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Betty anderson, and David Patrick Alumbaugh Aka David Patrick anderson, His Guardian Ad Litem v. Parson Red-E'-Mix Paving Company, Inc., A Utah Corporation, and Max E. Green, Et Al. : Respondents' Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

BETTY ANDERSON, and DAVID PATRICK ALUMBAUGH aka DAVID PATRICK ANDERSON, his Guardian Ad Litem,

Plaintiffs and Appellants,

vs.

PARSON RED-E-MIX PAVING COMPANY, INC., a Utah corporation, and MAX E. GREEN, et al.,

Defendants and Respondents.

Case No. 11,746

RESPONDENTS' BRIEF

Appeal from the District Court
of Box Elder County, Utah
Honorable Maurice Harding, *District Judge*

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OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF KIND OF CASE

This is an action for personal injuries arising out of an automobile-truck accident.

DISPOSITION IN LOWER COURT

After hearing plaintiffs' case for two days and allowing plaintiffs to make an additional proffer as to additional proof they wished to offer, the lower court directed a judgment in favor of the defendants and respondents, no cause of action.

RELIEF SOUGHT ON APPEAL

Defendants and respondents seek affirmance of the judgment of the lower court.

STATEMENT OF FACTS

The appellants' Statement of Facts is incomplete and argumentative.

This accident happened shortly after 4:00 p.m. on a bright clear day. Immediately prior to the accident Max E. Green had delivered a load of concrete to a Phillips 66 Station located on the northwest corner of the intersection of Fourth North and Main Street in Brigham City, Utah. After completing the delivery he pulled the Red-E-Mix concrete truck out of the station and drove it to a position approximately 150 feet west of the west curb of Main Street and parked it at the north edge of Fourth North Street (R. 101). While Max Green, the truck driver, was standing on the platform washing out the mixer drum he heard the squealing of tires (R. 55). Mr. Green looked up and saw the Kim Mortensen vehicle sliding sideways about 50 feet away (R. 55).

Defendants' Exhibit No. 8 shows the defendants' truck and the platform on which Max Green was standing at the time of the accident.

The record does not show that Fourth North Street narrows at the point of the accident. The evidence only shows that there was an asphalt apron extending from the Phillips 66 Station to the edge of the asphalt on the roadway immediately south of the station and that thereafter to the west there was gravel and no apron. The area of the accident is clearly shown in defendants' Exhibits Nos. 5, 6 and 7 received without objection.

The statement on page 4 of Appellants' Brief that there was a false impression created by the narrowing of the roadway is argumentative as shown by the aforementioned exhibits.

Kim Mortenson, the driver of the motor vehicle in which the plaintiff was riding was 15 years old on April 22, 1966 (R. 226). He stole the vehicle to get possession of it (R. 227). He had had no driver training instruction and no driver license (R. 231). When he started to make the turn he accelerated rapidly (R. 232). He lost control during the turn and went into slides and fishtails (R. 232, 233). First he slid the rear of the car to the north, then overcorrected to the south, then went back to the north. When he was out of control he did not apply his brakes (R. 233). When he was sliding out of control at a speed of between 20 and 30 miles an hour he saw the truck 30 feet away (R. 234). He never saw any east bound traffic on Fourth North (R. 234). He never saw the chute on the rear of the truck (R. 235). Kim Mortenson admitted that his automobile slid sideways a little bit before it hit the truck (R. 235).

Defendants' Exhibit No. 9 shows the area of impact on the vehicle in which plaintiff was riding.

Mr. Daines, trial counsel for the plaintiffs, stipulated that from 150 feet west of the west curb of Main Street, Fourth North was zoned commercial and that the remainder of the block west was zoned residential R-3 (R. 243).

ARGUMENT

POINT I.
MAX GREEN WAS NOT NEGLIGENT.

