

**MADSEN
vs.
READ**

No. 5766

SUPREME COURT OF NEW MEXICO

1954-NMSC-086, 58 N.M. 567, 273 P.2d 845

August 30, 1954

In action for death of 4 1/2 year old child who was struck by defendant's south-bound vehicle when she endeavored to cross from east to west side of highway immediately after north-bound vehicle had passed her, the District Court, Chaves County, Harris, D.J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Sadler, J., held that evidence on issue as to whether defendant saw, or should have seen, the child in time to slacken his speed and to assume degree of wakefulness essential to her safety was not such as to establish as a matter of law that defendant had been negligent.

COUNSEL

Carpenter, Eaton & Phelps, Roswell, for appellant.

Frazier, Cusack & Snead, Roswell, for appellee.

JUDGES

Sadler, Justice. McGhee, C.J., and Compton, Lujan and Seymour, JJ., concur.

AUTHOR: SADLER

OPINION

{*568} {1} Shortly after the noon hour on March 18, 1953, at a point approximately one and one-half miles south of Roswell on Highway 285, little Judy Elaine Madsen, four and one-half years of age, was struck by defendant's pickup truck and killed in front of her home on the west side of the highway. Damages on account of her death were sought in an action instituted by her father as administrator of her estate which resulted in a verdict for the defendant on which judgment in his favor was entered {*569} in the district court of Chaves County. The plaintiff in that action complains in this Court of the

judgment and as the appellant here seeks its reversal. The parties will be designated here as they were below.

{2} It was about 12:45 o'clock p. m. on March 18, 1953, when the victim of the tragic accident resulting in her death crossed the road in front of the family home, located on the west side of Highway 285 extending south from Roswell to the Whitcamp store and filling station, situated directly east and across the highway from her home. After purchasing the gum and candy which had occasioned her trip, the child started to cross the highway again to return home. Observing a pickup truck approaching from the south, she stood on the edge of the paving for a brief period and then started to cross the road to the rear of the pickup which had just gone by.

{3} In the meantime the defendant, driving a pickup truck with a horse trailer attached at the rear, and accompanied by his three children, ranging from 14 to 9 years of age, was proceeding south at about 50 miles per hour and converging from a distance of 125 to 130 feet to the north on the route the child would take in crossing the highway. The mother of the child sensing danger to it had come from her house and had taken a position of watchfulness on the east side of the highway. She carried her young baby in her arms, and seeing the child about to start across the highway cried out, "Not yet, Judy]" But she was tragically too late. The child was already on the way. She was seen to disappear behind the pickup truck proceeding north, emerging from behind it on a dead run to the opposite side of the highway, only to be struck by defendant's pickup when within two (2) feet of safety. The broken body of the child was hurried to the hospital where she was pronounced dead on arrival.

{4} The scene of the accident was only 1.8 miles south of the city limits of Roswell, the weather was clear and the view was unobstructed for half a mile in either direction from the scene of the accident. A somewhat vivid picture of how it happened may be visualized from the testimony of Sergeant Lawrence A. Halverson, an employee of Walker Air Force Base in Roswell. He was traveling on a motorcycle behind defendant's pickup as they passed beyond the city limits of Roswell. Testifying as a witness for defendant, he was asked questions and made answers, as follows:

"Q. State your name. A. Sgt. Lawrence A. Halverson.

"Q. You testified previously in this case yesterday? A. Yes sir.

{*570} "Q. Where do you live? A. Seventeen twenty-four and a half North Missouri, Roswell, New Mexico.

"Q. What is your occupation? A. I am employed at the Walker Air Force Base.

"Q. On March eighteenth, 1953 were you at or near the Whitcamp service station around noon on that date? A. Yes sir.

In the meantime the defendant, driving a pickup truck with a horse trailer attached at the rear, and accompanied by his three children, ranging from 14 to 9 years of age, was proceeding south at about 50 miles per hour and converging from a distance of 125 to 130 feet to the north on the route the child would take in crossing the highway. The mother of the child sensing danger to it had come from her house and had taken a position of watchfulness on the east side of the highway. She carried her young baby in her arms, and seeing the child about to start across the highway cried out, "Not yet, Judy]" But she was tragically too late. The child was already on the way. She was seen to disappear behind the pickup truck proceeding north, emerging from behind it on a dead run to the opposite side of the highway, only to be struck by defendant's pickup when within two (2) feet of safety. The broken body of the child was hurried to the hospital where she was pronounced dead on arrival.

{5} Finally, counsel for plaintiff urge upon us the claim that the trial court erred in failing to grant his motion for new trial. Largely, it is a reassertion of previous questions already argued, but in the respects in which additional grounds of error are sought to be injected, we find them either to be without merit, or unavailable to plaintiff by reason of failure to reserve the claimed errors below. It follows from what has been said that the judgment under review should be affirmed.

{6} It is so ordered.