

2003

Larry S. Henshaw v. Pine Mountain Mutual Water Association, Lynn Coon, Luann Coon, and Eric Coon : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LARRY S. HENSHAW,
Plaintiff and Appellant,
v.

PINE MOUNTAIN MUTUAL
WATER ASSOCIATION, LYNN
COON, LUANN COON, and ERIC
COON
Defendants and Appellees,

Case No. 20030990-CA

BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
HONORABLE RONALD E. NEHRING,
(ORAL ARGUMENT REQUESTED)

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STATUTES, RULES, AND TREATISES

U.C.A.78-2a-3(j), as amended 5

U.R.App.P. 34(a)30

JURISDICTIONAL STATEMENT

The Utah Supreme Court transferred this appeal to the Utah Court of Appeals which has jurisdiction under U.C.A. 78-2a-3(j), as amended.

ISSUES PRESENTED FOR REVIEW, STANDARD OF REVIEW, AND PRESERVATION FOR REVIEW

FIRST ISSUE. Whether Defendants and Appellees Lynn Coon and Luann Coon (“ATV Owners”) were entitled to summary judgment as a matter of law where they owned the subject all terrain vehicle in a defective and unsafe condition and failed to take reasonable steps to repair the defect or to keep the vehicle secured against use and where such failure was a substantial factor in causing the subject accident.

SECOND ISSUE: Whether Defendant and Appellee Lynn Coon (“Host”) was entitled to summary judgment as a matter of law when he obtained permission to use a family cabin and the ATV stored there with a broken headlight and failed to lock or disable the ATV to prevent its use by guests after dark, and where the Host’s conduct was a substantial factor in causing the subject accident.

THIRD ISSUE. Whether Defendant and Appellee Pine Mountain Mutual Water Association (“PMMWA”) was entitled to summary judgment as a matter of law where it failed to enforce PMMWA rules intended to protect

order, safety, and prevent the unsafe and unreasonable operation of ATVs by not providing security patrols or other security services during nighttime hours over the subject Memorial Day weekend, and where such failure was a substantial factor in causing the subject accident.

STANDARD OF REVIEW. In Wycalis v. Guardian Title of Utah, 780 P.2d 821, 116 Utah Adv. Rep. 27, 1989 Utah App. LEXIS 145 (Utah Ct. App. 1989) the standard of review for appeals of summary judgment was articulated as follows:

“Appellate courts scrutinize summary judgments under the same standard applied by the trial courts, according no particular deference to the trial court's legal conclusions concerning whether the material facts are in dispute and, if they are not, what legal result obtains. [citations omitted]. We consider the evidence in the light most favorable to the losing party, and affirm only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law.” (780 P.2d at 824).

PRESERVATION OF ISSUES FOR REVIEW. The first and second issues were preserved in the trial court by Plaintiff's October 30, 2000 memorandum opposing motions for summary including the evidence and other materials cited therein (R. at 429-491), and during oral argument on December 22, 2000. (R. at 1267, T. pp. 1-54).

The third issue was preserved in the trial court by Plaintiff's December 5, 2000 memorandum opposing motions for summary judgment including the

discovery materials and other evidence cited in or attached to the memorandum. (R. at 656-766), and during oral argument on December 22, 2000. (R. at 1267, T. pp. 1-54).

STATEMENT OF THE APPELLANT'S CASE

NATURE OF THE CASE: Mr. Henshaw ("Injured Person") was standing in the driveway of his residence in the early morning hours during the Memorial Day weekend 1999 when he was struck by an ATV. The ATV Operator was a social guest from a party at a nearby cabin. The ATV had a broken headlight which impaired the operator's ability to see objects in the road ahead. The injured person filed suit against the ATV Operator, the ATV Owners, the owners of the cabin where the ATV was stored and where the party was being held, the Host throwing the party, and PMMWA which promulgated and undertook to enforce rules and regulations for the homeowners' safety and quiet enjoyment of their property.

COURSE OF THE PROCEEDINGS. ATV Operator filed for and obtained a discharge in bankruptcy while this case was pending. The cabin where the party occurred was owned by Truth and Parley Coon. Parley Coon passed away and claims against Truth Coon as surviving cabin owner were settled and compromised. ATV Owners, Host, and PMMWA were dismissed on their motions summary judgment on the basis of no duty. No trial occurred.

