

1992

Joseph Kitchen and Richard Phillips v. Cal Gas Company, Inc., a California corporation : Brief in Opposition to Certiorari

Utah Supreme Court

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JOSEPH KITCHEN and RICHARD
PHILLIPS,

Plaintiffs/Petitioners,

vs.

CAL GAS COMPANY, INC., a
California corporation,

Defendant/Respondent.

Case No. ~~900071~~

920027

Priority No. 13

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

Petition for Review by Writ of Certiorari of the Opinion of the Utah Court of
Appeals in Case No. 910420-CA, Affirming a Final Judgment of the Third
Judicial District Court, Salt Lake County, in Case No. 870902515

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UTAH

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PARTIES TO THE PROCEEDINGS BELOW

The caption contains the names of all parties to the proceeding in the Utah Court of Appeals. In addition to the parties listed in the caption, the following were parties to the proceedings in the district court but settled all claims by and against them before a final judgment was entered and were not parties to the appeal: C.R. England & Sons, Inc., a Utah corporation, and Richard Foreman, represented by John M. Chipman and Linda L. W. Roth of Hanson, Nelson, Chipman & Quigley, and by Frederick N. Green and Julie V. Lund of Green & Berry; and A.N.R. Freight System, Inc., represented by Stuart Poelman of Snow, Christensen & Martineau.

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QUESTIONS PRESENTED FOR REVIEW

1. Have the petitioners shown "special and important reasons" justifying review by writ of certiorari where their only argument is that the lower courts erred in deciding that there was insufficient evidence of Cal Gas's negligence to withstand a motion for summary judgment?
2. Did the Court of Appeals correctly apply Utah law regarding summary judgment, negligence and *res ipsa loquitur* in affirming the trial court's decision?

OPINION OF THE COURT OF APPEALS

The opinion of the Utah Court of Appeals, which is published in 821 P.2d 458, is included in the appendix.

JURISDICTION OF THE SUPREME COURT

The Court of Appeals entered its decision in this matter on November 20, 1991. On December 19, 1991, the plaintiffs and appellants sought an extension of time until January 20, 1992, to petition for certiorari. They filed their petition for writ of certiorari on January 21, 1992 (January 20 being a legal holiday). This court has jurisdiction to grant or deny the petition for writ of certiorari under Utah Code Ann. § 78-2-2(2), (3)(a) and (5).

CONTROLLING RULES OF LAW

This case does not involve controlling provisions of constitutions, statutes, ordinances, or regulations.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Lower Courts

The plaintiffs, Joseph Kitchen and Richard Phillips, brought this action against Cal Gas Company and C.R. England & Sons, Inc., seeking damages for personal injuries they suffered when the tractor-trailer they occupied overturned on Interstate 80 near Wendover, Utah. The plaintiffs claimed that the defendants were negligent and that their negligence proximately caused the plaintiffs' injuries. See Record ("R.") at 2-7. Cal Gas moved for summary judgment on the grounds that any negligence on its part was not a proximate cause of the plaintiffs' injuries. R. at 87-98. That motion was denied. R. at 114, 136-37. Cal Gas then moved for summary judgment on the grounds that there was no evidence that Cal Gas was negligent. R. at 179-84. That motion was granted, R. at 308-12, and the plaintiffs appealed, R. at 315-16. (The plaintiffs have settled with C.R. England.)

The appeal was poured over to the Utah Court of Appeals. A panel of the Court of Appeals unanimously affirmed the district court's grant of Cal Gas's motion for summary judgment in all respects. See Kitchen v. Cal Gas Co., 821 P.2d 458 (Utah Ct. App. 1991).

B. Statement of Facts

1. In February 1986, the plaintiffs, Joseph Kitchen and Richard Phillips, were truck drivers for what is now A.N.R. Freight Systems, Inc. R. at 3 ¶ 7; Deposition of Joseph Richard Kitchen ("Kitchen Depo.") (R. at 327) at 12.

2. On February 5, 1986, Kitchen and Phillips drove an A.N.R. truck consisting of a tractor and two trailers out of Los Angeles, California, heading for Salt Lake City. Kitchen Depo. at 35-36.

3. At about 11:30 p.m. on February 5, 1986, the plaintiffs pulled into the weigh station at the port of entry near Wendover, Utah. Kitchen Depo. at 43, 97-98. A highway patrol officer at the weigh station told Kitchen that there were patches of black ice beginning about twelve to fourteen miles ahead and continuing on into Salt Lake City. *Id.* at 44 & 114.

4. When the plaintiffs left the weigh station, Kitchen was driving, and Phillips was in the truck's sleeping compartment. Deposition of Richard Allen Phillips ("Phillips Depo.") (R. at 328) at 10-11.

5. Shortly after the A.N.R. truck left the weigh station, it was passed by a Cal Gas truck that appeared to be "in a hurry." Kitchen Depo. at 48-49, 74 & 113.

