

1963

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

Utah Supreme Court

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APR 16 1964

## IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

OCT 21 1963

Clerk, Supreme Court, Utah

RICHARD E. ASHBY

*Plaintiff and Respondent*

vs.

Case No. 9953

WHITING & HAYMOND CON-  
STRUCTION COMPANY,*Defendant and Appellant*

## BRIEF OF RESPONDENT

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

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*Defendant and Appellant*

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BRIEF OF RESPONDENT

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The statement of facts as contained in the Appellant's Brief does not coincide with the evidence, and especially statements which the Appellant in his Brief contends are undisputed are at variance with the real facts of the case, and for that reason Respondent makes the following:

STATEMENT OF FACTS

Highway U-100, also known as First North Street in Fillmore, Utah, is and was a State Road running in an east-west direction through Fillmore City in Millard County (tr 9). That Second West Street in Fillmore runs in a north-south direction and intersects with Highway U-100 (First North Street). That at all times prior to the commencement of construction and improvement of the road at this intersection by Whiting Haymond Construction

Company on about September 1st, 1960, a stop sign on the northwest corner of the intersection and a stop sign on the southeast corner of the intersection had controlled traffic going either south or north on Second West Street and which intersected U-100. Five witnesses, Eugene Ashby, Maxim Thornton, Everett Ashman, Gayle Rasmussen and Merlin Hare, testified as to these stop signs which controlled the traffic, as being in place to the time of construction work (T 39, 65, 66, 77, 84, 105).

That about 6:30 P.M. on Saturday, October 29, 1960, the plaintiff and respondent was driving east in his Chevrolet pickup along U-100. (T 9) Respondent was traveling approximately 20 miles per hour. As he approached the intersection of Second West Street he passed a west bound vehicle several feet before entering the intersection, for which he dimmed his lights. (T 10) Respondent testified on cross examination, that he had no recollection of anything that happened after he passed the car just before the intersection (T58), and further testified as follows: "After passing a car it takes a second or two to regain full concept of the road ahead, and I guess I just didn't have time to look anywhere. (T 11) I didn't remember anything until I woke up in the hospital". (T 49)

The Respondent's vehicle had been struck on the left side between the door and the rear fender by one Verl Justesen (T 87), who was proceeding south on Second West Street when he entered the intersection of Second West and Highway U-100, which had been left unprotected by defendant's removal of the STOP sign. The pickup truck was rolled over and the glass was broken by the force of the impact and the front end of the vehicle driven by Justesen was smashed. (T 87)

Within a few minutes from the time of impact the accident was investigated by Fillmore City Police, Merlin Hare, and State Trooper Gayle Rasmussen, who testified that there was no stop sign in place on the northwest corner of the intersection which controlled the traffic coming

from the north along Second West into U-100. (T 88)

Officer Hare stated that there was no construction horse or other warning device on the night of the accident where the stop sign had been. Officer Merlin Hare further stated that he further investigated the accident the next morning and that there was no stop sign and no construction horse at the northwest corner of the intersection to control or regulate the traffic. (T 92)

Gayle Rasmussen, State Highway Trooper, testified that he lives just north of the intersection of Second West and U-100 and that he also assisted in the investigation of the accident. That on the night of the accident the stop sign was down on the ground near a mound of dirt in the general area of where it had formerly been set to control the traffic. (T 104) He further testified that he saw no construction horses or other signs in place on the night of the accident. Gayle Rasmussen further testified that he passed the intersection frequently going to and from work and that the stop sign had been down for several days before the accident. (T 109) On cross examination, Gayle Rasmussen was asked "During the week did you see it down on the ground with your own eyes?" Trooper Rasmussen's answer, "Yes, I did." (T 110)

Everett Ashman, who lives in the home on the northwest corner of the intersection, stated "That the stop sign was down lying on the ditch bank for approximately a week during the latter part of October". (T 79) He further testified that he didn't recall seeing a construction horse or construction sign in the area; that on returning home at night after dark in his car he missed the bridge or culvert because the stop sign was not there to guide him and no other warning in its place. (T 79 82)