DISPOSITION BELOW. Argument on the summary judgment motions went forward December 22, 2000. (R. at 1267, T. 1-54). The Trial Court's ruling and analysis on the motions are set forth in the Minute Entry dated February 14, 2001. (R. at 827, 834, Addendum 1). The Order granting PMMWA's motion for summary judgment was signed March 1, 2001. (R. at 855-57). The Order granting the motions for summary judgment of Lynn, Luann, and Eric Coon was signed March 5, 2001. (R. at 872-74). Following settlement of the claims against the remaining Defendant Truth Coon, Final Judgment was entered November 20, 2003 dismissing the action in its entirety and with prejudice. (R. at 1255-56). Notice of Appeal was filed November 24, 2003.(R. 1257-58).

FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW¹

The accident occurred within the Pine Mountain subdivision located about 8 miles east of .Oakley, Utah. (R. at 657; Depo. Henshaw², pp. 4, 10-11, R. at

¹ The facts are substantially set forth with citation to the supporting evidence in Plaintiff's October 30, 2000 Memorandum opposing the motions for summary judgment of Host and ATV Owners (R. at 429) and in Plaintiff's December 5, 2000 Memorandum opposing the motion for summary judgment of PMMWA. (R. at 656)

² Portions of various depositions are appended to the parties' memoranda. The following complete deposition transcripts are part of the record and contained on 3.5" floppy disks: Dallan T. Walters May 4, 2000; Eric Coon May 19, 2000; Lynn Coon, LuAnn Coon, and Truth Coon July 20, 2000; Jerry DeBry, Ron Probert November 9, 2000; Evan Baker September 19, 2000; Ronald Taylor, November 28, 2000; R. at Vol. 1).

769-71, 747; Depo. Walters, pp. 35-38, R. at 749-750). The injured person was standing in the driveway of his residence at Lot 603 near the edge of the road when he was struck by the ATV operated by Dallan Walters, age eighteen years, traveling at a speed of approximately 35 to 40 mph. (R. at 656-57, Depo. Henshaw, pp. 4, 18-21, R. at 769-71, 747, Depo. Walters, pp. 4, 39-42, R. at 1003, 1010) The injured person had been working on the plumbing in the basement of his home for about 30 minutes prior to the accident he heard and saw an ATV without lights going by fast. He went to bed but still heard the sound of an ATV driving back and forth so he went outside and stood in his driveway three to four feet off the edge of the road. The ATV approached and the injured person estimated the speed of the ATV to be 35 to 40 m.p.h. Just prior to impact, the injured person was reaching in his pocket for a lighter to attract the ATV Operator's attention when he was stuck by the ATV and thrown by the impact an estimated distance of 40 to 50 feet. (R. 439, Depo. Henshaw, pp. 10-21, R. at 770-71, 747). The speed limit for all wheeled vehicles in the Pine Mountains Subdivision set by PMMWA was 15 mph. (R. 463)

The lens on the ATV headlight lens was broken so that the headlight was not functional which made it difficult for the ATV Operator to see because of the darkness. (Depo. Walters, pp. 39-41, 45-46, R. at 1003, 1010-1011; Depo. Lynn Coon, pp. 10-11, R. at 727-28). The ATV Operator did not see the injured

person until the injured person was right in front of the ATV Operator. Mr. Walters would have applied the brakes had he seen Mr. Henshaw earlier. (Depo. Walters, pp. 45-46, R. at 1011). On the evening of the accident the Host knew the ATV headlight was not working. (Depo. Eric Coon, pp. 43-44, R. at 746). The ATV owners knew that the headlight on the ATV was broken and had been broken for three years before the accident. (Depo. Lynn Coon, pp. 10-11, R. at 727-28) The ATV was left at the cabin and the owners had simply not fixed the headlight. (Depo. Lynn Coon, p. 11, R. at 728)

The ATV Operator had been attending a party at a nearby cabin with the actual or implied permission of the Host who was one of his friends. (R. at 430, Depo. Walters, pp. 27-30, R. at 586; Depo. Eric Coon p. 18, R. at 981). The Host had requested and received permission to use the cabin from his grandmother Truth Coon who owned the cabin and also from his parents Defendants Lynn and Luanne Coon. (Depo. Eric Coon, pp. 7-9, R. at 980; Depo. Lynn Coon, pp. 33-34, R. at 731).

