

1963

Richard E. Ashby v. Whiting & Haymond Construction Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

RICHARD E. ASHBY

Plaintiff and Respondent

vs.

WHITING & HAYMOND CON-
STRUCTION COMPANY,

Defendant and Appellant

Case No. 9953

FILED

AUG 23 1963

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

Appeal from the Judgment of the
Fifth District Court for Millard County
Honorable C. Nelson Day, District Judge

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IN THE SUPREME COURT
of the
STATE OF UTAH

RICHARD E. ASHBY
Plaintiff and Respondent

vs.

WHITING & HAYMOND CON-
STRUCTION COMPANY,
Defendant and Appellant

Case No. 9953

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

This is an action for personal injuries and property damage arising out of a collision between a pickup truck driven by the plaintiff and an automobile driven by Verl Justesen. Justesen was *not* the employee or agent of the defendant Construction Company. He was not a party to the lawsuit.

DISPOSITION IN LOWER COURT

The case was tried to the court. It held the defendant Construction Company liable for not replacing and maintaining a stop sign located at the intersection where the accident occurred. From a judgment for the plaintiff, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in its favor, as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

The following statement of facts views the evidence in the light most favorable to the plaintiff. It also includes the *undisputed* facts which favor the defendant. For the purpose of identification the court record will be referred to by "R" and the reporter's transcript by "T".

At about 6:30 p.m. on Saturday, October 29, 1960, the plaintiff was driving east in his 1955 Chevrolet pickup on Highway U 100 (First North Street) in Fillmore, Utah. (T9) The defendant construction company had been working on Highway U 100 since September 1, 1960. (T 123). The project involved putting in a concrete ditch to act as a ditch and curb and gutter on the north side of the street, curb and gutter on the south side of the street, and resurfacing the road and intersections from curb to curb. (T 124). *The defendant had taken down and replaced the stop signs in order to complete the project.* The plaintiff had driven to work on Highway U 100 whenever it was open. (T 44) He had noticed the stop signs were down at the intersection of Highway U 100 and First, Second and Third West, except for the one on the south side of Third West (T 43). He had seen equipment working in the area where the stop signs were (T 43). The plaintiff was driving with his lights on high

beam then dimmed his lights for another vehicle coming west on Highway U 100. (T 51). As the plaintiff approached the intersection of Highway U 100 and Second West he passed the vehicle going west. (T 10) When the plaintiff entered the intersection of Highway U 100 and Second West he did not remember that he looked to the north. (T 49)

Q. That's what I am saying is, you were looking straight ahead?

A. Yes.

Q. As you were going east and you did not look to to the north?

A. No, not that I remember.

Q. Not that you can remember?

A. No. (T 48)

Plaintiff did not remember seeing anything before the impact. (T 11). His vehicle was struck on the left side by an automobile driven by Verl Justesen. (T 87) Justesen was proceeding south on Second West when he entered the intersection of Second West and Highway U 100 and struck the plaintiff's pickup between the cab and the back fender (T 87). The pickup truck was rolled over, the fenders and the bed were bent and the glass was broken by the force of the impact. The front end of the Plymouth driven by Justesen was all smashed. (T 87). *Justesen told Fillmore police officer, Merlin Hare, he was going 40 m.p.h. when he entered the intersection.* (T. 90) *Justesen also told Officer Hare he had been drinking prior to the collision.* (T 97)

The automobile driven by Justesen left 25 feet of skid marks commencing just south of the cross walk on the

north side of the intersection of Highway U 100 and Second West Street and continuing up to the point of impact. The officer measured an additional 30 feet of skid marks from the point of impact to where the Justesen vehicle finally came to a rest. (T 88, 91)

There were no skid marks left by the plaintiff's truck before the impact. (T 88). The pickup truck skided 33 feet after the impact, then rolled over 50 feet before it came to a rest. (T 95).