6. Where the Cal Gas truck passed the A.N.R. truck, the road was wet but not icy. *Id.* at 46, 48. Kitchen first encountered black ice fourteen or fifteen miles east of the point at which the Cal Gas truck passed him. *Id.* at 46, 48-49.

7. About twenty-five minutes after the plaintiffs left the weigh station, a Toyota pick-up truck passed them. The Toyota had been traveling in the left-hand lane, and the A.N.R. truck was in the right-hand lane of the two eastbound lanes of traffic. *Id.* at 50, 73. As the Toyota passed the A.N.R. truck, it turned on its high beams, and Kitchen saw "a shadow" in the road ahead, "like a glare . . . from the lights hitting on the object." *Id.* at 50, 79. The object

was at least one-quarter mile away. Id. at 53. Kitchen could not tell if the object was stopped or moving. Id. at 123.

8. As the Toyota truck passed the A.N.R. truck, Kitchen slacked off the throttle to slow down and let the Toyota truck into his lane. Id. at 51 & 79.

9. As the A.N.R. truck slowed down, a C.R. England truck hit it from behind, causing Kitchen to lose control of the A.N.R. truck. The A.N.R. truck overturned on its side, injuring Kitchen and Phillips. Id. at 52, 79-80, 96-97; R. at 4 ¶ 11.

10. After the plaintiffs were pulled out of their vehicle, they saw the Cal Gas truck overturned ahead of them, blocking the left-hand lane and part of the right-hand lane. Kitchen Depo. at 49, 51; Phillips Depo. at 12, 14. The A.N.R. truck never struck the Cal Gas truck. In fact, the Cal Gas truck was some distance away.¹

11. There was no evidence as to how the Cal Gas truck overturned.

SUMMARY OF ARGUMENT

The plaintiffs have not offered any "special and important reasons" why this court should grant review by writ of certiorari. Their only argument is that there were sufficient facts of

¹ Kitchen estimated the distance to be less than 65 feet. Kitchen Depo. at 93. With no citation to the record, the plaintiffs now put the distance at 200 feet. See Petition for Writ of Certiorari ("Petition") at 2. Newell Knight, the only expert witness in the case, put the distance at over a quarter of a mile. Deposition of Newell Knight (R. at 329) at 106. In fact, Mr. Knight, who was hired by C.R. England, concluded that the distance between the Cal Gas truck and the A.N.R. truck was so great that there was no relationship between the Cal Gas accident and the A.N.R. accident. Id. at 100-02.

record from which a jury could have concluded that Cal Gas was negligent. Two courts have now considered and rejected this argument. The courts' conclusions are supported by established Utah law governing the standard for summary judgment, negligence and res ipsa loquitur. The plaintiffs' petition for writ of certiorari should therefore be denied.

ARGUMENT

I.

THE PLAINTIFFS HAVE NOT DEMONSTRATED ANY "SPECIAL AND IMPORTANT REASONS" WHY THIS COURT SHOULD GRANT REVIEW.

Review by writ of certiorari is not a matter of right but of judicial discretion. Utah R. App. P. 46; Utah Code Ann. § 78-2-2(5). A party seeking review by writ of certiorari has the burden of demonstrating "special and important reasons" why the writ should be granted. Utah R. App. P. 46. The type of cases in which such review is justified include cases in which one panel of the Court of Appeals renders a decision in conflict with a decision of another panel or in conflict with a decision of this Court; cases in which the Court of Appeals has decided an important unsettled question of law that should be settled by this Court; and cases in which the decision of the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision." *Id.* None of these situations applies in this case.

The plaintiffs have not alleged, much less demonstrated, any "special" or "important" reasons for granting their petition.² They do not even cite Utah Rule of Appellate Procedure 46, which sets forth the considerations governing review by certiorari. Rather, they concede that this case is governed by general principles of tort law. Petition at 2. Their only argument is that the trial court and the Court of Appeals erred in not allowing their negligence claim against Cal Gas to go to a jury. As shown below, the trial court and Court of Appeals correctly applied controlling Utah law in granting Cal Gas's motion for summary judgment and in affirming that judgment.

II.

THERE WAS INSUFFICIENT EVIDENCE OF CAL GAS'S NEGLIGENCE TO WITHSTAND A MOTION FOR SUMMARY JUDGMENT.

