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Le Roy Sweat and Virginia M. Sweat, Administritrix of the Estate Of Blaine Orvel Sweat, Deceased, v. Rex T. Fuhriman, Craig Fuhriman, James H. Maddox and Dan Allison : Brief of Respondents James H. Maddox and Dan Allison

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IN THE SUPREME COURT OF THE STATE OF UTAH

LE ROY SWEAT and VIRGINIA M. SWEAT, ADMINISTRATRIX OF THE ESTATE OF BLAINE ORVEL SWEAT, DECEASED,
Plaintiffs and Appellants,
vs.
REX T. FUHRIMAN, CRAIG FUHRIMAN, JAMES H. MADDOX and DAN ALLISON,
Defendants and Respondents.

Case No. 11,596

BRIEF OF RESPONDENTS JAMES H. MADDOX AND DAN ALLISON

Appeal from the District Court
of Wasatch County
Honorable Maurice Harding, District Judge

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Defendants and Respondents.

Case No. 11,596

BRIEF OF RESPONDENTS JAMES H. MADDOX AND DAN ALLISON

STATEMENT OF KIND OF CASE

This is an action for wrongful death.

DISPOSITION IN LOWER COURT

The lower court granted summary judgment in favor of all defendants, no cause of action, and denied plaintiffs' motion for summary judgment against defendants, Rex T. Fuhriman, Craig Fuhriman and Dan Allison.

RELIEF SOUGHT ON APPEAL

These defendants seek affirmance of the judgment of the lower court in their favor.

STATEMENT OF FACTS

On May 19, 1968, at approximately 2:00 a.m. 22 miles east of Heber on Highway 40 in Wasatch County, Blaine Orvel Sweat was struck by a westbound DeSoto automobile driven by Harold J. Sergent and killed (R. 124, attached accident reports).

Plaintiffs are the father, mother and administratrix of the estate of Blaine Orvel Sweat, deceased (R. 136, page 5). Plaintiffs were not witnesses to the accident (R. 136, page 10).

Defendant Rex. T. Fuhriman, the father of Craig Fuhriman, is the owner of the Chevrolet Impala automobile used by his son, Craig, at the time of the accident (R. 109, page 5). Rex T. Fuhriman did not witness the accident. Defendant James H. Maddox is the owner of a 1966 jeep. This jeep was loaned by him the day before the accident to his brother-in-law, Rickie Allison. Defendant James H. Maddox was in Price, Utah, at the time of the accident and did not witness it (R. 59).

Dan Allison, the other defendant, did not see the accident either. He is the father of Rickie Allison, deceased.

Where the accident happened, Highway 40, was generally straight and level in each direction (R. 124, page 25). The roadway was marked for one lane in each direction (R. 124, attached diagrams to depositions).

Defendant, James H. Maddox, used the Dan

Allison family automobile to go on the trip to Price. He loaned his jeep, a 1966 model, to his brother-in-law, Rickie Allison to use. Maddox granted Rickie permission to use the jeep to go from Rickie's home to Christensen Brothers farm. Rickie had a milking job each morning and evening and needed transportation to and from work (R. 53).

In spite of specific instructions from James Maddox to Rickie Allison not to use the jeep for any purpose except to go to and from milking at Christensen Brothers, the employer of Rickie Allison, Rickie took the jeep on Saturday night and used it to go to the Yearbook Dance at Wasatch High School. After 5:00 p.m. on May 18, 1968, Blaine Sweat, the deceased, used and rode in the jeep with Rickie Allison. After the dance, Blaine Sweat and Rickie Allison met Craig Fuhriman and his friend, Henry Lund, who were returning to Salt Lake City from a fishing trip at Flaming Gorge at a service station near the Y in Heber (R. 136, page 14).

Fuhriman and Lund, who were driving an Impala automobile westward on Highway 40, had run out of gas 22 miles east of Heber. Prior to running out of gas, they parked their automobile off the roadway facing left and left it without lights showing. They hitchhiked into Heber to obtain a container of gasoline (R. 136, pages 13, 14).