The ATV Operator had not been expressly invited, however the Host said nothing which made the ATV Operator believe he was not welcome to be there. (Depo. Walters, pp. 26-27, R. at 1006-07). The Host had been acquainted with the ATV Operator for years prior to the accident. (Depo. Eric Coon, p. 18, R. at 981). They had been on the same football team. (Depo. Walters, pp. 33-34, R. at

1008). Approximately 16 people attended the party, including the ATV Operator and others the Host did not invite directly. The Host did not object to the presence of any of the party attendees. (Depo. Eric Coon, pp. 26-28, R. at 722-23). The Host never asked any of the people at the party to leave. (Depo. Eric Coon, p. 50, R. at 987). The ATV was kept in the basement of the cabin, and was taken out by one of the guests and used by guests without objection from the Host. The ATV Operator and others at the party had the actual or implied permission of Defendant Eric Coon to use the ATV with the broken headlight. (Depo. Walters, pp. 31-33; R. at 587; Depo. Eric Coon, pp. 26-28, 45-46, 69, R. at 744-746). At no time that night did the Host tell the ATV Operator that he could not ride the subject ATV after dark. (Depo. Eric Coon, p. 69, R. at 991; Depo. Walters, pp. 33-34, R. at 1008). The ATV Operator rode the subject ATV once before the accident while it was still light out, and it appeared to him that "...everyone was using it..." and that whoever wanted to use the ATV could do so. The ATV Operator could hear the sound of the ATV being ridden for quite a while as he was inside the cabin from the time he arrived until after dark. (Depo. Walters, pp. 31-34, R. at 1008). The Host was aware that the ATV was not equipped with an on-off switch but no ignition key or other such locking device to restrict use the ATV. (Depo. Lynn Coon, p. 15-17, R. at 996; Depo. Eric Coon, pp.63-64, R. at 990).

The By-Laws of Pine Mountains Mutual Water Company (Depo. Baker, Exh. 2, R. at 705-07, 674-690) enumerate the following among the specific powers of the Board of Trustees in Article XI :

“...(h) establish ‘Rules of the Road’ for all development roads; (i) provide regulations for the common public health, welfare, and safety: Refer to Pine Mountains Rules Appendix ‘A’ attached. (j) Levy fines which, if not paid, will become a lien against the real property owned by the person fined, which shall be levied for the violations of the rules and regulations of Pine Mountains Mutual Water Company...” (R. at 682-683).

The Amended Pine Mountains Rules (Depo. Baker, Exh. 2, R. at 684-90) in effect at the time of the accident include the following provisions:

“OWNERS ARE RESPONSIBLE FOR COMPLIANCE WITH THE RULES. OWNERS ARE RESPONSIBLE FOR THEIR GUESTS AND EMPLOYEES. ARTICLE XI (J) OF OUR BYLAWS PROVIDES FOR THE BOARD OF TRUSTEES TO IMPOSE PENALTIES FOR VIOLATIONS OF THE RULES...”

2. PLEASE DRIVE SLOWLY AND SAFELY. A maximum speed of 15 mph applies to ALL wheeled vehicles on all Pine Mountains property unless otherwise posted...All rules of the rules must be obeyed. **DRIVE ON THE RIGHT...**

4. ALL RECREATIONAL MOTOR VEHICLES i.e. ATV’s motorcycles, snowmobiles, etc. will only be driven by a person of qualifying age of eight (8) years or older, properly trained, mentally and physically capable of handling the machine in a safe and proper manner to ensure their safety and the safety of others. The vehicle shall be properly maintained with all safety equipment working properly including lights, brakes and noise abatement mufflers with spark arresters...

6. ALL VEHICLES will display Pine Mountains decals...All motor bikes, ATV’s and snowmobiles will display the lot owners numbers for identification...