The plaintiffs claim that the standard for granting summary judgment, especially in negligence cases, is "very restrictive." Petition at 7. In fact, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

² Their Petition for Writ of Certiorari is simply a warmed-over version of their brief on appeal. They have simply cut out portions to meet the shorter page limitation for petitions for certiorari and changed the word "plaintiffs" to "petitioners." The Petition does not present any argument or authority that the Court of Appeals has not already fully considered.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).³ Utah appellate courts have not hesitated to affirm summary judgments where the record is devoid of any evidence (or at least any evidence that is not highly speculative) to establish an essential element of a negligence claim.⁴ See, e.g., Hunt v. Hurst, 785 P.2d 414, 415-16 (Utah 1990) (insufficient evidence of negligence); Mitchell v. Pearson Enterprises, 697 P.2d 240, 245-46 (Utah 1985) (no proof that the defendants' alleged negligence was the proximate cause of injury); Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983) (no evidence of a dangerous condition that caused the accident); Massey v. Utah Power & Light, 609 P.2d 937, 938-39 (Utah 1980) (insufficient evidence of negligence); Long v. Smith Food King Store, 531 P.2d 360, 361-62 (Utah 1973) (no evidence of negligence); Preston v. Lamb, 20 Utah 2d 260, 436 P.2d 1021, 1022-23 (1968) (no showing of negligence); Dybowski v. Ernest W. Hahn, Inc., 775 P.2d 445, 446-47 (Utah Ct. App. 1989)

³ Although Celotex was decided under Federal Rule of Civil Procedure 56(c), Utah Rule of Civil Procedure 56(c) is identical to the federal rule in all relevant respects. To the extent that Utah rules are substantially similar to their federal counterparts, this Court has looked to federal courts' interpretation of the federal rules in construing the Utah rules. See, e.g., Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952, 958 (Utah 1984).

⁴ The essential elements of a negligence claim are (1) a duty that the defendant owed the plaintiff, (2) a breach of that duty (that is, negligence), (3) proximate cause, and (4) injury in fact. See, e.g., Williams v. Melby, 699 P.2d 723, 726 (Utah 1985); Steffensen v. Smith's Management Corp., 820 P.2d 482, 486 (Utah Ct. App. 1991). The plaintiffs claim that each of these elements presents a question for the jury. Petition at 10. In fact, the question of duty is a question of law for the court. See, e.g., Ferree v. State, 784 P.2d 149, 151 (Utah 1989); Weber v. Springville City, 725 P.2d 1360, 1363 (Utah 1986). The other elements, like any other fact question, present a question for the jury only if reasonable minds could reach different conclusions from the evidence. See, e.g., Cruz v. Montoya, 660 P.2d 723, 729 (Utah 1983). Cf. Gray v. Scott, 565 P.2d 76, 78 (Utah 1977); Restatement (Second) of Torts §§ 328B & 328C (1963 & 1964).

(no evidence of negligence); Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 264-67 (Utah Ct. App. 1987) (insufficient evidence of negligence). This is true even where, as here, the plaintiff also relied on a theory of res ipsa loquitur. See, e.g., Hunt, 785 P.2d at 415-16; Robinson, 740 P.2d at 264-67.

The plaintiffs next argue that there were genuine issues of material fact on the issue of Cal Gas's negligence, precluding summary judgment. However, bare allegations of negligence, "unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude the entry of summary judgment." Massey, 609 P.2d at 938. The plaintiffs have not specified any material fact that they claim was in dispute.⁵ They simply claim that, because the trial court denied Cal Gas's motion for summary judgment on the issue of proximate cause and because the issues of proximate cause and negligence are "intertwined," it was "illogical" not to find a disputed issue of fact regarding negligence. Petition at 8. In fact, the dispositive issue on Cal Gas's first motion was whether the negligence of the C.R. England truck was a superseding cause of the accident. The trial court simply concluded that it could not say, as a matter of law, whether C.R. England's negligence was foreseeable and hence a superseding cause of the accident. Cf. Harris v. Utah Transit Authority, 671 P.2d 217, 219-20 (Utah 1983) (trial court erred in not submitting the issue of proximate cause to the jury where reasonable minds could have inferred from the evidence that a subsequent actor's negligence was foreseeable). It

⁵ Cal Gas concedes that there were genuine issues of fact, see supra note 1, but none of those facts was material to the issue of whether Cal Gas was negligent.

does not follow that, if C.R. England was negligent, then Cal Gas must have been negligent, too. It is not "illogical" to say that, on the one hand, the foreseeability of C.R. England's negligence presented a jury question while, on the other hand, there was no evidence of Cal Gas's negligence. Cf. Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636, 642 (Utah Ct. App. 1988) (dispute in the evidence as to causation was no bar to entry of summary judgment based on undisputed evidence of no negligence). Therefore, the court's decision on Cal Gas's first motion for summary judgment cannot create a factual dispute as to the Cal Gas driver's negligence, nor can it satisfy the plaintiffs' burden of establishing Cal Gas's negligence.

Thus, the only issue the lower courts had to decide was whether the plaintiffs had made a sufficient showing of Cal Gas's negligence to get to a jury. They correctly concluded that the plaintiffs had not.