Verl Justesen had been driving a milk truck up and down Highway U 100 every day for a period of time prior to the accident. Officer Hare testified:

Q. You were acquainted with him (Verl Justesen) at the time of this accident?

A. Right.

Q. And you know of your own knowledge that he had been driving a truck up and down Highway U 100 prior to this accident?

A. That's right.

Q. Did he tell you for whom?

A. Floyd Killis' milk route.

Q. Did he have occasion because of his employment to drive this street every day?

A. Yes.

Q. That was for a period of time before the accident occurred?

A. Yes. Yes, that was prior to the accident.

Q. About how long had he lived in Fillmore prior to this accident?

A. Well, I don't know for sure but I'd say at least two or three years he had been in the area.

Q. Your testimony would be, then, that to the

best of your knowledge, he traveled this street during the period of construction?

A. Yes. (T 98)

Grant Palfreyman, construction foreman for defendant testified that when the construction crew moved into the area of Second West and Highway U 100, the stop sign on the Northwest corner of the intersection was down. (T 125).

Each evening when the construction crew left the area, Mr. Palfreyman propped the stop sign against a "construction horse" and placed it at the Northwest corner of the intersection. (T 126-128)

Mr. Palfreyman testified the construction horse was painted a safety yellow with reflectorized stripes which were either red and white or black and white. There was also a "slow" sign approximately 2 foot square bolted to the construction horse. (T 128)

During the day when the defendant's construction crew was working, the construction horse and stop sign were moved out of working area. (T 126)

It is undisputed that when Defendant's crew left the job site on the evening of Friday, October 28, 1960, the stop sign was "toe-nailed" to a construction horse and set on the northwest corner of the intersection of Highway U 100 and Second West street. (T 126-127)

With regard to where the construction horse was placed on the evening of October 28, 1960, Mr. Palfreyman testified:

"Q. And now, could you tell us approximately where that sign was placed by yourself on that night?

A. Approximately at the edge of the old cross walk because we didn't have the oil laid out from the intersection at that time. The oil was laid in a strip about 60 feet wide down through the center of the road from Highway 91 down to approximately Fifth West.

Q. And is it your recollection that the sign was close to the cross walk, the old cross walk that went across the street there?

A. That's right." (T 128)

Defendant's crew did not work on Saturday, October 29th the day the accident happened. (T 144)

When defendant's crew returned to the job site on Monday, October 31st a police officer of Fillmore City rounded up a group of boys, had them get a tractor and a wagon and bring back some of the construction signs which had been taken from the area. (T 127) *One of the signs returned was the stop sign for the northwest corner of the intersection of Highway U 100 and Second West. (T 127)*

Trooper Gayle C. Rasmussen of the Utah Highway Patrol testified that the normal reaction time for a driver is one-half to three-fourths of a second, so that a driver going 40 m.p.h. would travel 30 to 45 feet from the time he observed the danger until he applied his brakes. (T 107).

Trooper Rasmussen testified that the stop sign on the northwest corner of the intersection of Highway U

100 and Second West was laying on the ground near a mound of dirt after the accident (T 104). He also testified the stop sign had been down for several days prior to the accident. (T 105)

Maxim P. Thornton, an employee of Fillmore City, testified the stop sign had been down most of the week before the accident. (T 66) *Thornton did recall there were construction horses at the intersections of First, Second and Third West and Highway U 100, but he could not recall whether he saw the construction horse on Saturday, October 29th or not. (T 69).*

Everett Ashman who resides in the house on the northwest corner of the intersection of Highway U 100 and Second West Street testified the stop sign at that particular corner was down for about a week during the latter part of October. (T 79-80) *He remembered seeing a "construction-horse" by the culvert on the northwest corner of the intersection of Second West and Highway U 100 where the stop sign was. (T 80).*

Defendant was unable to locate Verl Justesen at the time of trial. He did not testify nor was he made a party to the action. (R-1)