Maxim Thornton, employee of the Fillmore City Street Department, testified that both stop signs were in place on Second West and First North before the construction work began. (T 65) That the stop sign was removed and was

down most of the week before the accident. He further testified that he hauled trash past the intersection of Second West and U-100 the morning of Saturday, October 29, and that the stop sign was down on Saturday morning, which was the morning of the accident. (T 68) He further testified that there was not any sign or a construction horse on the northwest corner of the intersection of Second West and U-100 for three days past. It is important to note that Maxim Thornton testified that he hauled trash in a north-south direction along Second West, Saturday and had passed the intersection each day previous thereto and that he didn't observe any construction horses on the intersection corner on October 27, 28 or 29th, (T 75) and that the stop sign was down most of that week. (T 74)

Verl Justesen, who was not a party to the action, but who drove his vehicle south along Second West into the unprotected intersection, was not a witness in the case and any testimony or statements allegedly made by Verl Justesen is clearly hearsay and inadmissible. It is known, however, that Verl Justesen had resided in Delta, Utah and not Fillmore, for several years, but the fact remains that the construction company, by the admission of its own foreman, testified that the stop sign was removed by them each day. Then he propped the stop sign against a construction horse in the evening. (T 126) But the foreman for the defendant construction company testified that the sign was down a morning or two the week of the accident. (T 141) And the foreman further testified that he spent part of his time out on the Holden project (approximately 10 miles away), and that the crew moved the signs at Second West Street and First North Street each day for several days while Palfreyman, the foreman, was doing construction at Holden. (T 142)

Eugene Ashby testified that because of the location of the house of Everett Ashman on the northwest corner of the intersection, that one back more than 50 feet of the



cross walks west of the intersection would have impairment of vision to the north. Everett Ashman testified that his house on the northwest corner of the intersection was set back from the property line approximately 20 feet on the south and approximately 25 feet on the east. (T 77) This visual obstruction would render the visibility at the intersection for both traffic from the north and west impaired until they got quite close into the intersection and made the necessity for the stop sign to control the traffic at Second West Street and U-100 the more important and necessary, and with no stop sign or traffic control device in place to keep the traffic from the north to the south controlled because of the defendant's negligence in having moved the sign, the obvious and easily contemplated result occurred, a motorist, Verl Justesen, drove into the unguarded intersection and injured the plaintiff. Inasmuch as the Appellant's Brief contains little or no reference to the matter of contributing negligence or matter of damages which were awarded in the trial court, Respondent will not include such matters in Statement of Facts.

## ARGUMENT

### POINT I

#### THE ABSENCE OF THE STOP SIGN WAS THE CAUSE OF THE COLLISION.

With four witnesses, Trooper Gayle Rasmussen, who resides two blocks north of the First North Second West intersection and who passed the intersection daily on his way to and from work; Maxim Thornton, City Road Employee, who travelled the road daily; Everett Ashman, who resides on the northwest corner of the intersection and who passed the stop sign area night and morning every day; Merlin Hare, City Police Officer, who investigated the accident, each testifying that the stop sign controlling the traffic at Second West Street and First North was left

down by the defendant construction company while they were working daily in the area on curb, gutter and culvert replacement, (T 79, 88, 92, 104, 105, 109, 110) leaves no doubt that the Court was justified in finding that the defendant was negligent. And of course on appeal, the review must be in light most favorable to the plaintiff unless the evidence so viewed is so completely contrary to the testimony as to compel findings as a matter of law in favor of the defendant, the judgment is required to be affirmed.