Both in the trial court and on appeal, the only relevant evidence that the plaintiffs relied on to establish Cal Gas's negligence was the fact that the Cal Gas truck was overturned in the road and that the road was slippery in places.⁶ See Petition at 10. That is simply not enough

⁶ In the lower courts the plaintiffs also suggested that the fact that the Cal Gas truck appeared to be "in a hurry" when it passed the A.N.R. truck coming out of the weigh station some 17-18 miles and 25-45 minutes before the accident, where the roads were not slippery, supported an inference of negligence. There was no evidence as to how fast the Cal Gas truck was going at the time (that is, that it was going too fast for existing conditions), and the evidence was too remote to be admissible. See generally Annotation, Admissibility, in Action Involving Motor Vehicle Accident, of Evidence as to Manner in Which Participant Was Driving Before Reaching Scene of Accident, 46 A.L.R.2d 9 (1956), and cases cited therein. The trial court so ruled on Cal Gas's motion in limine. See R. at 253, 308 & 312. Thus, the evidence was insufficient to present a jury question because the jury never would have heard it. The plaintiffs did not appeal the trial court's ruling on the motion in limine. Nevertheless, the Court of

to withstand a motion for summary judgment.

The fact that there were patches of black ice on Interstate 80 from about mile post 15 on into Salt Lake City says nothing about the Cal Gas driver's conduct at the time of the accident. There is no evidence that the Cal Gas truck overturned because of the black ice, and even if there were, that does not mean that the Cal Gas driver was negligent. Even the most careful drivers travelling at the safest speeds can lose control of a vehicle on black ice. See 821 P.2d at 464 ("Common experience and reason suggest black ice is a hazard that threatens even the most reasonable and prudent driver").

Similarly, the fact that the Cal Gas truck overturned says nothing about the Cal Gas driver's conduct. Utah courts have long held that the mere occurrence of an accident, without more, does not support an inference that anyone was negligent. See, e.g., McCloud v. Baum, 569 P.2d 1125, 1127-28 (Utah 1977); Horsley v. Robinson, 112 Utah 227, 186 P.2d 592, 596 (1947). There was a presumption, based on the instinct for self-preservation, that the Cal Gas driver was exercising due care for his own safety at the time his truck overturned. DeMille v. Erickson, 23 Utah 2d 278, 462 P.2d 159, 161 (1969), cert. denied, 397 U.S. 1079 (1970). The presumption disappears only when the opposing party produces some evidence of negligence. Where, as here, the plaintiffs have produced no evidence as to the Cal Gas driver's conduct, the

Appeals considered the evidence and concluded that the Cal Gas driver's being "in a hurry" so long before the accident "cannot sustain an inference that the Cal Gas driver was speeding and that such speeding continued after the roads became icy." 821 P.2d at 462. In any event, judging from their petition, it appears that the plaintiffs have now abandoned the argument.

presumption is not overcome, and it would be error to submit the issue of negligence to a jury. 462 P.2d at 161-62.

None of the cases the plaintiffs have cited is to the contrary. In each case where the issue of the defendant's negligence was submitted to the jury, there was evidence of the defendant's conduct at or shortly before the time of the accident, from which a jury could infer that the defendant was negligent. See, e.g., Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664, 665 (1966) (some evidence that the defendant handed a sandwich to the driver "immediately prior to the accident," thereby distracting him); Horsley, 186 P.2d at 594 (evidence that the vehicle was traveling at a "considerable speed" at the time of the accident and that the driver had sufficient time to avoid the collision if he had been in control of the vehicle); Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563, 564 (N.M. Ct. App. 1970) (disputed evidence that the defendant had parked his car on the highway in violation of a safety statute before the accident occurred).⁷

Here the plaintiffs offered no evidence to establish that the Cal Gas driver was negligent. As the Court of Appeals concluded, "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. . . .

⁷ Although they have cited two Utah statutes, the plaintiffs never established in the lower courts the evidentiary foundation necessary to establish a violation of either statute. Thus, the statute, without more, cannot meet the plaintiffs' burden of establishing negligent conduct on the part of Cal Gas. See King v. Fereday, 739 P.2d 618, 620 (Utah 1987).

[B]ecause 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." 821 P.2d at 462-63.

III.

THE DOCTRINE OF RES IPSA LOQUITUR DOES NOT APPLY UNDER THE FACTS OF THIS CASE.

Finally, the plaintiffs claim that the lower courts erred in not allowing their negligence claim to get to a jury under the doctrine of res ipsa loquitur. Under that doctrine, a jury may infer negligence under certain circumstances notwithstanding a lack of evidence to show that the other party acted negligently. However, before a party can proceed on a theory of res ipsa loquitur, "the party must satisfy a preliminary evidentiary foundation demonstrating that the facts of the case properly present a res ipsa loquitur question." 821 P.2d at 463 (citing Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980)). Before the plaintiffs could rely on res ipsa loquitur, they had to prove

(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.