23. **QUIET TIME** is in effect between 10:00 pm and 8:00 am. Please observe and instruct your families and your employees to do the same... (emphasis original).” (Depo. Baker, Exh. 2, R. at 705-07, 684 –85, 688)

Ronald Taylor was a member of the Pine Mountain’s Board of Trustees in 1999. (Depo. Taylor, pp. 6-7, R. at 735). Security patrols instituted by the Board in approximately 1992 in response to complaints about people speeding on the Pine Mountains roads. (Depo. Taylor pp. 8-10, R. at 735-36). The board identified four high-use weekends including Memorial Day during which private security personnel would patrol during the daytime to avoid injuries to people in the subdivision from speeding vehicles.(Depo. Taylor, pp. 11-15, R. at 736-37). Mr. Taylor understood from conversations with a Deputy Summit County Sheriff that the County would act upon five or six different types of problems within the subdivision including murder, drunken and disorderly conduct, theft, medical emergencies. Mr. Taylor spoke to the board about the types of problems the Sheriff would act upon and this was published in the subdivision’s “Pine Mountaineer” newsletter three or four weeks after the accident. (Depo. Taylor, pp. 16-19, R. at 737-38).) ATV speeding and operation of ATVs without headlights were not problems the Sheriff would act upon. (Depo. Taylor, pp. 18-20, R. at 738).) ATV speeding was the main concern of the homeowner’s association. (Depo. Taylor, p. 19, R. at 738).

Evan Baker is and has been a member of the Pine Mountains' Board of Trustees since 1983. He has served at various times as vice president and president. (Depo. Baker, pp. 6-7, floppy disk transcript) The Board has the power to enforce the subdivision rules by fines. (Depo. Baker, pp. 12, R. at 1015). ATV use and traffic in the subdivision has changed during the past five years. With a younger group of ATV users at Pine Mountains have come more ATV incidents including accidents, people rolling over, people going through fences, as well as increased noise and dust. Mr. Baker has increased concerns about safety. (Depo. Baker, pp. 13-15, R. at 1015-16). One of the functions of the Board is to enforce compliance with subdivision rules concerning ATV's. (Depo. Baker, p. 24, R. at 1018). If late at night security provider Mr. DeBry or someone else on the board were notified that people were racing up and down subdivision roads on ATV's, that is something the Board would attempt to address as opposed to going to the Sheriff's Department or law enforcement. (Depo. Baker, p. 71, R. at 719).

Jerry DeBry provided security services for approximately eight years before the subject accident including traffic control on a part time basis during busy weekends when requested by the Pine Mountains' Homeowners' Association. (Depo. DeBry, pp. 7, 10-12, 15-16, R. at 708-710). He was compensated by Pine Mountains for this work. (Depo. DeBry, p. 14, R. 710).

Mr. Debry wore a forest green uniform on duty with patches identifying him as a Pine Mountain Security agent. (Depo. DeBry, pp. 9-10, R. at 709). Mr. DeBry was present at his cabin on the subject Memorial Day weekend beginning Friday at around 6:00 p.m., but had not been called by the Homeowners' Association to do security patrol work and did not patrol which surprised him since he had regularly been called about to patrol on holiday weekends. (Depo. DeBry, pp. 15-16, R. at 710). During the five years before the accident, Mr. Debry had been concerned about people exceeding the speed limit on ATV's after dark. (Depo. DeBry pp. 23-25, R. at 711-12, see also diskette transcript). Mr. DeBry was paid \$8.00 to \$9.00 per hour to provide security patrol services. (Depo. DeBry, p.13-14, R. at 710). The September 1, 1999 report to shareholders and its attached Statement of Receipts and Disbursements for the fiscal years ending July 31, 1998 and July 31, 1999 show total receipts for those years of \$141,194.00 and \$152,373.00 respectively and total disbursements of \$130,028.00 and \$175,157.00 respectively. The line item for security expenditures in 1998 was \$1,925.00 and for 1999 was \$1,392.00.(R. at 694-703, 697).

Mr. Debry observed the subject ATV being ridden around the subdivision prior to the subject accident with a broken headlight. He did not issue a citation

for the broken headlight because the vehicle was being ridden in the daylight hours. (Depo. DeBry, pp. 21-23, R. at 712).

Pine Mountains Subdivision property owners, including Plaintiff and Defendant Truth Coon, paid for security services from their dues as shown in Pine Mountain's budget. (Deposition of Truth Coon, pp. 10-12, R. 693, Depo. Exh. 4, R. at 694-703)

The 1997 Holiday Edition of the PMMWA newsletter contained an article describing how "road rage" had spread to Pine Mountains: "...People race up and down the canyon, throw open the gates and drive around the subdivision like mad, speeding and driving recklessly..." The article reminded homeowners: "REMEMBER MEMBERS ARE RESPONSIBLE FOR THE ACTIONS OF THEIR GUESTS AND EMPLOYEES. Please take this serious (sic) as action will be taken..." (Emphasis original). (Depo. Baker, pp. 41-45, R. at 1019-20; Depo. Ex. 10, Bates page 25-26, R. at 1598-99) Defendant Truth Coon received a copy of this particular newsletter. (Depo. Truth Coon, p. 14-16, R. at 1025).