Fuhriman and Lund were not able to get a container for gasoline at the Y Conoco service sta-

tion in Heber, but aranged with Rickie Allison and Blaine Sweat to get a ride back to their stalled automobile (R. 136, page 15). They left the service station in Heber at about 1:30 a.m. and drove in a topless jeep. There was no conversation between Allison and Sweat, sitting in the front, and Fuhriman and Lund sitting in the rear of the open jeep. It was too cold and noisy to talk (R. 136, page 18).

They drove to the Strawberry station, woke up the operator and asked for gas and a container (R. 136, page 16). This station is located about a mile or mile and one-half east of where the Impala was stalled (R. 136, page 16). The operator of this service station told the boys he had no container and thereafter Fuhriman purchased $2 worth of gasoline and had it put in the tanks of the jeep (R. 136, pages 16, 17). The boys intended to siphon gas from one vehicle to the other (R. 136, page 17).

After getting the $2 worth of gas, Allison drove the jeep back to the Chevrolet Impala (R. 136, page 18). Rickie Allison drove back west past the stalled Impala, parked along the north edge of the roadway turned around and then parked the jeep facing east along the north edge of the roadway in the westbound lane (R. 136, pages 19, 20). He left the lights of the jeep on and activated the flasher lights (R. 136, pages 22, 23). The jeep was parked so that the cap to its gas tank matched the cap of the stalled Impala with a space of about 3 feet in between.

No one went to the east or west to flag or warn

traffic. The jeep blocked the westbound roadway and its lights shined down the straight road to the east (R. 136, page 26).

Rickie Allison took the siphon hose and endeavored to start to siphon gasoline from one tank to the other (R. 136, page 24). Almost immediately he got a mouth full of gasoline and had to quit. He moved to the rear of the stalled Impala operated by Fuhriman and was spitting out gasoline (R. 136, page 25). Blaine Sweat, without instructions from anyone, picked up the siphon hose and endeavored to start to siphon. While this was taking place, Craig Fuhriman and Henry Lund were standing along the edge of the jeep west of Sweat a few feet (R. 136, page 26). While Blaine Sweat was siphoning, Craig Fuhriman looked to the east and saw a vehicle approaching at a speed judged to be about 60 miles an hour about a block away (R. 136, page 62). He watched this vehicle for half a block and realized it was not going to stop and shouted a warning to the others and started to run (R. 136, page 62). Blaine Sweat was siphoning gas when the warning was shouted (R. 136, page 61). Fuhriman does not know exactly where Lund and Allison were when he started to run (R. 136, page 63). Craig Fuhriman took three or four steps west and then was struck and knocked down (R. 136, page 64). After this impact, he picked himself up and observed that the jeep was still standing on the roadway facing east with its lights on. He also observed that a car had struck

the rear of the unlighted Impala and pushed it off the roadway across the north barrow pit. After the impact Rickie Allison and Blaine Sweat were lying unconcious in the barrow pit northwest of where last seen (R. 136, page 66). Officer Gile's testimony shows that Rickie Allison was standing to the rear of the Impala when it was struck by a westbound DeSoto driven by Harold J. Sergent. Sergent, who was driving west, went off the road on his right to avoid the jeep and struck the rear of the Impala after hitting Rickie Lee Allison (R. 124, attached accident report).

POINT I
APPELLANTS' BRIEF DOES NOT SUPPORT AN APPEAL AGAINST MADDOX.

Appellants in their brief state no ground or point supporting a reversal of the judgment in favor of James Maddox. The general rule is that when the appellant fails to set forth a specification of error as against a party in a brief, a higher court may affirm the judgment without reference to the merits of the case.

In *Roth vs. Palutzke,* (1960) 350 P.2d 358, the plaintiff failed to set forth any specifications of error in his brief as required by the Supreme Court rule of the State of Montana.

Deemer vs. Reichart, (1965) 195 Kan. 232, 404 P.2d 174, holds the reviewing court was required to take as established fact that party was negligent in parking a truck on highway where appellant failed

to raise the issue in Statement of Points on Appeal as to existence of negligence.