Anderton v. Montgomery, 607 P.2d 828, 833 (Utah 1980) (footnotes omitted). The Court of Appeals correctly found that the plaintiffs had failed to establish the first element of res ipsa loquitur. It therefore did not have to consider the other elements. See 821 P.2d at 464.

To establish the first element of *res ipsa loquitur*, a plaintiff must present evidence that the occurrence of the incident is "more probably than not caused by negligence." Ballow v. Monroe, 699 P.2d 719, 722 (Utah 1985) (quoting Quintal v. Laurel Grove Hospital, 62 Cal. 2d 154, 41 Cal. Rptr. 577, 397 P.2d 161, 171 (1964) (Traynor, C.J., concurring and dissenting)). The plaintiff must show that "the balance of probabilities" weighs in favor of negligence. *Id.*

The mere fact that a driver loses control of his vehicle, even on an icy road, is not sufficient to meet the first element of *res ipsa loquitur*. See, e.g., Millonig v. Bakken, 112 Wis. 2d 445, 334 N.W.2d 80, 86 (1983); Wilson v. Rushton, 199 Kan. 659, 433 P.2d 444, 449 (1967); and authorities cited therein. As these authorities recognize, a vehicle can slide on an icy road without fault on the part of the driver. Similarly, a truck can overturn for any number of reasons, only a few of which involve the negligence of the driver. For example, the driver could have had a sudden heart attack or stroke without any prior warning, or a deer or other animal could have darted into his path, or he could have been confronted with some other sudden emergency or mechanical failure, or a tire could have blown out, or he could have been sideswiped or rear-ended by another vehicle, or his truck could have been overturned by some natural force such as a sudden, strong gust of wind. The plaintiffs made no effort in the lower courts to rule out any of these non-negligent explanations of the truck overturning, nor did they introduce any evidence to show that, when a truck overturns, it is more likely than not because the driver was negligent. In fact, based solely on the evidence in this case, one would have to conclude that it is more likely than not that an overturned vehicle is not the result of the driver's

negligence. There was deposition testimony of three trucks overturning at one time or another—the Cal Gas truck and the plaintiffs’ truck in this case, and another A.N.R. truck that plaintiff Kitchen had driven on another occasion. The plaintiffs do not claim that their truck overturned because of their own negligence, and, according to Mr. Kitchen, the other accident he was involved in was not the result of his negligence either. His trailer hitch broke, causing his trailer to overturn. See Kitchen Depo. at 25-26. Thus, based solely on the record in this case, one would have to conclude that more often than not trucks do not overturn as a result of their drivers’ negligence. Because the plaintiffs failed to establish the first element of *res ipsa loquitur*, they could not rely on that doctrine to meet their burden of showing negligence. See, e.g., Hunt v. Hurst, 785 P.2d 414, 416 (Utah 1990); Ballow, 699 P.2d at 723; Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 265-67 (Utah Ct. App. 1987).

CONCLUSION

The plaintiffs have not presented any "special and important reasons" why this court should review the Court of Appeals’ decision in this case. Moreover, the Court of Appeals’ decision correctly applied Utah law in concluding that the plaintiffs did not present sufficient evidence of negligence to withstand a motion for summary judgment. Therefore, this Court should deny the plaintiffs’ Petition for Writ of Certiorari.

DATED this 13th day of February, 1992.

SUITTER AXLAND ARMSTRONG & HANSON

Paul M. Simmons

FRED R. SILVESTER, Esq.

PAUL M. SIMMONS, Esq.

LAWRENCE R. DINGIVAN, Esq.

Attorneys for Respondent

(Original signature)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the above and foregoing BRIEF
IN OPPOSITION TO APPELLANTS' PETITION FOR WRIT OF CERTIORARI were mailed,
postage prepaid thereon, this 13th, day of February, 1992, to:

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

Paul M. Simmons

(Original signature)

A P P E N D I X

been charged at all, nor do they raise an issue concerning a prosecutor's discretion to charge a lesser crime as part of a plea bargain. They argue only that they have received prison sentences while others have not and have therefore received unequal protection of the laws.

In an effort to prove that other offenders did not receive the same sentence as they, plaintiffs offered as evidence clippings of several newspaper articles and letters sent to newspaper editors and an uncertified copy of a judgment from a different district court in another case. Though these items are all hearsay, the trial court did not disallow this evidence. Instead, the court ruled that all of the evidence was irrelevant, even if any of it showed that others who were not entitled to the incest exception escaped incarceration, which it does not. The judge stated that the fact that others may have received a sentence which violated the statute did not justify sentencing plaintiffs in a similarly illegal manner. The court ruled that inasmuch as plaintiffs received the sentences required under the law, their rights to equal protection were not violated. The petition was dismissed, and plaintiffs have appealed. We find no error.