The only testimony of the defendant and the only witness produced by the defendant, namely, the foreman of the construction job, Grant Palfreyman, testified that he was directing two construction jobs at the same time, one at Fillmore along U-100 and one at Holden, approximately 10 miles north ( T 142), and that while he, Grant Palfreyman, was working at the Holden job, his crew at Fillmore moved the signs at Second West Street and First North Street each day for several days. (T 142) That the same witness testified that he knew the stop sign was down a morning or two of the week of the accident. (T 141)

The negligence of the defendant company in not placing the stop sign or placing other control devices to protect the travelling motorists at this intersection was the proximate cause of the collision between Verl Justesen who drove through the unguarded intersection and into the vehicle of the plaintiff, who was rightfully and carefully travelling U-100. The plaintiff was entirely free of any negligent conduct and no contributory negligence is argued by appellant.

In case of *Edmunds v. Germer*, 12 Utah 2d 215 364 P. 2d 1015, this court held defendant negligent in not placing sufficient warning signs on an old highway after a new section of highway parallel to the old had been constructed and that the construction company was not relieved either under common law or contractual duty, from adequately warning the public by signs or barricades of any dangerous condition on the old highway. In that case, the plaintiff

Edmunds, drove north from Cedar City on U. S. 91, passed the south junction of the old and new highways, and, using the new road, traveled to a point near the north end of his property. After briefly inspecting his property on the east, he drove over the old highway by means of an access road to look at his property on the west side of the old road. Then Edmunds drove the automobile south on the old road for approximately one mile when he drove into a drainage cut. The accident occurred between 3 and 4 o'clock in the afternoon. The weather was clear and the visibility good. The road was level and unobstructed. How much more negligent was Whiting Haymond Construction Company in the instant case, when they left a main intersection of U-100 at Second West Street, unprotected by any sign, warning device or barricade?

The defendant in his Brief attempts to shift the blame to some boys who his witness testified had taken down some of the construction company signs, and a city officer compelled the boys to return them. The only person to testify regarding this matter was Grant Palfreyman, (T 127), who testified that the stop sign which was put up against the barricade or construction horse, was missing Monday morning. (T 127) He also testified that there had been no stop sign in place or against the barricade one or two other mornings of the week of the accident. (T 141) Yet, Mr. Rasmussen of the Highway Patrol, stated that the stop sign, the night of the accident, was laying on the ground near a mound of dirt where the construction work was going on. (T 104) That it had been down for several days. (T 105, 109, 110) And that he saw no construction horses or other barricade the night of the accident. Everett Ashman, residing on the northwest corner of the intersection stated that the stop sign was down, laying on a ditch bank and had been for approximately a week (T 79), and that he didn't see a construction horse or barricade. (T 80) That there was a construction sign put up later. (T 81) Officer Merlin Hare stated that he saw neither construc-

tion horses, nor sign the night of the accident, nor the next morning when he further investigated. (T 88) Maxim Thornton, City Road Employee, testified that the stop sign had been down most of the week before the accident, (T 67), and that on Saturday morning, the day of the accident, when he passed this intersection going in a north-south direction, there was not a construction horse. (T 71)

It is pointed out that Halloween is the night of October 31st, Monday, and the accident occurred October 29th, Saturday. If there was any molesting of any signs, it would, in all probability, be on Halloween, but at any rate the testimony of Pafreyman is overcome by the testimony of the other four witnesses who testified that the sign was actually on the ground and that there was no construction horse in place for it to be leaned against.

## POINT II

### DEFENDANT-NEGLIGENCE WAS PROXIMATE CAUSE

The defendant was negligent and there was no intervening act of a third person which became a superseding cause of the harm to the plaintiff preventing the actions of the defendant from being a contributing proximate cause of the accident and the accompanying injuries. This Court has spoken forcibly upon this matter in a case very similar in fact.

