MAYS v. RITCHIE GROCER COMPANY.

Opinion delivered April 30, 1928.

1. NEGLIGENCE—PROXIMATE CAUSE.—While the failure of the defendant to perform a duty imposed upon him by statute is evidence of negligence, such negligence, in the absence of evidence showing it to have been the proximate cause of the injury complained of, furnishes no legal ground of complaint.
2. NEGLIGENCE—PROXIMATE CAUSE.—In order to warrant a finding that negligence was the proximate cause of an injury, it must appear that the injury was the actual and probable consequence of the negligence and that it ought to have been foreseen as likely to result in the injury of others.
3. NEGLIGENCE—PROXIMATE CAUSE.—To warrant a finding that negligence was the proximate cause of an injury, it is not necessary that the particular injury complained of should have been foreseen, but if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated as likely to result in the injury of others, it is liable for the injury proximately resulting therefrom, though it might not have foreseen the particular injury which did occur.
4. NEGLIGENCE—JURY QUESTION.—Whether defendant's negligence was the proximate cause of the injury sued for is ordinarily a question for the jury.
5. AUTOMOBILES—PROXIMATE CAUSE OF DEATH INJURY.—In an action by a father of a four-year-old child for the child's death by being run over by defendant's motor truck, it was error to

instruct the jury as a matter of law that the fact that defendant's driver permitted the engine of the motor truck to run while he was delivering groceries could not be considered as an element of negligence entitling plaintiff to recover damages, though such act was a violation of Crawford & Moses' Dig., § 7425.

Appeal from Ouachita Circuit Court, Second Division; *W. A. Speer,* Judge; reversed.

STATEMENT OF FACTS.

Smith Mays instituted this action in the circuit court against the Ritchie Grocer Company to recover damages for the death of his infant child, caused by the alleged negligence of the driver of one of the defendant's motor trucks.

The record shows that Smith Mays is a retail dealer in groceries, and that the Ritchie Grocer Company is a wholesale dealer in groceries in Camden, Arkansas. The defendant delivers its groceries to retail grocers in Camden in auto trucks. On the 5th day of November, 1926, Robert Siders, a driver of one of the defendant's auto trucks, went to the grocery store of Smith Mays, in Camden, Arkansas, to deliver some groceries. The driver left the motor of his truck running, which was in violation of a statute of the State. Smith Mays held the screen door of his store open while Siders carried in the groceries. Siders made two or three trips with the groceries. He then entered the driver's seat of the motor truck and started the truck in motion. The truck ran over the little four-year-old son of the plaintiff, and killed him. The little boy lived probably thirty minutes after he was run over. The driver of the truck did not see the boy, and the plaintiff did not know that he was playing around the truck. The little boy had gone in front of the truck, and was playing with the crank while the driver of the truck was delivering the groceries. The driver of the truck was in sight of it all the time he was delivering the groceries, except at one time, when he turned his back to it. He did not see the little boy playing around the truck, and did not notice him in front of it when he entered it and drove it away.

The jury returned a verdict in favor of the defendant, and from the judgment rendered the plaintiff has duly prosecuted an appeal to this court.

T. W. Hardy and *J. P. Machen,* for appellant.

T. J. Gaughan, J. T. Sifford, J. E. Gaughan and *E. E. Godwin,* for appellee.

HART, C. J., (after stating the facts). The main ground relied upon for a reversal of the judgment is that the court erred in giving an instruction asked by the defendant, which reads as follows:

"You are instructed that the fact that defendant's driver permitted the motor truck to continue to run while he was delivering packages or merchandise in the store cannot be considered by you as an element of negligence that will entitle plaintiff to recover damages from the defendant."

Under § 7425 of Crawford & Moses' Digest it is made unlawful to leave a motor vehicle without an attendant, upon any public highway, without shutting off entirely the motor, engines or engine. The section provides that any person violating this provision shall be fined in any sum not exceeding $25.

We are of the opinion that the court erred in giving the instruction above set forth. The general rule in this State is that, in an action for personal injuries, while the failure of a defendant to perform a duty imposed upon him by statute is evidence of negligence on his part, nevertheless such negligent conduct, in the absence of evidence showing it to have been the proximate cause of the injury complained of, furnishes no legal ground of complaint. *Bain* v. *Fort Smith Light & Traction Co.,* 116 Ark. 125, 172 S. W. 843, L. R. A. 1915B, 1021; *Ward* v. *Fort Smith Light & Traction Co.,* 123 Ark. 548, 185 S. W. 1085; and *Temple* v. *Walker,* 127 Ark. 279, 192 S. W. 200.

It is also the general rule in this State that, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the actual and probable consequence of the negligence,

and that it ought to have been foreseen in the light of the attending circumstances. *Meeks* v. *Graysonia, Nashville & Ashdown Rd. Co.,* 168 Ark. 966, 272 S. W. 360.

This court has also held that, to warrant a finding that negligence was the proximate cause of the injury, it is not necessary that the particular injury complained of should have been foreseen. If the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated as likely to result in the injury of others, it is liable for an injury proximately resulting therefrom, though it might not have foreseen the particular injury which did occur. *Standard Pipe Line Co., Inc.,* v. *Dillon,* 174 Ark. 708, 296 S. W. 52. In that case it was also held that whether defendant's negligence was the proximate cause of the injury sued for is ordinarily a question to be determined by the jury.

In the application of these well-settled principles of law, we think that the court erred in telling the jury as a matter of law that the fact that the defendant's driver permitted the engine of the motor truck to run while he was delivering groceries could not be considered as an element of negligence entitling the plaintiff to recover damages from the defendant. This was one of the facts in the case which the jury had a right to consider, along with the other facts and circumstances in the case, in determining the negligence or non-negligence of the defendant. The instruction as given tended to confuse and mislead the jury by withdrawing from their consideration a material fact in the case. Under the evidence introduced, the jury had a right to consider the fact that the defendant's driver left the engine of his motor truck running while he was delivering groceries, in determining whether the defendant was guilty of negligence in starting the motor truck without finding that the child was in front of it. We do not mean to say that the leaving of the engine of the motor truck running in violation of the statute constituted negligence *per se,* under the circumstances, but this was a fact to be considered by the jury along with the other facts and circumstances in determining whether the conduct of the

defendant's driver in not seeing the child before starting the truck was negligent.

Therefore the judgment will be reversed, and the cause will be remanded for a new trial.