In essence, plaintiffs allege selective enforcement of the child sexual abuse laws. However, even proof that they were tried, convicted, and sentenced while others who were convicted of the same crime went unpunished does not show a violation of plaintiffs' rights to equal protection of the law. At best, the argument would show only laxity in enforcement of the law. But laxity in enforcement of the law with respect to others is not a defense to enforcement of the law against plaintiffs.² Plaintiffs have failed even to allege that there is an intentional and deliberate plan on the part of state officials to enforce the law selectively against them. Their argument therefore fails.

2. See *State v. Bell*, 785 P.2d 390, 404-05 (Utah 1989); *Thiokol Chemical Corp. v. Peterson*, 15 Utah 2d 355, 393 P.2d 391, 395 (1964). Our sister states are in accord. See *People v. Thorpe*, 641 P.2d 935 (Colo.1982); *State v. Bowman*, 104 Idaho 39, 655 P.2d 933 (1982); *Pork Motel, Corp.*

We have carefully reviewed and considered the other points raised by plaintiffs on appeal and find them also to be without merit.

Affirmed.



Joseph KITCHEN and Richard Phillips,
Plaintiffs and Appellants,

v.

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

No. 910420—CA.

Court of Appeals of Utah.

Nov. 20, 1991.

Truck drivers injured in accident brought suit against owner of truck which overturned ahead of them, precipitating the accident. The Third District Court, Salt Lake County, Frank G. Noel, J., rendered summary judgment in favor of defendant, and plaintiff drivers appealed. The Court of Appeals, Billings, Associate P.J., held that: (1) there was no evidence of negligence to rebut presumption that defendant's driver was exercising due care, and (2) accident was not the type which normally did not occur in absence of negligence, as required for application of doctrine of *res ipsa loquitur*.

Affirmed.

v. *Kansas Dep't of Health & 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).

1. Negligence ⇨1

In negligence action, plaintiff has burden of establishing duty, breach of duty, proximate cause and injury.

2. Negligence ⇨136(14)

Issue of negligence, or breach of legal duty, is normally question of fact for jury.

3. Judgment ⇨185.3(21)

Party may not merely rely on bald assertions of negligence to overcome motion for summary judgment; to have negligence case submitted to jury, plaintiff must submit sufficient evidence to establish prima facie case against defendant.

4. Automobiles ⇨242(1)

Where driver is unavailable to testify as to his or her actions and there is no other evidence of driver's actions, driver is presumed to have been exercising due care.

5. Automobiles ⇨242(2, 4)

Mere fact that defendant's driver had passed plaintiffs "in a hurry" some 45 minutes before the accident could not support inference that driver was speeding and that such speeding continued after roads became icy, and mere fact that defendant's truck was overturned in the road did not establish that driver acted negligently.

6. Negligence ⇨121.2(3)

To proceed on theory of res ipsa loquitur, party must establish that accident was of kind which in ordinary course of events would not have happened had defendants used due care, instrument or thing causing injury was at the time of the accident under management and control of defendant, and accident happened irrespective of any participation at the time by plaintiff.

7. Negligence ⇨121.2(9)

Once party satisfies preliminary evidentiary foundation for res ipsa loquitur, there arises rebuttable inference of negligence which will carry the party's case past motion for nonsuit.

8. Automobiles ⇨242(2)

Mere fact that defendant's driver lost control of truck on icy road was insufficient to establish accident of a kind which, in the ordinary course of events, would not

have happened had driver used due care, as required to raise inference of negligence under doctrine of res ipsa loquitur.

James R. Black and Susan B. Black (argued), Wayne L. Black & Associates, Salt Lake City, for plaintiffs and appellants.

Stewart M. Hanson, Jr., Fred R. Silvester, Charles P. Sampson and Paul M. Simmons (argued), Suttter, Axland, Armstrong & Hanson, Salt Lake City, for Cal Gas.

Before BENCH, BILLINGS and GARFF, JJ.

OPINION

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 passed them five minutes after the ANR truck left the port of entry. At the time, Kitchen was driving the ANR truck approximately twenty to twenty-five miles an hour on the wet, but not icy, interstate highway. Kitchen testified the Cal Gas

truck passed "in a hurry," but he did not attempt to estimate the Cal Gas truck's 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 the icy road. A Toyota pickup truck passed the ANR truck in the left lane of the two eastbound lanes of traffic four miles after Kitchen first encountered black ice and approximately forty-five minutes after being passed by the Cal Gas truck. The Toyota turned on its high-beam headlights as it passed Kitchen. According to Kitchen, the Toyota's headlights illuminated a "shadow" lying across the road approximately a quarter mile ahead. When 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 both Kitchen and Phillips were injured. After 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 and was blocking the left lane and part of the right 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's 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 had operated the Cal Gas truck negligently, such negligence could not have been the proximate cause of Kitchen's and Phillips's 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 not 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 issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R.Civ.P. 56 (1991). We review a trial court's grant of summary judgment under a "correctness" standard. *Daniels v. Deseret Fed. Sav. & Loan Assoc.*, 771 P.2d 1100, 1101-02 (Utah App.), *cert. denied*, 783 P.2d 53 (Utah 1989). We accord no deference to the trial court's conclusion that the facts are not in dispute nor the court's legal conclusions based on those facts. *See Wycalis v. Guardian Title*, 780 P.2d 821, 824 (Utah App.1989), *cert. denied*, 789 P.2d 33 (Utah 1990). When determining if summary judgment is proper, we view all relevant facts, including all inferences arising from the facts, in the light most favorable to the party opposing the motion. *See Barlow Soc. v. Commercial Sec. Bank*, 723 P.2d 398, 399 (Utah 1986).