At the trial appellants claimed Max Green was negligent in two respects: First, they claimed he violatede §41-6-101 Utah Code Annotated 1953 in parking a vehicle on a roadway. Second, they claimed he violated a Brigham City ordinance and a state statute, §41-6-128 Utah Code Annotated 1953, requiring anyone with a load extending from a vehicle more than 4 feet to have a warning flag.

Max Green did not violate §41-6-101 Utah Code Annotated 1953. This statute (quoted in Appellants' Brief on page 6) begins:

> "Upon any highway *outside of a business or residence district* no person shall stop, park, or leave * * *" (Emphasis added)

The record, including the exhibits, shows there was a gas station just a few feet east of the accident on the north side of Fourth North and that there was a construction company office immediately north of the point of impact.

This accident happened in Brigham City. It occurred in a residential or commercial zone as shown by Mr. Daines' stipulation. A Philips 66 Service Station and Whitaker Construction Company operated businesses on Fourth North. When counsel for the appellants refers to a vacant graveled lot used to park equipment on page 7 of his brief, he is admitting a

business use of property. It is an established fact that the property adjacent to the accident was being used to operate businesses. All reasonable persons consider service stations and construction companies as businesses.

In suggesting, as appellants' counsel does on page 7 in his brief, that Max Green was negligent in violating §41-6-101 Utah Code Annotated 1953, because he could have driven back to Parson's yard in ten minutes, he is talking about immaterial facts. How long it would have taken Max Green to drive back to Parson's yard is not competent evidence to show he violated §41-6-101 Utah Code Annotated 1953. In substance, appellants' counsel is arguing that Max Green was negligent because he did not stay home. This is another form of the argument that you were negligent because you drove on State Street instead of Main Street.

In deciding *Hillyard vs. Utah By-Products Co.*, (1953) 1 Utah 2d 143, 263 P.2d 287, this court did not mention §41-6-101 Utah Code Annotated 1953. Section 21-4-13 of the Revised Ordinances of Salt Lake County, Utah, provides:

> "Sec. 21-4-13. Parking Not to Obstruct Traffic. No person shall park any vehicle upon a street in such a manner or under such conditions as to leave available less than ten feet of the width of the roadway for free movement of vehicular traffic."

In the *Hillyard* case, 27th South Street at 480

East had a surface of 24 feet and a 12 foot lane for traffic was provided in each direction. Utah By-Products' driver parked a truck so that its rear end extended out onto the paved portion 5 feet. Vaughn Aston, the driver of the vehicle in which plaintiff's son was riding, could not see the protruding truck because of the vehicle ahead of him and crashed into the protruding vehicle occupying 5 feet of his lane.

Under the Salt Lake County ordinance there is a duty not to park a vehicle upon any street in the county in such a manner as to leave available less than 10 feet of the roadway for free movement of traffic. Under §41-6-101 Utah Code Annotated you are not forbidden to stop, park or leave a vehicle on a highway within a business or residential district.

In residential and business districts it is the custom and practice to park on the pavement at the side of the roadway. In these areas streets are often paved from curb to curb. A vehicle parked at the edge of the pavement in a business or residential area is one of those conditions all reasonable men are expected to anticipate. On the other hand, vehicles parked on the pavement outside of business or residential areas are not anticipated by reasonable men as it is not the customary practice to park on the pavement outside of business or residential areas.

With respect to appellant's contentions that Max Green violated §136 of the Brigham City ordinance and §41-6-128 Utah Code Annotated 1953, ap-

pellants' evidence failed to show a violation of either.

Section 136 states no person shall drive any vehicle with a load or object upon such vehicle extending 4 feet or more beyond the bed or body of said vehicle during the daytime without having a red flag attached. The evidence in this case shows Max Green was not driving a cement truck but in fact was standing on it while it was parked at the edge of the roadway washing out the mixing drum. Section 136 of the Brigham City ordinance does not require a warning flag on a load or object protruding 4 feet or more from a parked vehicle.