SUMMARY OF ARGUMENTS

First, the Trial Court erroneously concluded that the ATV Owners owed no duty to the injured person applying Drysdale v. Rogers, 869 P.2d 1 (Utah App. 1994). There, the conclusion that the parents owed no duty toward a passenger in the son's vehicle negligently operated by their adult son. Here, the

duty of the ATV Owners arises from the defective condition of their ATV including both broken headlight and the absence of a locking ignition switch or other locking device. Evidence presented below showed that the ATV Owners were aware for a substantial time of the defective conditions of the ATV and who unreasonably failed to take steps to correct the conditions. Further, evidence below showed that nighttime use of the ATV was foreseeable where the Host had consulted the ATV owners about using the cabin where the ATV was stored. Evidence below showed the ATV Operator's ability to see objects ahead of him on the road was impaired by the lack of working headlight which was a substantial factor in causing the subject accident. Considering these factors, the appropriate approach to the existence of duty here is a flexible, fact-based approach considering the condition of the ATV and the foreseeability of injury, rather than a rigid approach focusing exclusively upon the nature of the relationship between injured party and defendant.

Second, the Trial Court erroneously concluded that the Host owed no duty to the injured person following Gilger v. Hernandez, 2000 Utah 23, 997 P.2d 305 (Utah 2000). There, the Utah Supreme Court declined to find a duty owed by a party host to control a belligerent guest or protect other guests from injury from the intentional acts of the belligerent guest. Here, the relationship between Host and ATV gives rise to the duty to lock or disable the ATV from use by

anyone, at least before darkness falls. During the weekend in question, the Host was the sole person authorized to use and control the cabin and ATV who was present. Locking or disabling the ATV would have been inexpensive and effective and would not require controlling guests. Applying PMMWA safety rules only homeowners deflates the force and effectiveness of the rules.

Third, the Trial Court concluded that PMMWA was not negligent as a matter of law for failing to perform security patrols after daylight during the subject Memorial Day Weekend. From the evidence below, reasonable jurors could have concluded that a security patrol on duty during the subject weekend would have observed the party and ATV racing during daylight hours and corrected it by a courteous warning. Such a jury could also find that the history of PMMWA's not providing patrols on busy weekends after dark was unreasonable, especially after the increased concern about ATV use on the part of Board members. The injured person had a contract based expectation as a homeowner of security services at least related to use of roads after dark on busy weekends when his peace and security were most likely to be offended.

ARGUMENT

POINT ONE: A duty of care is imposed upon the ATV Owners from the circumstances including the defective condition of the ATV.

White v Pinney, 99 Utah 484, 108 P.2d 249, 1940 Utah LEXIS 76 (Utah 1940) involved an injured caused by a wheel from a hand truck which flew off defendant's beer truck and injured the plaintiff. Plaintiff unsuccessfully attempted to establish an inference of negligence through the use of *res ipsa loquitur*. Of interest here is the following general statement of the obligations of owners to maintain vehicles in a safe condition:

“Defendants would not be liable for accident resulting from a defect in the mechanism of their truck and equipment of which they had no knowledge, and which would not be revealed by reasonable and prudent inspection. We quote from 3 Huddy: Cyclopedia of Automobile Law, 9th Ed., Section 71:

‘Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travelers.

‘To this end, the owner or operator of a motor vehicle must exercise reasonable care in the inspection of the machine, and is chargeable with notice of everything that such inspection would disclose. This rule applies whether the operator is the owner of the vehicle or rents it from another, or permits another to use it, or lets it to another for hire. But, in the absence of anything to show that the appliances were defective, the owner or driver is not required to inspect them before using the car or permitting it to be used.’” (99 Utah at 492-93)

The Trial Court reasoned away the broken headlight as the basis for duty by considering that it was unreasonable to expect a party guest would operate the ATV at night, that it was unreasonable to expect the ATV owners to repair the headlight in anticipation of the party, that an inoperable headlight is only a

defect if the ATV is operated at night, and that the PMWWA rules apply only to homeowners and not to the ATV Owners. (R. at 829).