SUMMARY JUDGMENT ON NEGLIGENCE

In this case, Kitchen and Phillips argue summary judgment was improper because there are disputed issues of fact as to whether the Cal Gas driver's negligence caused their truck to overturn and block traffic. The Cal Gas driver died shortly after the accident of causes unrelated to the accident. Kitchen and Phillips offer no direct evidence as to what caused the Cal Gas truck to overturn because of the driver's death and the lack of other witnesses. However, they assert a jury could infer the Cal Gas driver was negligent in driving at an excessive speed given the road conditions. Kitchen and Phillips claim this inference reasonably flows from Kitchen's testimony that the Cal Gas truck passed them

"in a hurry" some forty-five minutes before the accident¹ and also from the undisputed facts concerning the poor road conditions existing on the morning of the accident.

Conversely, Cal Gas argues summary judgment was proper because there is no fact, or any reasonable inference drawn from the facts, that establish the Cal Gas driver was negligent. Cal Gas contends the mere fact that the Cal Gas truck passed the ANR truck forty-five minutes prior to the accident cannot support any inferences about the Cal Gas driver's conduct just prior to the accident, particularly given the substantially different road conditions existing where the accident occurred. Additionally, Cal Gas points out that Kitchen and Phillips have offered no expert testimony as to the cause of the Cal Gas truck overturning. The trial judge agreed with Cal Gas, concluding: "on the undisputed facts viewed most favorably to the plaintiffs, no facts establish the Cal Gas driver was negligent; therefore, any such finding by a jury could only be based on speculation."

[1-3] In a negligence action, the plaintiff has the burden of establishing four elements: "that the defendant owed the plaintiff a duty; that defendant breached the duty (negligence); that the breach of the duty was the proximate cause of plaintiff's injury; and that there was in fact injury." *Steffensen v. Smith's Management Corp.*, 820 P.2d 482, 485 (Utah App.

1991). The issue of negligence, or breach of a legal duty, is normally a question of fact for the jury. See *Harris v. Utah Transit Auth.*, 671 P.2d 217, 220 (Utah 1983). Accordingly, summary judgment is generally improper on the issue of negligence and only in clear-cut cases, with the exercise of great caution, should a court take the issue of negligence from the province of the jury. See *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985); *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982). However, a party may not merely rely on bald assertions of negligence to overcome a motion for summary judgment. "Naked assertions of negligence, unsupported by any facts whatsoever ... [fall] far short of raising a material issue of fact on the issue of negligence." *Massey v. Utah Power & Light*, 609 P.2d 937, 938-39 (Utah 1980).² To have a negligence case submitted to the jury, "[a] plaintiff must submit sufficient evidence to establish a prima facie case against the defendant." *Lindsay v. Gibbons and Reed*, 27 Utah 2d 419, 497 P.2d 28, 30 (1972).

Initially, we recognize the Cal Gas driver (and, through vicarious liability, Cal Gas) owed Kitchen and Phillips a duty to act as a reasonable and prudent truck driver would have acted under the circumstances. See *Meese v. Brigham Young Univ.*, 639 P.2d 720, 723 (Utah 1981). We must decide whether there is sufficient evidence of the Cal Gas driver's breach of this duty to

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.

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.

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).

raise an issue of material fact, thereby requiring us to overturn the trial court's summary judgment on the issue of negligence.

[4] Utah courts have long held that "[t]he mere happening of [an] accident of course does not prove that the defendants were negligent." *Horsley v. Robinson*, 112 Utah 227, 186 P.2d 592, 596 (1947). Rather, a plaintiff must offer some proof of negligence to prevail at trial. See *Massey*, 609 P.2d at 938-39. Utah courts have articulated this burden of proof principle as a rebuttable presumption: Where a driver is unavailable to testify as to his or her actions and where there is no other evidence of the driver's actions, the driver is presumed to have been exercising due care. *DeMille v. Erickson*, 23 Utah 2d 278, 462 P.2d 159, 161 (1969), cert. denied, 397 U.S. 1079, 90 S.Ct. 1531, 25 L.Ed.2d 814 (1970).

