence so clearly explain the cause of the accident that res ipsa loquitur is not appropriate.

III. UNAVOIDABLE ACCIDENT

The trial court gave defendant's proposed jury instruction on unavoidable accident. Plaintiff argues on this appeal that the instruction should not have been given. Courts in other jurisdictions have disapproved such an instruction, *see, e.g., Lewis v. Buckskin Joe's, Inc.*, 156 Colo. 46, 61, 396 P.2d 933, 941 (1964), and we have said that it is only to be used "in a rare case . . ." *Stringham v. Broderick*, Utah, 529 P.2d 425, 426 (1974). Nevertheless, we have approved unavoidable accident instructions in two recent cases. *Anderson v. Toone*, Utah, 671 P.2d 170, 174 (1983); *Anderton v. Montgomery*, 607 P.2d at 834-35 (case involving res ipsa loquitur). "Such an instruction should be given with caution and only where the evidence would justify it." *Woodhouse v. Johnson*, 20 Utah 2d 210, 213, 436 P.2d 442, 445 (1968) (emphasis in original).

[11] It will be up to the district court on remand to determine whether the facts presented at the second trial warrant an unavoidable accident instruction. The instruction should only be given if the evidence could be interpreted as showing that

this was an unusual and unexpected occurrence "which result[s] in injury and which happen[s] without anyone failing to exercise reasonable care . . ." *Id.*

The judgment of the trial court is reversed, and the case is remanded for a new trial consistent with this opinion. Each party to bear own costs.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.



THORNE AND WILSON, INC., A Utah Corporation, Plaintiff and Appellant,

v.

UTAH STATE TAX COMMISSION,
Defendant and Respondent.

No. 18825.

Supreme Court of Utah.

April 24, 1984.

Investment broker dealer brought action to obtain declaration that it was not subject to sales taxes for sale of rare United States coins, foreign coins, and precious metals. The Third District Court, Salt Lake County, Philip R. Fishler, J., held sale of such items subject to state sales tax, and broker dealer appealed. The Supreme Court, Stewart, J., held that: (1) rare United States coins, foreign coins, and precious metals sold by broker dealer for their extrinsic value, and not for use as currency, were "tangible personal property" subject to state sales tax, and (2) sales taxation of such items did not impinge upon federal government's exclusive rights with regard to coinage of money.

Affirmed.

Environment, 234 Kan. 374, 673 P.2d 1126 (1983); *In re Initiative Petition No. 272*, *State Question No. 409*, 388 P.2d 290 (Okla. 1963); *Somer v. Woodhouse*, 28 Wash. App. 262, 623 P.2d 1164 (1981).

Cite as
174 Utah Adv. Rep. 14

IN THE
UTAH COURT OF APPEALS

Joseph KITCHEN and Richard Phillips,
Plaintiffs and Appellants,

v.

CAL GAS COMPANY, INC., a California
Corporation,
Defendant and Appellee.

No. 910420-CA
FILED: November 20, 1991

Third District, Salt Lake County
Honorable Frank G. Noel

ATTORNEYS:

James R. Black and Susan B. Black, Salt Lake
City, for Appellants

Stewart M. Hanson, Jr., Fred R. Silvester,
Charles P. Sampson, and Paul M.
Simmons, Salt Lake City, for Appellee

Before Judges Bench, Billings, and Garff.

OPINION

This opinion is subject to revision before
publication in the Pacific Reporter.

BILLINGS, Associate Presiding Judge:

Plaintiffs Joseph Kitchen and Richard Phillips appeal from a summary judgment in favor of defendant Cal Gas Company, Inc., in a negligence action stemming from a truck accident. Kitchen and Phillips assert there are disputed issues of material fact and, thus, the trial court erred in granting Cal Gas's motion for summary judgment. We affirm.