Nyman v. Cedar City 12 Utah 2d 45 361 P.2d 1114. In that case, on Center Street in Cedar City, which is a main-traveled, east-west street, hardsurfaced, 25 feet in width. The city, in connection with installing curb and gutter, had left a bank of dirt about two feet high and about four or five feet wide along the north edge of the surfacing in the 100 to 200 east block, and some blocks of concrete had been dug up and were left lying in the dirt. A culvert lay generally parallel to and in the row of dirt; about 40 feet from

the east end thereof the culvert protruded about a foot beyond the dirt into the surfaced portion of the highway; about fifteen feet west a block of concrete similarly projected about a foot or two beyond the south side of the dirt onto the highway, and about 20 feet further west still another did so. There were no barricades or warning signs or lights to warn traffic of the obstructions mentioned. About midnight on May 18, 1958, one Ivan Walton, Jr., driver of a Model T Ford automobile, with his wife and the plaintiff and her husband got in the car, men in front, ladies in the rear, and started for a cafe in Cedar Canyon east of town. Mr. Walton, while driving at a moderate speed, came upon the bank of dirt, and as the trial court found, the car struck the south edge of the windrow near its easterly end, skirted the edge of the windrow and the front wheel or axle struck the end of the culvert. The car continued onward along the edge of the windrow and struck the second concrete block with such force as to cause the three passengers to be thrown from the vehicle. Quoting from that case on page 48:

The trial judge, with commendable judicial zeal, prepared a memorandum decision in which he set forth a clear and complete determination of the facts as he viewed them, together with a lucid and accurate exposition of the principles of law applicable thereto. He made separate findings on each of the city's contentions: that the headlights and brakes of the ancient automobile were not up to standard; that it was not licensed for use upon the highways; and that the parties, including the driver, had been drinking. However, he found expressly that none of these factors proximately caused the accident; and that the plaintiff was not guilty of any negligence which contributed as a proximate cause thereto. He did find that Mr. Walton was negligent but held that it was only a concurring proximate cause of the accident, and that the "accident would not have happened but for the concurrent negligence of the defendant city." He also correctly ruled that the negligence of the host driver was not imput-

able to the plaintiff as guest passenger, and that notwithstanding his negligence she could recover from another tortfeasor whose negligence concurred to cause her injury. It has long been accepted in this jurisdiction that a city is required to exercise reasonable care to keep its streets in safe condition, and that it may be held liable for injuries proximately resulting from its failure to do so.

Quoting further from *Nyman v. Cedar City* on Page 50, the quote states:

But a different principle applies if the later actor (the driver Walton), even though acting negligently, did not become aware of the danger until too late to avoid striking the obstruction. After getting into such an emergency situation, his action in driving into the obstruction could be regarded as acting in combination with the prior negligence of the city as a concurring proximate cause of the accident. In that event his act would not be the sole proximate cause. It is reasoned that this is so because the condition of danger created by the city is such that it could reasonably be anticipated that travelers on the street, negligent or otherwise, may not observe the dangerous condition until too late to avoid it. Therefore, an accident of the character here under consideration might be expected to follow as a natural consequence of the dangerous condition previously created, and consequently may be deemed to be proximately caused by it. The evidence here is reasonably susceptible of the view that the driver was unable to see the obstruction until too late to avoid it. In fact, that is the import of the plaintiff's evidence and the theory upon which the trial court rendered its judgment. Accordingly, the finding must be sustained.

The only purpose for the State Road Commission or other legal agencies to provide and maintain stop signs, semaphores, warning signals or other traffic control devices, is to warn the traveling public and control their driving actions. It is absurd for the defendant to state



in his Brief on Page 9 thereof that "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." Justesen never even testified and there can be no supposition drawn from hearsay as to what he observed or what he did not observe at the intersection as he approached it from a northerly direction on the night of October 29th, or what knowledge he may have had or may not have had or remember or did not remember concerning construction work being conducted by the defendant in the area of Second West Street and U-100. The facts are certain that there was no stop sign, warning sign, barricade or other control device to protect or direct or control the motoring public. That a stop sign is put in place near the edge of the road approximately 20 feet back from the cross walks and would be more than 100 feet back from the center of the intersection to protect and control the flow of traffic into the intersection. Verl Justesen, or any other motorist, traveling south on Second West Street, had a stop sign been in place, would have observed the sign more than 200 feet before reaching the sign, could have and would have brought his vehicle to such speed and traveling conditions as would permit him to stop in the location of the stop sign, instead of traveling to an area passed where the stop sign was required to be before there was a showing of break marks or skid marks where it was too late for the driver to avoid colliding with the passing motorist, who had the right-of-way and who had the right to believe that there was a stop sign in place on Second West, and that the driver on Second West would obey the traffic control.