Section 41-6-128 requires whenever the load upon a vehicle extends to the rear 4 feet or more, a red flag or cloth not less than 12 inches square be hung so that the entire area is visible to the driver of a vehicle approaching from the rear.

Kim Mortenson ran into a large red and white ready-mix truck. He did not collide with a load on the truck. As the evidence shows the vehicle in which the plaintiff was riding collided with the rear of the cement truck and its chute and not with a load, this section is inapplicable by its very language.

POINT II.

THE NEGLIGENCE OF KIM MORTENSON WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT.

The appellants argue the lower court should not have held as a matter of law the sole proxiimate cause of the appellant's injuries was the negligence

of Kim Mortenson, the 15 year old driver of the vehicle in which David Anderson was riding. Accordingly, for the purpose of discussion, let us assume that Max Green was negligent in parking the truck so that the right rear duals encroached on the pavement and in failing to display a red warning flag and consider whether or not his negligence in either respect was a proximate cause of the accident of which plaintiffs complain.

In *Hillyard vs. Utah By-Products*, supra, this court set out guide lines to use in determining what the proximate cause of an accident was. In *Hillyard* the court said:

> "In applying the test of foreseeability to situations where a negligently created pre-existing condition combines with a later act of negligence causing an injury, the courts have drawn a clear-cut distinction between two classes of cases. The first situation is where one has negligently created a dangerous condition (such as parking the truck) and a later actor observed, or circumstances are such that he could not fail to observe, but negligently failed to avoid it. The second situation involves conduct of a later intervening actor who negligently failed to observe the dangerous condition until it is too late to avoid it. In regard to the first situation it is held as a matter of law that the later intervening act does interrupt the natural sequence of events and cut off the legal effect of the negligence of the initial actor. This is based upon the reasoning that it is not reasonably to be foreseen nor expected

> that one who actually becomes cognizant of a dangerous condition in ample time to avert injury will fail to do so."

The *Hillyard* case involved a fact situation which fitted into the second category above where the negligent second actor failed to observe the condition until it was too late to avoid a collision.

On the other hand, in the present case there is no allegation and the facts show that the cement truck was not hidden and that Kim Mortenson could clearly have seen it before he turned from Main Street onto Fourth North to go west. This case fits in the first category of cases mentioned in *Hillyard* and the negligence of Kim Mortenson was an intervening act which interrupted the natural sequence of events and cut off the legal effect of the negligence, if any, if Max Green.

In *McMurdie vs. Underwood,* (1959) 9 Utah 2d 400, 346 P.2d 711, this court said:

> "It does not seem unreasonable to conclude that one who approaches a dangerous condition, created by the negligence of another, and either sees it or circumstances are such that one must see it in time to avoid danger, and fails to do so, becomes the sole proximate cause of any damage or injury caused thereby."

Velasquez vs. Greyhound Lines, Inc., (1961) 12 Utah 2d 379, 366 P.2d 989, from a factual standpoint, is the closest case in point. In this case a colli-

sion occurred on Interstate 80 in southwestern Wyoming. The hard surface of the westbound lanes included two 12 foot traffic lanes, a 4 foot shoulder on the inside (south) and a 10 foot emergency pull out strip on the outside (north). James Buckley, traveling west, pulled his car off the highway in the emergency strip on the north side because of tire trouble and sought help from passing motorists. An Interstate Motor Lines truck stopped beside Buckley, partially in the 10 foot emergency lane but with its back end protruding approximately 7 feet into the outside westbound lane. The truck driver left clearance lights on and the driver of the Greyhound Lines bus observed the truck three-fourths of a mile away and realized it and the Buckley vehicle were stopped. The bus driver intended to stop behind the truck to render assistance even though there was plenty of room for him to have passed in the inside westbound lane. Thereafter, momentarily the bus driver lost consciousness, either blacking out or falling asleep, and did not wake up until a woman passenger shouted a warning, "Don't hit it." The bus driver swerved to his left but could not avoid a collision. Velasquez, the plaintiff, was a passenger in the Greyhound hus and the action was brought against Interstate Motor Lines, its driver and Greyhound Lines, Inc. and its driver. The lower court held that as a matter of law the negligence of the bus driver was the sole proximate cause of the collision.