FACTS

Kitchen and Phillips drove trucks for A.N.R. Freight Systems, Inc. (ANR). Kitchen and Phillips drove an ANR truck out of Los Angeles, California, heading for Salt Lake City, Utah, on February 5, 1986. They stopped at the port of entry east of Wendover, Utah, early in the morning on February 6th. At the weigh station, a Utah Highway Patrolman warned Kitchen and Phillips of black ice on Interstate Eighty beginning twelve to fourteen miles ahead, and continuing into Salt Lake City. As the truckers left the port of entry, Kitchen drove the ANR truck while Phillips climbed into the "sleeper" part of the

truck's cab to rest. A Cal Gas truck struck them five minutes after the ANR truck port of entry. At the time, Kitchen was the ANR truck approximately twenty-five miles an hour on the wet, icy, interstate highway. Kitchen testified Cal Gas truck passed "in a hurry," but not attempt to estimate the Cal Gas speed.

Kitchen first encountered black ice approximately fifteen miles later. Kitchen proceeded slowly, continuing to drive approximately twenty to twenty-five miles an hour on icy road. A Toyota pickup truck passed ANR truck in the left lane of the two bound lanes of traffic four miles after first encountered black ice and approximately forty-five minutes after being passed Cal Gas truck. The Toyota turned on its beam headlights as it passed Kitchen. Coming to Kitchen, the Toyota's headlights illuminated a "shadow" lying across the approximately a quarter mile ahead. Kitchen saw the "shadow" ahead, he took his foot off the throttle, causing the ANR truck to slow. Almost immediately, the ANR truck was struck from behind by another large truck owned by C.R. England & Sons, Inc. The ANR truck overturned on its side, and Kitchen and Phillips were injured. Kitchen and Phillips were pulled from the ANR truck, they recognized the "shadow" as the Cal Gas truck that passed them earlier. The Cal Gas truck was overturned approximately 200 feet ahead of the ANR truck was blocking the left lane and part of the lane of the eastbound traffic.

Kitchen and Phillips subsequently brought this action against both C.R. England and Cal Gas, alleging that their truck drivers' negligence caused Kitchen's and Phillips' injuries. Prior to trial, Kitchen and Phillips reached a settlement with C.R. England. Thereafter, Cal Gas filed a motion for summary judgment claiming that, even if the Cal Gas driver operated the Cal Gas truck negligently, such negligence could not have been the proximate cause of Kitchen's and Phillips' injuries. The trial court denied this motion. Cal Gas subsequently filed a motion for summary judgment claiming there was no evidence that the Cal Gas driver was negligent. The trial court granted Cal Gas summary judgment, concluding, as a matter of law, that on the undisputed facts before the court, Cal Gas was negligent.

STANDARD OF REVIEW

On appeal, Kitchen and Phillips assert the trial court erred in granting summary judgment on the issue of Cal Gas's negligence. Summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine

both parties moved for a directed verdict. The court ruled the decedent was negligent as a matter of law for driving on the wrong side of the road in the path of an approaching automobile. However, the court denied both directed verdict motions and submitted the issue of the other driver's negligence to the jury, which returned a verdict for the plaintiff-decedent. *Id.* at 161. On appeal, the Utah Supreme Court reversed, holding the lower court should not have submitted the issue of negligence to the jury. The *DeMille* court pointed out that the plaintiff-decedent had submitted no evidence of the other automobile driver's conduct. The court explained that, because of the instinct for self preservation, the law presumes an automobile driver is exercising due care and that the presumption disappears only when the opposing party produces evidence of negligence. *Id.* Because the plaintiff-decedent had produced no evidence as to the other driver's conduct, the presumption remained intact and thus the trial court erred in not granting a directed verdict in favor of the defendant driver.³ *Id.* at 162.

The *DeMille* presumption, which disappears when a prima facie case of negligence is presented, *Pearce v. Wistisen*, 701 P.2d 489, 495 (Utah 1985), is really no more than an incorporation of the evidentiary burden of proof in a negligence action. The plaintiff bears the burden of proof and must establish a prima facie case to survive summary disposal of the case. *Lindsay*, 497 P.2d at 30; *Dybowski v. Ernest W. Hahn, Inc.*, 775 P.2d 445, 446 (Utah App. 1989).