Counsel for the defendant has cited several cases in his Brief contending that they support the proposition that the actions of the defendant in this action were not negligent, proximately contributing to the accident. An examination of the facts of the cases cited clearly show that there is a fact situation entirely different from that of the

instant case, *Richard E. Ashby v. Whiting & Haymond*. The defendant, in citing such cases, points out an intervening act of a third person committed in such manner as to make it a superseding cause of harm to the third party and there are many cases where the intervening act can and does become a superseding cause, but a careful analysis of the law on causation and proximate cause will clearly reveal that in the instant case of *Richard E. Ashby v. Whiting & Haymond Construction Company*, with the continuing negligence of the defendant, antedating and concurring with the negligent act of the third party, *Verl Justesen*, made the actions of the defendant actor proximate cause and him a joint tortfeasor.

A statement of the law on negligence of intervening acts directly applicable to the fact situation in the instant case is contained in the *Restatement of the Law of Torts*, Vol. II Section 447 Page 1196. We quote the following:

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 response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

Comment on Clause (a) :

- a. The statement in Clause (a) applies where there is a realizable likelihood of such act but the likelihood is not enough in itself to make the actor's conduct negligent, the conduct being negligent because



of other and greater risks which it entails. If the realizable likelihood that a third person will act in the negligent manner in which a particular third person acts is so great as to be the risk or even one of the risks which make the actor's conduct unreasonably dangerous and therefore negligent, the case is governed by the rule stated in 449.

There was a realizable likelihood when the defendant left the stop sign down and the intersection with U-100 and Second West Street unguarded and uncontrolled by warning signs or barricade, that a third person will act in such manner as to negligently or otherwise drive into the unprotected and uncontrolled and unguarded intersection. The only purpose for having stop signs is to prevent such condition. Quoting now from Restatement of the Law of Torts, Vol. II, Section 449, Page 1202, the law is stated as follows:

If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.

**Comment:**

a. The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability, cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk, from which it was the purpose of the duty to protect him, resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.

To further establish that there was no intervening act in the instant case constituting a superseding cause of harm, the rule on intervening force as contained in the Re-

statement of the Law of Torts, Vol. II, Section 443, Page 1189 is quoted:

An intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor's negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about.

**Comment:**

a. The rule stated in this Section applies not only to acts done by the person who is harmed or by a third person as a normal response to the situation created by the defendant's negligence, but also to acts of animals reacting thereto in a manner normal to them. It is not necessary that an act which is done by the person harmed or by a third person should be "reasonable"; that is, that the act should be one which a reasonable man would regard as not involving an unreasonable risk to himself or others. It is enough that the act is a normal response to the stimulus of the situation created by the actor's negligence.

The act of the third person, in this case, Verl Justesen, though negligent, was only a concurring cause and the defendant actor's negligence was still actively operating and contributing as proximate cause to the harm of the plaintiff. The law on this matter is contained in the Restatement of the Law of Torts, Sections 439-440-441, Page 1184, part of which is hereby quoted:

Section 439. If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.

**Comment:**

a. Although in the great majority of cases to which the rule stated in this Section is applicable, the effects of the conduct of both the actor and the third

person are in simultaneous active operation, it is not necessary that their operations shall be absolutely simultaneous. It is enough that the two are in substantially simultaneous operation, as when the effect of the conduct of one or the other has ceased its active operation immediately before the other's conduct takes active effect in harm to the other.

b. If the harm is brought about by the substantially simultaneous and active operation of the effects of both the actor's negligent conduct and of an act of a third person which is wrongful towards the other who is harmed, the conduct of each is a cause of the harm, and both the actor and the third person are liable.