ARGUMENT

POINT I

THE ABSENCE OF THE STOP SIGN (IF IT WAS ABSENT) WAS NOT A CAUSE OF THE COLLISION

Defendant respectfully submits that there is no evidence in the record to support a finding that it was negligent. If the Court should hold the record does support such a finding, such negligence was *not* a proximate cause of the accident. *The proximate cause of this accident was the negligence of Verl Justesen.*

The record conclusively shows that Justesen knew the area where the accident happened as he had been driving a milk truck up and down Highway U 100 every day for some time prior to the accident. Officer Merlin Hare testified that Justesen had traveled Highway U 100 during the period of the construction and was familiar with the intersection.

The testimony of Officer Hare on this point is undisputed. Justesen must be charged with the knowledge that the stop sign was removed the week before the accident so equipment could work in the intersection, as he drove the street every day. *Justesen knew he was approaching a state highway as he drove south on Second West Street.* He knew he had the duty to yield the right of way to vehicles traveling on the state highway.

The Utah Code Provides:

"Vehicle entering a through highway.—The driver of a vehicle shall stop as required by this act at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard but said driver having so yielded may pro-

ceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to the vehicle so proceeding into or across the through highway." (U.C.A. 1953 41-6-74) (*Italics ours*)

If the stop sign had been up, it would not have given Justesen any more warning of the highway or of the plaintiff's vehicle than he already had.

In *Haarstrich v. Oregon Short Line R. Co.* 70 Utah 552, 262 Pac. 100, (Utah 1927) this court was confronted with facts similar to the instant case. In that case the plaintiff a guest passenger in an automobile, claimed the defendant, railroad was negligent for failing to have proper signals at the crossing in North Salt Lake. The plaintiff was injured when the automobile in which she was riding collided with a freight train at the crossing around 1:15 a.m. The evidence disclosed that the driver of the automobile had a clear view of the train for 150 feet or more yet he failed to see it until it was too late to avoid the collision. The jury returned a verdict in favor of the plaintiff and the defendant appealed. The Supreme Court reversed holding the negligence of the Railroad company in not complying with the law as to warnings and signals, was not a proximate cause of the accident.

The question on appeal was whether the negligence of the defendant, if any, was a proximate cause of the injury sustained by the plaintiff. The court held it was not, stating:

"The street lights were functioning, and there appears to have been no reason whatever why he

could not have stopped his car and avoided the collision if he had looked ahead and applied his brakes at the proper time. *In view of the indubitable facts disclosed by the evidence, it is wholly immaterial whether the defendant strictly complied with the law as to warnings and signals. Its failure in that regard, if there was a failure, which is very doubtful, had nothing whatever to do with the accident and was in no sense the proximate cause of the plaintiff's injury.*" (Italics ours)

In the instant case, the fact that the stop sign was down has no bearing whatsoever on the cause of the plaintiff's injuries. Justesen *knew* he was approaching a highway from a secondary road and he *saw* the plaintiff's vehicle on the highway. His negligence in failing to yield the right of way was the proximate cause of the accident.

In *Hillyard v. Utah By-Products Co.* 1 Utah 2d 143, 263 P.2d 287 (Utah 1953) this court announced the rule that where one has negligently created a dangerous condition and a later actor observed or circumstances are such that he could not fail to observe such condition, but negligently failed to avoid it, then *as a matter of law the later intervening act interrupts the natural sequence of events and cuts off the legal effect of the negligence of the initial actor.*

In *Toma v. Utah Power & Light Co.* 12 Utah 2d 278, 365 P.2d 788 (Utah 1961); and *Velasquez v. Greyhound Lines*, 12 Utah 2d 379, 366 P.2d 989 (Utah 1961), this court held that where the later actor *knew* of the condition created by the prior actor, but negligently failed to avoid

it, the negligence of the later actor cut off the prior negligence and became the sole proximate cause of the accident.