In light of this authority, we must now determine if Kitchen and Phillips offered any evidence of negligence to rebut the presumption that Cal Gas's driver was exercising due care at the time the truck overturned. In this case, Kitchen and Phillips produced no evidence as to the Cal Gas driver's negligence, and therefore, they cannot survive a motion for summary judgment. The Cal Gas driver's being "in a hurry" forty-five minutes prior to the accident cannot sustain an inference that the Cal Gas driver was speeding and that such speeding continued after the roads became icy. Further, we cannot say the mere fact that the Cal Gas truck was overturned in the road establishes that the Cal Gas driver acted negligently. There are numerous possible explanations as to why the truck overturned, many of which would not involve the negligence of the driver and, in this case, all of which require speculation. Submitting the issue of negligence to the jury would require the jury to engage in mere speculation as to whether the Cal Gas driver was negligent. Accordingly, because Kitchen and Phillips have not produced any evidentiary basis for a jury to find the Cal Gas driver acted negligently, the trial court's summary judgment for Cal Gas on the issue of negligence was proper.⁴

RES IPSA LOQUITUR

Alternatively, Kitchen and Phillips argue that the trial court erred in rejecting their argument that the Cal Gas driver's negligence is inferred under the doctrine of *res ipsa loquitur*.

Res ipsa loquitur is a rule of evidence that allows a party, in certain circumstances, to raise an inference that another party has been negligently *notwithstanding* a lack of evidence concerning the other party's actions.

[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; and cast the burden upon the other to make proof of what happened."

Anderton v. Montgomery, 607 P.2d 82 (Utah 1980)(quoting *Lund v. Phillips Petroleum Co.*, 10 Utah 2d 276, 351 P.2d 95 (1960)). Accordingly, the fact that Kitchen and Phillips failed to produce any evidence of negligence does not, by itself, preclude a *res ipsa loquitur* claim. However, because a party is entitled to proceed on a *res ipsa loquitur* theory, the party must satisfy a primary evidentiary foundation demonstrating that the facts of the case properly present a *res ipsa loquitur* question. See *Nixdorf v. Hix*, 612 P.2d 348, 352 (Utah 1980). This foundation consists of three parts:

- (1) ... [T]he accident was of a kind which in the ordinary course of events, would not have happened had the defendant(s) used due care;
- (2) the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant, and
- (3) the accident happened irrespective of any participation at the time by the plaintiff.

Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193, 196 (Utah 1990)(quoting *Moore v. James*, 5 Utah 2d 91, 96, 297 P.2d 221, 224 (1956)). Once a party makes a showing, there arises a "rebuttable inference of negligence which will carry the case past the motion for nonsuit." *Nixdorf v. Hix*, 612 P.2d at 354. Therefore, to determine if Kitchen and Phillips were entitled to proceed under a *res ipsa loquitur* theory, we must evaluate the evidence in light of the three-part test.

Under the first prong of the test, we must determine whether the accident in question

at 196. Kitchen and Phillips argue that, normally, a truck does not roll over in the absence of negligence. Cal Gas, on the other hand, asserts that because there is no evidence from which to infer negligence, and because of the icy road conditions, it is *not* more likely than not that the Cal Gas truck overturned due to its driver's negligence.

The Utah Supreme Court has recently outlined the analytical framework for deciding the first prong of the *res ipsa loquitur* test:

Before a plaintiff is entitled to a jury instruction on *res ipsa loquitur*, the plaintiff must have presented evidence that the occurrence of the incident is "more probably than not caused by negligence." The plaintiff need not eliminate all possible inferences of non-negligence, but the *balance of probabilities must weigh in favor of negligence*, or *res ipsa loquitur* does not apply.

Ballow v. Monroe, 699 P.2d 719, 722 (Utah 1985)(emphasis added)(citations omitted). Further, the court recognized that "[w]hen, however, the probabilities of a situation are outside the realm of common knowledge, expert evidence may be used to establish the necessary foundational probabilities." *Id.*

Courts from several jurisdictions have held that the mere fact that a driver has lost control of a vehicle on icy roads is insufficient to meet the first prong of the *res ipsa loquitur* test. See, e.g., *Millonig v. Bakken*, 112 Wis. 2d 445, 334 N.W.2d 80, 86-87 (1983)(rear-end collision resulting from icy roads does not raise inference of negligence under *res ipsa loquitur* as skidding on ice can occur without fault of driver); *Wilson v. Rushton*, 199 Kan. 659, 433 P.2d 444, 449 (1967)(automobile passenger could not sustain burden under first prong of *res ipsa loquitur* test in injury action arising from accident in which driver passed another automobile just as the road had suddenly changed to ice); see also 4 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts*, §19.7 at 57 (2d ed. 1986)(mere fact of vehicle sliding on icy road insufficient to raise inference of negligence under first prong of *res ipsa loquitur* test).