In the *Velasquez* case in affirming a judgment

n.o.v. in favor of the trucking company, the court said:

> "We quite agree with the proposition that where one has negligently created a condition of danger he is not relieved of responsibility for damage it causes to another merely because the injury also involved the later misconduct of someone else. But this is true only if both negligent acts are in fact concurring proximate causes of the injury; and it is not true if the later negligence is an independent, intervening sole proximate cause of the incident."
>
> "In *Hillyard vs. Utah By-Products Co.*, we had occasion to consider the problem of proximate cause in another case where defendant's truck had been parked protruding onto the highway and was run into by a car in which the person injured was a guest passenger. It was held that under the particular fact situation the prior negligent parking of the defendant's truck could reasonably be found to be a concurring proximate cause of the collision. The deceased was a guest in a car being negligently driven; the driver veered to his left in attempting to pass a car ahead; saw a car coming from the other direction; then moved back into his own lane just as the car ahead swerved to its left to miss the parked truck, thus leaving the driver suddenly confronting the parked truck when it was too late to avoid it. We held that in this emergency situation the prior negligent parking of the truck setting up the hazard could reasonably be found to be a concurring proximate cause with the negligence of the driver in producing the in-

jury. *But we also pointed out that even where there is a negligently created hazard (Interstate parking the truck) and a later actor (Greyhound) observed, or circumstances were such that he could not fail to observe, the condition, but he nevertheless negligently failed to avoid it, the latter negligence would be an independent, intervening cause and therefore the sole proximate cause of the accident.*

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

"Applying the foregoing test to our situation: we think it is not reasonably to be foreseen that an oncoming driver (Greyhound) would see (or fail to see) this large, well-lighted truck so parked up on the highway, and with at least one and one-half useable traffic lanes to his left, nevertheless run into it. The trial court was correct in so concluding and entering a judgment in favor of Interstate Motor Lines as a matter of law on the ground that the negligence of Greyhound was the sole

proximate cause of the collision." (Emphasis added)

This case is similar to the *Velasquez* case. If, for the sake of discussion we assume Max Green was negligent in parking the cement truck with the left rear duals partially on the roadway, nevertheless the trial court was justified in finding that the negligence of Kim Mortenson was the sole proximate cause of the collision. The truck, a large red and white ready-mix truck, was parked at least 150 feet west of the west curb of Main Street on Fourth North, a straight and level road. The accident occurred about 4:15 p.m. in broad daylight. Fourth North Street was paved approximately 27 feet wide. There was no oncoming traffic and even if 2 feet of the truck were on the pavement, there was 25 feet of useable roadway to the left of the ready-mix truck. In the ordinary course of events it is not reasonable to believe that an oncoming driver would fail to see this large red and white ready-mix truck until he was within 30 feet of it and that if the truck driver had had a red flag tied onto the chute, a collision could have been avoided. It is not reasonable to assume that Green should have foreseen that a 15 year old driver would come around the turn at high speed, out of control and fishtailing and that he would slide sideways into the rear of the truck.

Kim Mortenson's negligent conduct constituted an independent, intervening cause and was, therefore, the sole proximate cause of the accident and in-

juries resulting even if you assume negligence on the part of Max Green.

CONCLUSION

The judgment of the lower court should be affirmed because:

1. The evidence adduced by the plaintiffs, including the additional proffered evidence, failed to show as a matter of law Max Green was negligent.

2. The evidence showed as a matter of law the sole proximate cause of the accident in question and resulting injuries was the negligence of Kim Mortenson.

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 Dale M. Dorius, Attorney at Law, 29 South Main Street, Brigham City, Utah 84302 this ..... day of January, 1970.