The Trial Court's logical premise is that an ATV without a headlight is only defective when operated in the dark. It would follow that a vehicle without brakes is only defective when the operator wishes to stop or slow, a vehicle without brake lights is only defective when brought to a sudden stop with a vehicle close behind, a vehicle without windshield wiper blades is only defective during periods precipitation, and so forth. Whether the rules of PMMWA alone create a duty to remedy the broken headlight, the force of ordinary prudence and due care would require repair of the headlight months or years before the party in anticipation that someone would need or wish to use the ATV after dark. Short of repairing the headlight, a reasonable jury could conclude that the owners should have taken steps to lock or secure the ATV against use by anyone or directed the Host to do so. Without a keyed locking device, the ATV could have easily been secured by a lock or by removing the spark plug or other such steps. The injured person should be allowed his day in court to persuade a jury of reasonable minds that the broken headlight was a defect which contributed to the accident and that the ATV Owners were negligent in either failing to repair the headlight or take steps to ensure the vehicle was locked or disabled. These

measures do not involve liability for the conduct of the ATV Operator and are separate acts of negligence.

POINT TWO: A duty of care is imposed upon the Host to secure the ATV with no working headlight and prevent its after dark use by guests.

Drysdale v. Rogers, 869 P.2d 1 (Utah App. 1994), supra, articulates the elements required for establishing negligence:

“In order to recover under a negligence claim, a plaintiff must establish that ‘the defendant owed the plaintiff a duty, defendant breached the duty (negligence), the breach of the duty was the proximate cause of plaintiff’s injury, and there was in fact injury.’ (citation omitted) Thus, Drysdale must show that Mr. and Mrs. Rogers owed Strong a duty of care. (citation omitted) A duty of care arises when ‘the defendant is under any obligation for the benefit of a particular plaintiff.’ (citation omitted) Absent a showing of duty or obligation to Strong, Drysdale’s claim against Mr. and Mrs. Rogers cannot succeed. (citation omitted).” (id. at 3).

Cruz v Middlekauff Lincoln-Mercury, Inc., 909 P.2d 1252, 281 Utah Adv. Rep. 51, 1996 Utah LEXIS 4 (Utah 1996) took up by interlocutory appeal the denial of Defendant’s motion to dismiss for failure to state a claim upon which relief can be granted. The trial court’s denial of the motion was affirmed. The appeal involved the issue of whether a duty was owed by a car dealership to occupants of a vehicle who were injured in a collision with another vehicle stolen from the car dealership’s lot and driven by the thief who was fleeing from the police. The Plaintiffs alleged the dealership was negligent for leaving the

keys in the ignitions of the cars on the lot which facilitated theft. The Utah Supreme Court wrote:

“Many jurisdictions have held that under ‘special’ or ‘unusual’ circumstances, a duty may exist where a defendant should reasonably anticipate that its conduct will create an unreasonably enhanced danger to one in the position of the injured plaintiff. If such danger is foreseeable, then a duty arises to exercise reasonable care for the safety of others. [citations omitted] (duty to exercise reasonable care toward safety of others is essential to physical security and safety of all persons in civilized society). Each case must be considered on its own facts to determine whether they result in a foreseeable risk of harm to third persons in the class of plaintiffs and thus create a duty to refrain from subjecting them to such risk. [citations omitted]” (909 P.2d at 1255)

After reviewing the factors supporting foreseeability¹ of both the theft and the negligent operation of the vehicle by the thief, including fleeing the police, the Utah Supreme Court concluded that Defendant may have had owed duty to Plaintiffs to take adequate precautions to prevent theft of its cars. (909 P.2d at 1256-57).

Here as in Middlekauff the duty rests upon the foundation of need to prevent access to a motor vehicle. The anonymous car thief in Middlekauff could have been denied access by the dealer’s removing and securing the keys. The ATV Operator here, together with all other guests at the party, could have

¹ “A person's negligence is not superseded by the negligence of another if the subsequent negligence of another is foreseeable.” Williams v Melby, 699 P.2d 723, 729, 1985 Utah LEXIS 784 (Utah 1985).

been denied access to the ATV after dark by locking or disabling the ATV. In Middlekauf, the discussion assumed the vehicles on the lot were in proper working order. Here the ATV has a defective condition known to the Host making after dark operation of the ATV dangerous. A person operating the ATV would be at substantially greater risk for having an accident after dark than during daylight hours. Where guests at the party were helping themselves to the use of the ATV without objection from the Host, the Host's assuming that guests would terminate use of the vehicle at sunset on their own accord is unrealistic and risky.