We agree with this authority as we cannot say that when a driver loses control of a vehicle on icy roads, the driver, more likely than not, was negligent. Common experience and reason suggest black ice is a hazard that threatens even the most reasonable and prudent driver. Accordingly, we find that Kitchen and Phillips have not met their burden under the first prong of the *res ipsa loquitur* test.

Because Kitchen and Phillips have failed to show that the accident was, more likely than

ence, thus failing to meet the first prong of the *res ipsa loquitur* test, it is unnecessary for us to consider the other two prongs of the test. Accordingly, we affirm the trial court's ruling rejecting Kitchen's and Phillip's *res ipsa loquitur* claim.

CONCLUSION

In conclusion, we affirm the trial court's summary judgment dismissing Kitchen's and Phillip's claim. Kitchen and Phillips produced no evidence that the Cal Gas driver was negligent. Furthermore, they cannot rely on the evidentiary doctrine of *res ipsa loquitur* to escape summary judgment as the accident is not the type which normally does not occur in the absence of negligence.

Judith M. Billings, Associate Presiding Judge

WE CONCUR:

Russell W. Bench, Judge

Regnal W. Garff, Judge

1. At oral argument, counsel for Cal Gas indicated that at the same time the trial judge granted Cal Gas's motion for summary judgment, the judge also granted Cal Gas's motion in limine to exclude Kitchen's testimony as to the Cal Gas truck's speed when the Cal Gas truck passed Kitchen. In bringing this to our attention, counsel for Cal Gas seems to suggest the trial judge did not take this evidence into consideration in ruling on Cal Gas's motion for summary judgment, and likewise implies that we should not consider this evidence.

Our independent review of the trial judge's rulings suggests that the order in limine excluded the disputed portions of Kitchen's testimony from trial, not from the consideration of the matter for purposes of the summary judgment ruling. There is no indication that the trial judge did not consider this evidence when ruling on Cal Gas's motion for summary judgment. On appeal, notwithstanding the order in limine, we consider Kitchen's testimony regarding the Cal Gas truck's speed in our review of the trial court's grant of summary judgment.

2. See, e.g., *Long v. Smith Food King Store*, 531 P.2d 360, 361-62 (Utah 1973) (summary judgment for defendant proper where pleadings and depositions showed no negligence or omission of duty of reasonable care); *Dybowski v. Ernest W. Hahn, Inc.*, 775 P.2d 445, 446-47 (Utah App. 1989) (summary judgment for defendant proper in slip and fall case where customer could not offer any evidence that defendant mall owner had acted negligently); *Robinson v. Intermountain Health Care, Inc.*, 740 P.2d 262, 266 (Utah App. 1987) (summary judgment proper on issue of negligence where plaintiff has failed to secure expert testimony in medical malpractice action).

3. The presumption outlined in *DeMille* was established in earlier Utah cases. See *Mecham v. Allen*, 1 Utah 2d 79, 262 P.2d 285, 290 (1953); *Compton v. Ogden Union Ry. & Depot*, 120 Utah 453, 235 P.2d 515, 517 (1951). The *DeMille* presumption was recently reaffirmed in *Pearce v. Wistisen*, 701 P.2d 489, 495 (Utah 1985)(presumption of due care rebutted where evidence indicated deceased acted negligently).

Kitchen and Phillips contend the New Mexico Court of Appeals decision in *Kelly v. Montoya*, 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970) should persuade us to remand their case for a jury trial. In *Montoya*, a truck passenger was injured when the truck collided with defendants' vehicles. Defendants had stopped their vehicles in the center of the road at the scene of a prior collision that occurred during a sandstorm. *Id.* at 564. The New Mexico court reversed the summary judgment for defendants, holding that material issues of fact existed as to whether defendants violated a safety statute prohibiting the leaving of vehicles on the highway.