The act of Verl Justesen in the instant case was not an independent force not stimulated by a situation created by the actor's conduct and accordingly, cannot be regarded as individual and intervening. Quoting from Restatement of the Law of Torts, Vol. II, Section 441, Page 1187, Comment a, the law is stated as follows:

The active operation of an intervening force may or may not be a superseding cause which relieves the actor from liability for another's harm occurring thereafter. Whether it has this effect is determined by the rules stated in 442 to 453. A force due to an act of a third person which is wrongful towards the other who is harmed may be only a contributory factor in producing the harm. If so, both the actor and the third person are concurrently liable. This is so, although the actor's conduct has ceased to operate actively and has merely created a condition which is made harmful by the operation of the intervening force set in motion by the third person's negligent or otherwise wrongful conduct.

In the instant case, the Court had the opportunity of hearing the testimony, examining the facts and listening to the witnesses and could then determine from the circumstances the likelihood of the defendant's negligent con-

duct in bringing harm to the plaintiff by stimulating the act of the third party, Justesen. The Restatement of the Law of Torts, Vol. II, Section 433, Pages 1165 and 1166 is quoted as follows:

Considerations important in determining whether negligent conduct is a substantial factor in producing harm.

The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

- (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
- (b) whether after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm;
- (c) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible.

The comment on Clause (b) is important to the circumstances in the instant case. We quote from Page 1167, Volume II of the Restatement of the Law of Torts:

Viewing the accident after the event. A result of the actor's tortious conduct may be one which, either in its extent or the manner in which or the sequence of events through which the conduct operates to bring about the harm, is altogether different from the result which the actor at the time of his negligence recognized or should have recognized as likely to result therefrom. None the less, after the event, such a result may not appear to the court or jury to be so highly extraordinary as to prevent the actor's conduct from being a substantial factor in bringing it about. What the actor does or should expect depends upon the circumstances which he knows or should know and his forecast in the light of these circumstances as to

what is likely to happen. The court's judgment, as to whether the harm is a normal or highly extraordinary result, is made after the event with the full knowledge of all that has happened. This includes those surroundings of which at the time the actor knew nothing but which the course of events discloses to the court.

The trial court, in its findings, found under No. 4 that the employees and agents of the defendant should have reasonably foreseen that persons driving vehicles south on Second West Street and into the intersection of First North Street, would not stop or proceed with the usual caution engendered by a STOP sign in place for traffic control at such corner, and that the defendant was negligent in not replacing and maintaining such STOP sign or other appropriate traffic control device at this intersection after they had removed the STOP sign and knew that it was so removed. The defendant's such negligence proximately contributed to cause the collision, which in fact resulted, and consequently, the defendant's such negligence caused and contributed to the plaintiff's injuries and damages complained of in his complaint.

In the light of all of the testimony, the supporting cases and the substantive law, and with the requirement that on appeal the court is required to review the matter in the light most favorable to the plaintiff, there is nothing presented by the defendant's Brief to change the ruling of the trial court. In the *Haarstrich v. Oregon Short Line* case 70 Utah 552, 262 Pac. 100, (Utah 1927); the case of *Hillyard v. Utah By-Products Co.* 1 Utah 2d 143, 263 P. 2d 287 (Utah 1953); the case of *Toma v. Utah Power and Light Co.* 12 Utah 2d 278, 365 P. 2d 788, and *Velasquez v. Greyhound Lines*, 12 Utah 2d 379, 366 P. 2d 989, each of the fact situations are entirely different from the instant case. In the *Toma - Utah Power and Light* case, the Utah Power and Light Company merely continued to have power continuing through their lines and the