POINT THREE: PMMWA owes to the injured homeowner a duty of care based in contract which encompasses providing security patrols on the subdivision roads and enforcing both speed limits and safety equipment rules.

In Martinez v. Woodmar IV Condominiums, 941 P.2d 218 (Ariz. 1997) the guest of a condominium unit owner attending a graduation party sued the condominium owners' association after being shot in the condominium complex parking lot. The plaintiff left the party to check his car in the parking lot and found a group of local ruffians sitting on the car. A discussion ensued, and plaintiff fled but was shot in the back while so doing. The perpetrators fled and were not identified or charged. From plaintiff's description, the condominium's live-in security officer recognized the group as a gang of young people from a

neighboring complex who would often gather in the parking lot to sell drugs and participate in other unsavory activities. The guard would usually disperse the group when he saw them, but because of budget constraints defendant employed only one guard who patrolled for eight hours a day in the evening and morning hours and the incident occurred about an hour before the guard came on duty. (id. at 219) On motion for summary judgment, the trial court dismissed finding no duty on the part of the association to prevent the attack. The trial court analyzed the issue of duty under the rubric of a landlord's duty to protect a licensee under Restatement (Second) Torts, sec. 315 (1965) which requires a "special relationship" between the defendant and either the plaintiff or the third person which imposes a duty to control. (id. at 219) The trial court found defendant had not assumed a duty to protect plaintiff. (id. at 220) The Arizona Court of Appeals affirmed. On further appeal, the Arizona Supreme Court *en banc* reversed, explaining that although the court of appeals correctly concluded that no special section 315 relationship existed this did not relieve the defendant from liability for breach of a duty it may have had as possessor of land with the right to control activities in the common area where the shooting occurred. (id. at 220) The supreme court focused on defendant's status with relation to the parking lot controlled by the association rather than on the presence or absence of a special relationship with the plaintiff or the tortfeasor. (id. at 220-221). The

supreme court relied in part on Restatement (Second) Property sections 17.3 and 344 which extend the duty of a condominium association to discover and afford protection from dangerous conditions or activities on land to not only to unit owners and their tenants, but also to those who are on the land with their consent. (id. at 220-222). The supreme court found a duty existed, clarifying that the question of duty was separate from the question of the breach, i.e. foreseeability of conduct and the reasonableness of precautions required to prevent injury. (id. at 223).

In Scott v. Watson, 359 A.2d 548 (Md. App. 1976) a tenant was shot and killed in an apartment complex garage. On receiving certification of questions of law from the United States District Court, the Maryland Court of Appeals held that the landlord owed a duty to use reasonable care to keep the premises safe and that the duty extended to injuries suffered by tenants as the result of criminal acts in common areas within the landlord's control. Discussing the landlord's undertaking to provide security by measures which included providing a private security guard, the court of appeals wrote: "We think it clear that even if no duty existed to employ the particular level of security measures provided by the defendants, improper performance of such a voluntary act could in particular circumstances constitute a breach of duty. (id. at 555).

In Sharp v. W.H. Moore, Inc., 796 P.2d 506 (Idaho 1990), a worker was raped in an office building and sued the building owner and the security contractor. The trial court granted a motion for summary judgment against the plaintiff which was reversed on appeal by the Idaho Supreme Court. The supreme court noted the Idaho rule concerning the duties of landlords adopted in Stephens v. Stearns, 678 P.2d 41 (Idaho 1984) which followed the modern trend to define the duty simply as reasonable care under the circumstances and to move away from the strict historical common law rules and exceptions predicated on the relationship between landlord and tenant. (796 P.2d at 509, 678 P.2d at 49-50). The supreme court rejected the notion that prior injuries were a necessary predicate to duty or foreseeability, observing that “[t]he solid and growing national trend has been toward the rejection of the ‘prior similar incidents’ rule. [citations omitted]” (id. at 510). The court also noted the circumstances of the case which were that the landlord had assumed a duty to provide security. “In addition to the clear rule of Stephens, other legal principles favor recognition of a requirement of due care in the circumstances present here. One is the familiar proposition that one who voluntarily assumes a duty also assumes the obligation of due care in performance of that duty. A landlord, having voluntarily provided a security system, is potentially liable if the security system fails as a result of the landlord’s negligence. [citations omitted]” (id. at