DeMille was a wrongful death action arising from a head-on automobile collision in which there were no survivors and no eyewitnesses. *Id.* 462 P.2d at 160. The only relevant evidence was that the decedent, on whose behalf plaintiff was suing, had been driving several feet over the center line in the road when the accident occurred. At the close of evidence, 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.* 462 P.2d 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.* 462 P.2d 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).

[5] 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, be-

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).

cause 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 assert the trial court erred in rejecting their argument that the Cal Gas driver's negligence can be inferred under the doctrine of *res ipsa loquitur*.

[6,7] *Res ipsa loquitur* is a rule of evidence which allows a party, in certain circumstances, to raise an inference that another party has acted 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 negli-

gence 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 828, 833 (Utah 1980) (quoting *Lund v. Phillips Petroleum Co.*, 10 Utah 2d 276, 351 P.2d 952, 954 (1960)). Accordingly, the fact that Kitchen and Phillips failed to produce any evidence of negligence does not, by itself, preclude their *res ipsa loquitur* claim. However, before a party is entitled to proceed on a *res ipsa loquitur* theory, the party must satisfy a preliminary evidentiary foundation demonstrating that the facts of the case properly present a *res ipsa loquitur* question. See *Nixdorf v. Hicken*, 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

4. 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.* 470 P.2d 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.* 186 P.2d 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.* 186 P.2d 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.* 186 P.2d 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.

(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 this showing, there arises a "rebuttable inference of negligence which will carry the [party's] case past the motion for nonsuit." *Nizdorf*, 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 above three-part test.

[8] Under the first prong of the test, we must determine whether the accident in question was the kind which ordinarily does not occur in the absence of negligence. *Dalley*, 791 P.2d 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 not, the result of the Cal Gas driver's negligence, 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 Phillips's res ipsa loquitur claim.

CONCLUSION

In conclusion, we affirm the trial court's summary judgment dismissing Kitchen's and Phillips'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.

eral appearance," which gave trial court personal jurisdiction over him.

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

BENCH and GARFF, JJ., concur.



John L. McCoy, Salt Lake City, for defendant and appellant.

Clair J. Jaussi, Provo, for plaintiffs and appellees.

Before BENCH, BILLINGS and GARFF, JJ.

David C. BARLOW and Clare O. Barlow, d/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.

Court of Appeals of Utah.

Nov. 21, 1991.

Civil action was commenced. After entering default judgment, the Fourth District Court, Utah County, Ray M. Harding, J., denied defendant's motion to quash any return of service, and defendant appealed. The Court of Appeals, Garff, J., held that defendant's motion to dismiss on ground of forum non conveniens was general appearance, which gave lower court personal jurisdiction over him.

Affirmed.

Appearance ¶9(5), 19(1)

Defendant's motion to dismiss on ground of forum non conveniens was "gen-

1. Rule 4(f)(2) of the 1989 version of the Utah Rules of Civil Procedure provided.

In circumstances ... justifying service of summons by publication, if the party desiring service of summons shall file a verified petition stating the facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service of

OPINION

GARFF, Judge:

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

FACTS

Appellees David C. Barlow and Clare O. Barlow, d/b/a Barlow's Wood Classics (Barlows), mailed to appellant Alan J. Cappo (Cappo) 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 Rules of Civil Procedure 4(f)(2) (1989).¹

On August 3, 1987, Cappo filed a motion to dismiss Barlows' action on the ground that the forum was not convenient. Cappo 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

summons shall be given by the clerk mailing a copy of the summons and complaint to the party to be served at his address, or his last known address. Service shall be complete ten days after such mailing.

This Rule has since been changed and its corresponding version can be found in Utah Rules of Civil Procedure 4(g) (1991).

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of and for
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Brent Klein

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JOSEPH KITCHEN and)	
RICHARD PHILLIPS,)	
)	
Plaintiffs,)	ORDER IN LIMINE
)	AND
v.)	SUMMARY JUDGMENT
)	
C. R. ENGLAND & SONS, INC., a)	
Utah corporation, and CAL GAS)	
COMPANY, INC., a California)	Civil No. C87-02515
corporation,)	
)	Judge Frank G. Noel
Defendants.)	

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

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

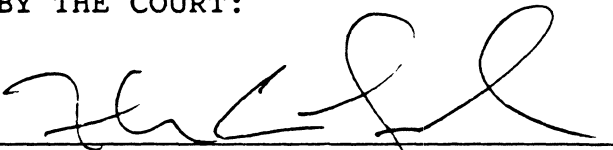
WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

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

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


DATED this 31 day of January, 1990.

BY THE COURT:

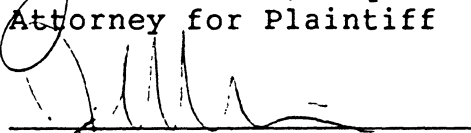


Honorable Frank G. Noel
District Court Judge

APPROVED AS TO FORM:



JAMES R. BLACK, Esq.
Attorney for Plaintiff



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

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