Mountain States Construction Company had knowledge that Utah Power and Light had refused to cut it off. There was no continuing negligence against Utah Power and Light as there is against Whiting Haymond Construction Company in the instant case. In the *Velasquez v. Greyhound Lines* case, it appears from the court decision and the facts that the driver of the semi-trailer was never negligent to the point of being proximate cause, but that the Greyhound Bus Company, as the Whiting Haymond Company, was guilty of negligence proximately contributing to the accident. In the *Haarstrich v. Oregon Short Line* case, the facts showed that it was doubtful that there was any negligence on the part of the railroad in the operation of their lights and if so, it had nothing to do with the accident. In the instant case the removal of the STOP sign by the defendant company was definitely negligent. It precipitated and stimulated the negligent act of the third party, Justesen, and the concurring negligence of both caused the injuries to the plaintiff.

The case at Bar is more nearly in line with the later Supreme Court Case, *Nyman v. Cedar City*, *Supra*.

As to the cases which the defendant quotes relating to past and future existence of a fact or condition, we have no quarrel whatsoever with the decision in those cases, but the fact situation of the instant case does not require the proof of a present condition or state of facts at a given time as being a presumption that the same condition or facts existed at a prior date. In the instant case, Trooper Gayle Rasmussen testified that the STOP sign had remained down for several days prior to the accident (T 105), and in answer to the defense counsel's cross examination: "During that week did you see it down on the ground with your own eyes", the answer was: "Yes, I did". City Employee, Maxim Thornton hauled trash passed the area where the STOP sign was supposed to be on the morning of the accident. He testified that there was not a STOP sign or a construction horse (T 71). He

passed the area in his work daily and stated that the STOP sign had been down most of the week before the accident. (T 67) Everett Ashman, property owner on the northwest corner of the intersection stated that the STOP sign was down laying on the ditch bank for approximately a week during the last week in October (T 79). The STOP sign was down on the ground the night of the accident, according to Trooper Rasmussen. (T 109, 110) We are not required to make any presumption when we have direct testimony that the STOP sign was down at the time of the accident and had remained down according to three different witnesses for several days prior thereto. Maxim Thornton specifically stating that on October 27, 28 and 29th the STOP sign was down. (T 75 ).

Under the abundance of evidence, there is no question but what defendant Whiting Haymond Construction Company was negligent. That the negligence proximately contributed to the accident and that they were a contributing tortfeasor with Verl Justesen, and the rule of negligence cited in American Jurisprudence, Vol. 38, Page 726, Sec. 69 is as follows:

The general rule is that whoever acts negligently is answerable for all the consequences that may ensue in the ordinary course of events, even though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer. An intervening cause does not operate to exempt a defendant from liability under a wrongful death statute, if that cause is put into operation by the defendant's wrongful act. One who is responsible for disorder in a crowd is liable for injuries suffered by a member of the crowd as a consequence of the disorderly acts.

As to contributing tortfeasors, the Restatement of the Law of Torts, Vol. 4, Page 875 provides that "Each of 2 or more persons whose tortious conduct is a legal cause of a harm to another, is liable to the other for the entire harm".

## CONCLUSION

The employees and agents of the defendant removed the STOP sign at Second West and U-100 while they were in the process of doing construction work. That they left it down for several days prior to the accident and the day of the accident. That it was laying in the general area on the ground and seen by several witnesses. The employees and agents of the defendant should have reasonably foreseen that persons driving vehicles south along Second West Street into the intersection of U-100 would not proceed with the caution engendered by a STOP sign in place on the northwest corner of the intersection for traffic control. That the absence of the STOP sign, leaving an unguarded intersection, it was natural and foreseeable that a collision would and could occur. The defendant's negligence proximately contributed to the cause of the collision and to the plaintiff's injuries. The judgment of the lower court should be affirmed. To reason otherwise would be to say that traffic control signals are unnecessary and useless and to remove them or obliterate them is a harmless act.

Respectfully Submitted,

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