In *Lepasiotes vs. Dinsdale,* (1952) 121 Utah 359, 242 P.2d 297, this court affirmed a judgment where the appellants failed to specifically assign error. This court said:

> "As to any prejudicial error claimed, none of the many rulings on admission of evidence was assigned specifically on appeal as constituting prejudicial error, so that any decision thereon would require discussion of all objections, — no one of which plaintiff has had an opportunity to meet in her brief because of such nondesignation. Therefore, we feel constrained not to review those matters which plaintiff cannot defend against because not called to attention by her opponents."

In *In Re Lavelle's Estate,* this court said, insofar as it is practical, an appellant who challenges the sufficiency of the evidence to sustain the court's finding of undue influence must detail, with citation to the record where appropriate, the particulars where in the evidence touching the finding is inconsistent therewith or is not enough moment to sustain it.

The purpose of a brief is to pinpoint how it is alleged the lower court erred. Since appellant's brief sets out no points or grounds as to alleged error in granting the judgment in favor of Maddox and against appellants, it is presumed the lower court did not err.

Unless this court is clairvoyant, it like Maddox and his attorneys is prejudiced by appellants' failure to assign specific error.

Matters not called to the attention of a party should not be raised on appeal.

POINT II
IF RICKIE ALLISON WAS NEGLIGENT, BLAINE ORVEL SWEAT WAS NEGLIGENT.

When Blaine Orvel Sweat was struck by Sergent's automobile, he was engaged in siphoning gas from the tank of the jeep to the tank of the Impala. No one directed him to do this. Blaine Sweat was a volunteer. All of the boys, including Blaine Orvel Sweat, knew the jeep was parked on the roadway with its lights shining east in the westbound lane of the roadway. The boys knew the jeep was parked on the wrong side of the road. None of the boys agreed to act as a lookout for the person siphoning gas. No one was keeping a lookout for oncoming traffic. No one put warning signs or signals up ahead. No one asked Blaine Orvel Sweat to do what he was doing at the time he was struck.

If it was negligence for Rickie Allison to park the jeep as he did, it follows since these facts were known by Sweat it was contributory negligence for Sweat to do what he was doing under the circumstances. Sweat is identified with whatever negligence occurred at the time and place of the accident. Sweat, as an occupant of the jeep, sitting in the front seat when it was stopped, knew exactly the

manner in which it was placed in the roadway. The stopping of the jeep, the leaving of the lights shining easterly, and the siphoning of gas were done with his acquiescence, consent and approval.

Maybee vs. Maybee, (1932) 79 Utah 585, 11 P.2d 973, is a case in point. This case arose before the passing of the Utah guest law. The defendant driver, Mrs. Maybee, the mother of the plaintiff, was very nearsighted and wore eyeglasses. The daughter, the plaintiff, knew her mother required eyeglasses for driving. The daughter knew before the accident occurred that her mother was driving without using her eyeglasses and knew that her mother relied on eyeglasses to see. This court in affirming a directed verdict in favor of the defendant and against the plaintiff in that case said:

> " * * * At the time of the accident plaintiff was eighteen years of age having become of that age April 23rd previously. Plaintiff testified that she had driven a car since she was sixteen, was familiar with the operation of the Dodge coupe and has alternated with the mother in driving the car on their trip East and the return. There is no evidence that plaintiff protested against her mother's driving without glasses or that she offered to do the driving after the glasses were broken. It is not disputed that every fact, circumstance, and condition relied on by the plaintiff as constituting negligence on the part of the defendant was fully known to an appreciated by plaintiff, and that, notwithstanding her knowledge of the defect in the eyesight of her mother and the fact that she was driving

without the aid of glasses, the plaintiff paid no attention to the conditions in the road, but was content to sit by and read a book while her mother was driving at a speed of forty to forty-five miles an hour. *If it was negligence for the defendant to drive at this speed with her vision impaired as it was, and without the aid of glasses, it would follow that, where all these facts are fully known to and appreciated by the plaintiff, and notwithstanding such facts and such knowledge she was willing to be driven in the car, she not only assumed the risk or hazard to her own safety, which resulted from such driving, but by her acquiescence, was guilty of independent negligence which contributed to the accident. The plaintiff identified herself with whatever negligence there was on the part of the mother because of her knowledge of all such facts and her approval, consent, and acquiescence in the driving of the car by her mother.*" (Emphasis added).