In the *Toma* case an action was brought by the administratrix of the Estate of Fred R. Shook, Jr. against the Utah Power & Light Company alleging Shook was killed because of the negligence of the defendant. With regard to the matter of proximate cause, the evidence proved that the deceased's employer *knew* that the defendant's power lines were energized at the time of the pouring of cement. The deceased's employer failed to take any acts to have the power cut off. Shook was electrocuted when a crane lowering a bucket into a truck he was driving, came into contact with a "hot" wire.

This Court stated:

"Examining the facts of the case at bar in light of this case, *we observe the Mountain States Construction Company knew the involved wires were live at the time of the pouring of cement on the south side September 5, 1956.* Mr. Waldren testified he had been told power would not be cut off. Thus, even though the Utah Power & Light Company had negligently created a dangerous situation, and negligently continued to maintain such a condition by refusing to cut off the power, the Mountain States Construction Company did have knowledge of such condition and failed to avoid the impending disaster. On the contrary the Mountain States Construction Company put into motion the actions which created the accident. It is not that the Mountain States Construction Company failed to observe a dangerous condition until too late to avoid it. In fact the Mountain States Construction

Company knew of the condition for four days.”
(Italics ours)

* * *

“While we attach no particular significance to the plaintiff’s pull, we do believe and so hold, from plaintiff’s own evidence, that as a matter of law the negligence of the Mountain States Construction Company as hereinbefore set out was the sole proximate cause of the accident. So holding, the judgment of the District Court is affirmed. Costs to respondent.”

A directed verdict in favor of the defendant was sustained by the Supreme Court.

In the *Velasquez* case *supra*, an action was brought for injuries sustained by a passenger on a bus which collided with the rear of a semi trailer stopped on the side of the highway. The action was brought against the bus company and the owner of the semi trailer.

The evidence disclosed that the driver of the semi trailer stopped his truck at night to help another motorist with approximately 7 feet of the trailer protruding on to the traveled portion of an interstate highway. The truck’s clearance lights, stop lights and blinker lights were on when the truck driver alighted. The Greyhound bus driver admitted he saw the truck as he approached. He said he intended to stop behind the truck to render assistance and to add the benefit of his lights to the scene. The evidence disclosed the bus driver lost consciousness by either falling to sleep or blacking out from some other

cause. He was aroused to consciousness by the cry of a woman passenger "Don't hit it". He swerved the bus but not in time to avoid hitting the left rear corner of the truck.

The question on appeal was whether the negligence of Greyhound was the sole proximate cause of the injury or whether the prior parking of the truck so as to partially obstruct the lane of traffic was a concurring proximate cause of the collision.

The court stated:

"In determining whether the negligence in creating a hazard (Interstate's parking the truck) was a proximate cause of the collision, this is the test to be applied: did the wrongful act, in a natural and continuous sequence of events which might reasonably be expected to follow, produce the injury. If so, it can be said to be a concurring proximate cause of the injury even though the later negligent act of another (Greyhound) cooperated to cause it. On the other hand, if the latter's act of negligence in causing the collision was of such character as not reasonably to be expected to happen in the natural sequence of events, then such later act of negligence is the independent, intervening cause and therefore the sole proximate cause of the injury.

"Applying the foregoing test to our situation: we think it is not reasonably to be foreseen that an oncoming driver (Greyhound) would see (or fail to see) this large, well-lighted truck so parked upon the highway, and with at least one and one-half usable traffic lanes to his left nevertheless run into it. The trial court was correct in so concluding

and entered a judgment in favor of Interstate Motor Lines as a matter of law on the ground that the negligence of Greyhound was the sole proximate cause of the collision."

The fact that the Greyhound bus driver saw the truck then failed to avoid it resulted in his negligence being the sole proximate cause of the accident.

