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Mavis E. Batt and Gary Alan Batt, Douglas Laverne Batt, Ronald Aaron Batt, and Danie James Batt, Minors by their Guardian Ad Litem Brooke Wells v. The State of Utah and Jack B. Parson Construction Company : Reply Brief of Respondent The State of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

MAVIS E. BATT and GARY ALAN BATT, DOUGLAS LAVERNE BATT, RONALD AARON BATT and DANIE JAMES BATT, minors, by their Guardian ad Litem BROOKE WELLS,

Plaintiffs-Appellants,

vs.

THE STATE OF UTAH and JACK B. PARSON CONSTRUCTION COMPANY, a corporation,

Defendants-Respondents.

Case No. 12639

REPLY BRIEF OF RESPONDENT, THE STATE OF UTAH

Appeal from the Third District Court of Salt Lake County
HONORABLE JAMES S. SAWAYA, JUDGE

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The following is submitted in response to Appellants' Supplemental Brief of additional authorities and argument.

POINT IV

THE TRIAL COURT DID NOT ERR IN THE MANNER IN WHICH THE ISSUE OF CONTRIBUTORY NEGLIGENCE WAS SUBMITTED TO THE JURY.

The matter of contributory negligence was submitted to the jury in special interrogatory No. 5. However, because the jury had fully disposed of the case in its answers to the first four interrogatories, the answer to interrogatory No. 5 became moot. The questions and the jury's answers were as follows:

"1. Was the defendant the State of Utah guilty of negligence? Answer: Yes.

"2. If you answered question No. 1 yes, then answer this question: Did the negligence of defendant State of Utah, proximately cause the accident? Answer: No.

"3. Was the defendant Jack B. Parson Construction Company guilty of negligence? Answer: No.

"4. If you answered question No. 3 yes, then answer this question: Did the negligence of defendant Jack B. Parson Construction Company proximately cause the accident? Answer: .....".

The jury at this point had disposed of the case because the negligence of the State was not found to be the proximate cause of the accident and Parson Construction Company was not found negligent. Nevertheless, the jury answered Interrogatory No. 5, as follows:

"5. If you answered "yes" to the foregoing questions 1 *and* 2 or 3 *and* 4, then answer the following questions:

(a) Was David Batt the driver of the Batt vehicle at the time of the accident? Answer: Yes.

(b) Was Charles Batt the driver of the Batt vehicle at the time of the accident? Answer: No.

(c) Was the driver of the Batt vehicle guilty of negligence? Answer: Yes.

(d) Did the negligence of the driver of the Batt vehicle proximately contribute to the accident? Answer: Yes." (Emphasis added).

The jury need not have answered the questions in Interrogatory No. 5, but in answering all doubt was removed concerning causation.

Furthermore, the appellants failed to preserve the issue surrounding contributory negligence concerning which their assignment of error is now claimed.

Plaintiffs' requested instruction No. 20 read as follows:

> "You are instructed that with respect to your consideration of the issue of contributory negligence, that if you find that the son David Batt was driving the Batt vehicle, and that he was contributorily negligent proximately resulting in the collision, that his contributory negligence would be a bar to any recovery by the plaintiffs. You are further instructed that if you find the father Charles Batt was driving the Batt vehicle and was contributorily negligent proximately causing the collision, his contributory negligence would bar any recovery by the plaintiffs for his death, but would not bar a recovery by Mavis E. Batt for the death of her son David Batt, unless you also find David Batt had been contributorily negligent proximately causing the collision." (R. 112).

This requested instruction was originally contained in the court's instructions to the jury as instruction No. 19. However, at the request of the plaintiffs it was withdrawn as indicated by the notation of Judge D. F. Wilkins, who presided in the case for the purpose of instructing the jury, because of the sudden illness of Judge James Sawaya. His notation on the requested instruction reads, "Withdrawn James Sawaya by D. F. Wilkins". (R. 112). See also instructions to jury R. 118.

Appellants' requested instruction was withdrawn because the agreed legal effect of the contributory negligence of the driver of the Batt car, if any, as determined by the jury, was as stated in the requested instruction. The plaintiffs did

not propose a substitute instruction, nor was exception taken to the failure of the court to more fully instruct upon the legal effect of contributory negligence generally, or in the special interrogatory. They are not now in a position to complain that the jury was not properly instructed on the legal effect of contributory negligence.

Even if the matter were material to the case at bar, and the issue had been properly preserved for this appeal, the recent case of *Phillips vs. Tooele City Corporation,* ..... U.2d ....., ... P.2d ..... (Aug. 29, 1972) Docket 12740, does not change the result. There, this court held that Sections 41-2-10(2) and 41-2-22, Utah Code Annotated 1953, do not serve to impute the contributory negligence of a minor to the adult who signed the driver's license application, or who provided a vehicle for the use of the minor. The decision did not constitute a change or reversal of previous law. The interpretation does not affect the doctrine of imputed negligence as established in *Fox v. Lavendar,* 89 Utah 115, 56 P.2d 1049, and the progeny of cases following that decision. The law is well established that the negligence of a driver is imputed to the owner who is present in the vehicle, because the owner is presumed to be in control. The law imposes upon a minor, who has been licensed to operate a motor vehicle, the same standards of care as an adult driver. *Stevens v. Salt Lake County,* 478 P.2d 496, 25 Utah 2d 168 (1970).

SUMMARY

The imputation of contributory negligence of a minor to an adult owner of the car who was present is academic in this case, because: (1) The appellants did not preserve their right to

raise the matter on appeal; (2) The issue of contributory negligence became moot because the jury found the State's negligence was not the proximate cause of the accident; and (3) The jury finding that the Batt boy was driving and was guilty of contributory negligence which proximately contributed to the accident, precluded recovery in any event.

Respectfully submitted,

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