Esernia vs. Overland Moving Co., (1949) 115 Utah 519, 206 P.2d 621, is another case involving acquiescence of conduct. In this case, the plaintiff hitched a ride with defendant's driver near the outskirts of Elko, Nevada, to go to Salt Lake City, Utah. At the time the plaintiff entered the truck he was told by the defendant driver that he was tired, weary and sleepy and the driver said he had driven straight through from San Francisco, California. Shortly thereafter, the driver of the defendant's vehicle went off the pavement and onto the shoulder of the road, having dozed at the wheel. After this

incident the driver and the plaintiff continued on, the driver merely requesting the plaintiff and another Marine, also picked up, to talk to him so he would remain awake. Again the driver dozed and went off the road and this time the van was upset and the plaintiff was injured. In this case there was no dispute that the driver dozed and that the plaintiff knew he was weary and tired. It was undisputed that the plaintiff had an opportunity to leave the truck but still he elected to remain.

In the above case the Supreme Court affirmed a judgment for the defendant, saying:

> "The evidence was uncontroverted that appellant knew that the driver was sleepy at the time he accepted the ride and also when the truck ran off the road the first time. Thereafter he had an opportunity to leave the truck when it stopped at Wendover or Delle, or he could have left the truck at any other of the towns between Elko and the point of the accident, of the existence of which this court can take judicial notice, but he did not leave. The Restatement of the Law of Torts, vol. 2, Sec. 466, states that a plaintiff's contributory negligence may be '(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence of which danger the plaintiff knows or has reason to know, * * * ' and that ' * * * (c) * * * a common form of the type of contributory negligence dealt with in clause (a) consists of the plaintiff's entrusting his safety to a third person whom he knows to be incompetent, customarily negligent or ill-equipped * * * '"

In *Landru vs. Stensrud,* (1945) 219 Minn. 227, 17 N.W. 2d 322, an action was brought by an automobile guest for personal injuries suffered when the automobile which had been driven by the defendant on the ice of the lake in a fishing excursion broke through the ice. In this case the court affirmed a judgment for the defendants saying that the risk of injury from the known general hazards of the undertaking such as driving on ice constituted contributory negligence in the assumption of this risk or was not evidence of driver's negligence in respect to the condition of the ice and, therefore, was insufficient to go to the jury.

In *Burns vs. Fisher* (1957) 132 Mont. 26, 313 P.2d 1044, plaintiff-decedent remained in a truck stalled on a highway and failed to put out flares in violation of statute. In this case the court ruled plaintiff could not recover because the decedent was contributorily negligent.

Section 466 Restatement of the Law Second, Torts 2d, provides:

> "§ 466. Types of Contributory Negligence
> The plaintiff's contributory negligence may be either
>
> (a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or
>
> (b) conduct which, in respects other than those stated in Clause (a), falls short

> of the standard to which the reasonable man should conform in order to protect himself from harm."

The law required Blaine Sweat to act as a reasonably prudent person under the circumstances.

If it was negligence for Rickie Allison to do what he did, Blaine Orvel Sweat was equally guilty of contributory negligence proximately causing his injuries and death.

Appellant's statement that Blaine Sweat never agreed at any time to the conduct of Fuhriman or Allison is without support. As a matter of fact, the record shows he volunteered to siphon the gas and acquiesced Allison's conduct.

CONCLUSION

The summary judgment in favor of James H. Maddox should be affirmed because:

1. Appellants have not specified any error in granting judgment in favor of him.

2. There is no evidence that James H. Maddox was negligent in loaning the jeep to Rickie Allison.

The summary judgment in favor of James H. Maddox and Dan Allison should be affirmed because if it was negligent for Rickie Allison to do what he did, it was, under the same circumustances,

contributory negligence for Blaine Orvel Sweat to act as he did at the time and place of the accident.

Respectfully submitted,

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MAILING NOTICE

I hereby certify by United States Mail, postage prepaid, I mailed two copies of the foregoing brief to J. Harold Call, Attorney at Law, 23 Center Street, Heber City, Utah; F. Robert Bayle, Attorney at Law, Continental Bank Building, Salt Lake City, Utah; and John L. Chidester, 51 West Center Street, Heber City, Utah, this ..... day of September, 1969.

Raymond M. Berry