Defendant respectfully submits that these two recent Utah cases are persuasive authority that defendant's negligence, if any, was not a proximate cause of this accident

Justesen *knew* that he was entering an intersection yet he failed to slow down or take any action to avoid the collision until it was too late. He admitted to Officer Hare that he was going 40 m.p.h. in a 20 m.p.h. zone when he entered the intersection. Justesen's reckless conduct in racing into the intersection at 40 m.p.h. conclusively shows he had no intention of obeying any stop sign. To say that Justesen would have seen the stop sign and slowed down is to completely ignore the physical facts of this case. Such reasoning is based on pure speculation. Justesen saw the plaintiff's vehicle when he was at least 70 feet from the point of impact (T 106) If he had been driving at a reduced speed he could have brought his vehicle to a stop within a reasonable distance, and stopped before the impact.

Justesen's own knowledge of the intersection, coupled with his actual knowledge of the plaintiff's vehicle on the highway gave him more warning than he would have received from the stop sign. He knew of the danger

then recklessly failed to avoid it. His conduct in speeding into the intersection was the sole proximate cause of this collision. It completely cuts off any prior negligence of this defendant.

POINT II.

THE UNCONTROVERTED EVIDENCE SHOWS THE DEFENDANT WAS NOT NEGLIGENT

The undisputed testimony conclusively shows that on Friday evening October 28, 1960, when defendant's construction crew left the job on Highway U 100, that the stop sign was "toe-nailed" to a construction horse and placed on the northwest corner of the intersection of Highway U 100 and Second West Street. Defendant's evidence stands uncontradicted on this fact.

Grant Palfreyman, defendant's construction foreman testified:

Q. Now directing your attention to the last weekend in October which was the weekend just before Halloween do you recall if on the night of Friday, October 28 what you did if anything with regard to the stop sign on the intersection on the north side of Second West and U-100?

A. I put them all in place against these horse construction barricades before I left the project.

Q. When you put them against the construction horses, did you prop them up or nail them or what did you do with them?

A. Sometimes toe-nailed them through the two by fours. (T 126-127)

There is *no* evidence which contradicts the fact that the stop sign was in place when the defendant's crew left the area.

It is elementary that the plaintiff cannot recover unless he can show that the defendant was negligent and that such negligence was a proximate cause of his injury. *Mortensen v. First Security Bank of Utah*, 12 Utah 2d 89, 363 P. 2d 75 (Utah 1961).

The fact that the stop sign was seen down on the ground on Saturday evening October 29, some 24 hours after defendant left the area, is not evidence that the sign was left down on Friday evening October 28th. *Mere proof of the existence of a present condition generally does not raise any presumption that the same condition existed at a prior date.*

The rule stated in 31 C.J.S. p 789 Sec. 140 relating to past and future existence of a fact or condition is as follows:

"As a general rule mere proof of the existence of a present condition or state of facts or proof of the existence of a condition or state of facts at a given time, does not raise any presumption that the same condition or facts existed at a prior date, since inferences or presumptions of fact ordinarily do not run backward.

Also in 20 Am. Jur. Sec. 210 the rule is stated as follows:

"Retrospective Operation of Presumption. The presumption of the continued existence of a person, a personal relation, or a state of things is prospective and not retrospective. *Such a presumption never runs backwards; the law does not presume, from the proof of the existence of present conditions or facts, that the same facts or conditions had existed for any length of time previously.* Thus, proof of insanity at a particular time is not competent to prove, on the principle of natural and probable relation, the same condition a considerable period prior thereto." (Italics Ours)

In *Russell, Poling & Co. v. Connors Standard Marine Corp.* 252 F. 2d 167 (Second Circuit 1958) the Court held that proof that two channel buoys were out of position the day *after* the plaintiff's barge was punctured by a sunken object, did not raise any presumption that the buoys were out of position on the day of the accident. When the buoys were found off position, they still were attached to their chains and anchors. No proof was offered as to the actual cause of the moving of the buoys, but there was evidence that buoys were often moved by tugs whose tow lines foul the chain of the buoys and drag the buoys off position. The Court stated:

"Appellants challenged the ruling of the Trial Court by asserting that a prior condition may be inferred from a state of facts subsequently established. Generally, mere proof of the existence of a state of facts does not raise a presumption that the same condition of facts existed at a prior date, since inferences or presumptions of fact ordinarily do not run backward."