509). Rejecting the argument that the defendant's agreement to provide security was limited to protecting the building and its contents, the supreme court wrote: "Unfortunately, criminals do not tidily confine their crimes to property only. Even a shoplifting may turn violent. [citation omitted]... The question is one of foreseeability. It is therefore an issue for the jury or other trier of fact to decide. [citation omitted]" (id. at 511). The court observed that the terms of the agreement between the security contractor and the owner authorized the contractor to do all acts the owner could do to protect the premises, and accordingly the contractor was an agent of the owner and the owner was liable for the contractor's acts or omissions committed within the scope of the agency. (id. at 512).

In Turner v. Hi-Country Homeowners Ass'n, 910 P.2d 1223 (Utah 1996) the owner of a subdivision lot located outside a security gate maintained by the homeowner's association refused to pay the association's special assessment for repair of the gate, arguing he should not be charged for services from which he did not and could not benefit. The association was a non-profit Utah corporation and its by-laws provided that every owner of a lot within the subdivision shall be a member of the association and is entitled to vote on association matters. (id. at 1224). The association charged periodic assessments to provide certain services to owners, including the security gate. (id. at 1224). The Utah Supreme Court

observed the applicable rule of contract law: “It is well established precedent that the bylaws of a corporation, together with the articles of incorporation, the statute which it was incorporated, and the members application, constitute a contract between the members and the corporation. [citations omitted]” (id. at 1225); See also Workman v. Brighton Properties, Inc., 976 P.2d 1209 (Utah 1999).

In DCR, Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983), a clothing store owner sued a burglar alarm company which installed and maintained a burglar alarm system on plaintiff’s premises in negligence for inventory losses resulting in a burglary where the perpetrators used a common technique to defeat the alarm system about which the alarm company was aware. The contract between the alarm company and the storeowner contained a liquidated damages provision. The trial court entered summary judgment for the alarm company and the issue on appeal was whether, assuming negligence on the part of the alarm company, the liquidated damages provision governed liability in tort as well as in contract. The Utah Supreme Court reversed, observing that contractual relationships for the performance of services impose on the parties a general duty of due care toward the other apart from the specific obligations contained in the contract. The Court wrote: “A party who breaches his duty of due care toward another may be found liable to the other in tort, even where the

relationship giving rise to such a duty originates in a contract between the parties.” (id. at 435).

Turning to the matter at hand, security patrols of Pine Mountain roads on Memorial Day weekend and other busy are part of the package of services to homeowners provided by PMMWA and funded by the homeowners. For the years before the accident, the Board had a budget line item for such services and a contractor, Mr. Debry, who had provided such services. Mr. Debry was at Pine Mountains the weekend in question and did not perform security patrol work because he was not called upon to work that weekend. Security patrols were affordable. The Board members were aware before the accident of increased ATV use and speeding. The fact that nighttime security patrols had not been provided by PMMWA in the past does not preclude a reasonable juror from finding negligence from failure to provide such patrols during a busy weekend Memorial Day Weekend. A reasonable jury could determine that a history of not providing nighttime patrols on busy weekends is a history of negligence. A reasonable juror could find causation from circumstantial and direct evidence that PMMWA’s conduct of providing security patrol services during the day and into the night on the subject Memorial Day Weekend would likely have established an effective, visible presence likely to deter misconduct including headlight violations and speeding.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Appellant Larry S. Henshaw respectfully submits that Appellees were not entitled to summary judgment as a matter of law. Appellant requests that summary judgment be reversed and set aside as to each Appellee, and that the case should be remanded to the trial court for jury trial and such further proceedings as may be appropriate and consistent with the foregoing. Further, Henshaw hereby requests an award of costs on appeal in his favor under U.R.App.P. 34(a) which provides in relevant part:

“Except as otherwise provided by law, ...if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court...”

Dated this 28th day of April, 2004.

DUNN & DUNN, P.C.



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CERTIFICATE OF SERVICE

I certify that on this 28th day of April, 2004 true and correct copies of the foregoing were served by Hand Delivery upon the following:

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