The facts of *Montoya*, however, are distinguishable from the facts surrounding the accident in which Kitchen and Phillips were injured. In *Montoya*, there was clear evidence that the defendants violated a safety statute. The nature of defendants' conduct in *Montoya* was not in dispute: they had parked their cars on the road during the day. In our case, however, there is no evidence that the Cal Gas driver's negligence caused the truck to overturn and block the road. Thus, *Montoya* is not applicable here.

Likewise, Kitchen and Phillips argue that the Utah Supreme Court's decision in *Horsley v. Robinson*, 112 Utah 227, 186 P.2d 592 (Utah 1947), mandates reversal. Again we find this case distinguishable on its facts. In *Horsley*, a bus passenger sued for injuries sustained in an accident between a car and the bus. Because of snowy and hazardous road conditions, the car driver lost control of the car and crossed the center line of a highway. The bus was coming from the other direction and was unable to avoid the car. The plaintiff was injured when the force of the accident threw her head forward and she struck her neck on the seat in front of her. *Id.* at 592-93. A jury returned a verdict for plaintiff passenger and the bus company appealed. In affirming, the Utah Supreme Court held there was sufficient evidence for the jury to infer the bus was driving at an excessive speed for the given road conditions. *Id.* at 599. There, the plaintiff testified that when the accident occurred, the bus was traveling fifty miles per hour, and that when the car crossed the center line, the bus was a city block away. The *Horsley* court recognized that a jury could have reasonably found the bus driver did not have his vehicle under sufficient control for the conditions and, therefore, the court affirmed the jury award. *Id.* at 600.

Unlike this case, the *Horsley* court was able to consider substantial evidence of the bus driver's conduct; therefore, the "inference" did not arise from the "mere happening" of an accident. The *Horsley* court was faced with a substantial contradiction in testimony, not with the complete lack of testimony as to the bus driver's conduct, as is the case here with regard to the Cal Gas driver's conduct. Accordingly, Kitchen and Phillips cannot rely on *Horsley* to raise an inference that the Cal Gas driver acted negligently.

Cite as
174 Utah Adv. Rep. 18

IN THE UTAH COURT OF APPEALS

David C. BARLOW and Clare O. Barlow
b/a Barlow's Wood Classics,
Plaintiffs and Appellees,

v.

Alan J. CAPPO, d/b/a Western Building
Center,
Defendant and Appellant.

No. 910417-CA
FILED: November 21, 1991

Fourth District, Utah County
Honorable Ray M. Harding

ATTORNEYS:

John L. McCoy, Salt Lake City, for Appellee
Clair J. Jaussi, Provo, for Appellee
Before Judges Bench, Billings, and Garff.

OPINION

This opinion is subject to revision before
publication in the Pacific Reporter.

GARFF, Judge:

Alan J. Cappel, d/b/a Western Building Center, appeals from an order denying motion to quash service of summons and aside judgment.

FACTS

Appellees David C. Barlow and Clare Barlow, d/b/a Barlow's Wood Class (Barlows), mailed to appellant Alan J. Cappel (Cappel) a complaint, motion and order for alternative service by mail. The complaint was filed on June 8, 1989. The motion for alternative service by mail, along with the affidavit was filed June 6, 1989 pursuant to Utah Rule of Civil Procedure 4(f)(2) (1989).¹

On August 3, 1989, Cappel filed a motion to dismiss Barlows' action on the ground that the forum was not convenient. Cappel characterized this motion as a special appearance. He requested that the action be dismissed and then be filed in Colorado, arguing that various warranty claims existed upon Barlows' products sold in Colorado, that all of the witnesses required to prove said claims were in Colorado, that much of the evidence was in Colorado, and that the expenses of litigation would be reduced if the claim were brought in Colorado.

On September 5, 1989, the court denied Cappel's motion to dismiss and found that a "review of the file indicates that Defendant appears to have agreed contractually to juris-