In *Sloan v. Caroline Power and Light Co.* 102 S. E. 2d 822, (North Carolina 1958) the Supreme Court of North Carolina held that evidence of the clearance between telephone wires and power wires *after* the plaintiff's decedent was electrocuted was not evidence of the distance of separation before the accident. The Court held:

"Conceding that a factual situation once proven is presumed to continue in existence unless there is proof to the contrary, the existence of a condition at the time of an accident is not presumed to have existed prior thereto, and particularly when the accident resulted from an operation that the evidence tends to show changed the condition and that such change was the proximate cause of the injury or one of the proximate causes thereof. Any inference or contention that the telephone wires were in the same location or condition before the accident as they were afterwards, must be predicated on evidence of such location or condition prior to the accident. The general rule in this respect is stated in 31 C.J.S. Evidence Sec. 140, p. 789, as follows: 'As a general rule mere proof of the existence of a present condition or state of facts or proof of the existence of a condition or state of facts at a given time, does not raise any presumption that the same condition or facts existed at a prior date, since inferences or presumptions of fact ordinarily do not run backward.'

Likewise, in the case of *Liverpool & London & Globe Ins. Co. of Liverpool, England v. Nebraska Storage Warehouses*, 8 Cir., 96 F. 2d 30, 36, it is said: '... that while a given condition, shown to exist at a given time, may be presumed to have continued, there is not, on the other hand, any

presumption that it existed previous to the time shown."

Plaintiff cannot rely on a retrospective inference to prove defendant's negligence. As was stated in *Sloan v. Carolina Power and Light Co. supra*.

"Negligence on the part of the defendant, as a general rule, is never presumed but is a matter for affirmative proof. . . . the presumption is in favor of innocence or performance of duty and against the existence of negligence, and in the absence of affirmative proof it will be presumed that defendant or his servants were not guilty of negligence but exercised due care with respect to the thing or condition which caused the accident."

Plaintiff's witness who testified the stop sign was down during the last week in October corroborated the defendant's evidence to the effect that the stop sign was moved out of the working area during the day. This evidence does *not* raise an inference that the stop sign was not put up Friday night when defendant's crew left the area.

The record clearly shows that defendant used reasonable care in "toe-nailing" the stop sign on the construction horse and placing it on the northwest corner of the intersection. This was done on Friday evening, October 28th. The plaintiff did not contend nor does the law require that the defendant place a guard at the construction site to see that signs are not removed.

The defendant's construction crew did not return to Fillmore until Monday October 31st. On that morning

all of the signs were returned to the construction area by some high school boys. There is no evidence in the record as to when the signs were taken down except that it was sometime after Friday evening, October 28th.

There was *no* evidence from which the Court could find defendant negligent. The evidence in the record clearly shows that defendant used reasonable care in placing the stop sign on the Northwest corner of the intersection when its crew left the construction area.

CONCLUSION

The record conclusively shows that the defendant was not negligent.

It is undisputed that on Friday evening October 28, 1960, when defendant's construction crew left the job in Fillmore, the stop sign was "toe-nailed" to a construction horse on the Northwest corner of the intersection of Highway U 100 and Second West.

The absence of the stop sign on Saturday evening, October 29th was not a cause of the accident between the plaintiff and Verl Justesen. Justesen *knew* he was approaching a highway and *saw* the plaintiff's car. His reckless conduct in speeding into the intersection was the sole proximate cause of the accident.

The judgment of the lower court should be reversed and judgment entered for defendant as a matter of law, or defendant should have a new trial.

Respectfully submitted,
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