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Kenneth White v. Kenneth J. Pinney as Pinney Beverage Company and A. C. Neslen : Brief of Respondents

Utah Supreme Court

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Gardner & Latimer; Attorneys for Respondents;

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In the Supreme Court of the State of Utah

KENNETH WHITE,

Appellant,

vs.

KENNETH J. PINNEY, doing bus-
iness as the PINNEY BEVERAGE
COMPANY, and A. C. NESLEN,

Respondents.

BRIEF OF RESPONDENTS

GARDNER & LATIMER,

Attorneys for Respondents.

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In the Supreme Court of the State of Utah

KENNETH WHITE,

Appellant,

vs.

KENNETH J. PINNEY, doing business as the PINNEY BEVERAGE COMPANY, and A. C. NESLEN,

Respondents.

No. 6218

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Ordinarily the respondent need make only a very short resume of the facts involved. But in the present appeal the appellant's Abstract of Record is so incomplete, sketchy and garbled and his Statement of Facts in his brief so one-sided that the respondent deems it necessary, in the interest of fairness, to present the facts more fully than is usually required.

THE SURROUNDING CONDITIONS.

The accident here involved occurred on December 23, 1938, at about 4:30 P. M. and on Highland Drive in the vicinity of a florist's shop numbered 2333 on that street. This is about two blocks south of the Sugar House business district. At this point the street is over 40 feet wide; paved with block asphalt over cement; a street car track was located in the center; and in general the surface was rough, (White, Tr. 27-28). Highland Drive just south of Sugar House is extensively used by motor vehicles and on the day of the accident—just two days before Christmas—the traffic was particularly heavy, (White, Tr. 28). The plaintiff had parked his own truck on the west side of the street opposite 2333, the Maxwell Floral Shop. The truck faced south, was parallel to the cement curb and only a few inches away from the curb. The street was dry and visibility was good.

THE PLAINTIFF'S ACTIONS.

After parking his truck the plaintiff crossed the street to the Maxwell Floral Shop, conversed with Mr. Maxwell and returned to his truck. Then Mr. Maxwell joined him to accept delivery of some flowers. Both stood at the back or north end of the truck facing it, White just to the west of Maxwell. White testified that prior to and at the time of the accident he did not even look to the east across the street or to the north or south

to see if he was in any danger from passing vehicles, (Tr. 28-29).

While so standing, White was struck on the left front part of his left leg about six inches above the bottom of his foot. He testified that the impact knocked his foot off the ground and caused the back part of the same leg to strike against the bottom edge of the open truck door. He picked up the object which struck him and discovered it to be a small metal wheel about six or seven inches in diameter, with a hard rubber tread and weighing about seven pounds. White then looked out on the street and saw the defendant's truck going north. White did not see the truck at all until it was already 150 to 200 feet past him, (Tr. 9, 29). He then got in his own truck, turned around to the north and followed the defendant's truck to the Dixie Inn, about 2160 South Highland Drive, and just south of the Southeast Furniture Company, where the driver of the defendant's truck stopped to make a delivery of beer.

THE DEFENDANT'S TRUCK.

The truck belonged to the Pinney Beverage Company and was a four cylinder, 1½ ton International. At the time of the accident, its load consisted of slightly over a ton, including two barrels of beer and the balance in cases of bottled beer, (Neslen, Tr. 127-128). The defendant, Neslen, was the regular driver of this particular truck and he had the witness, Sharp, as his helper. To assist in delivering barrels of beer to customers, the Inter-

national truck had as part of its regular equipment a small hand truck. This hand truck was carried underneath the left side of the truck body and was securely attached to the chassis by some clamps at both ends. In the travelling position the handles were on the inside and the wheels on the outside, (Neslen, Tr. 128-129). Both the driver, Neslen, and his helper, Sharp, testified that the hand truck was in its regular position at the time of the accident, and was never carried in any other manner; but White claimed that when he saw the big truck at the Dixie Inn immediately following the accident, the little hand truck was hanging in some manner from the left top side of the truck body.

At the request of the attorney for the plaintiff and with the consent of the attorney for the defendants, the jury was allowed by the Court to take a view of the International truck with the hand truck in place. The hand truck was later brought into Court and exhibited to the jury separately.

The two wheels on the hand truck are held in place on the shaft by cotter pins, (Neslen, Tr. 149). Neslen greased the wheels once or twice a week, (Neslen, Tr. 149), and in so doing had never noticed anything out of order. The hand truck had been used several times on the day of the accident, the last time being at Murray, from where the defendant's truck was driven to make a delivery at 48th South and Highland Drive and thence along the latter street to the scene of the accident. When used in Murray, the hand truck from all appearances was in perfect working order.

THE ACCIDENT.

Having made delivery of some barrels of beer at Murray with the use of the hand truck, Neslen drove the International truck to 48th South and Highland Drive to leave some bottled beer and then drove north towards Sugar House. Neslen testified that when he passed the site of the accident, he was driving 20 to 25 miles an hour, (Tr. 132), and his helper, Sharp, agreed, (Tr. 154), but White who never saw the truck until it had gone past him 150 to 200 feet guessed the speed at 50 miles per hour (Tr. 9, 10).

Neslen passed by the plaintiff without knowing anything had happened and proceeded on to the Dixie Inn at 2160 Highland Drive. The plaintiff never saw the defendant's truck until after the wheel had hit him. At the Dixie Inn immediately thereafter, White showed Neslen the wheel and Neslen, upon investigation, found it had become detached from the hand truck. That was the first information Neslen or Sharp had that an accident had occurred.

There is no evidence in the record to show how the wheel became detached or that either of the defendants had previously known of any defect on the hand truck. In fact, all the evidence is undisputed that the routine inspections and lubrication of the hand truck once or twice weekly had shown no defects in it.

THE PLAINTIFF'S INJURIES.

The blow struck by the wheel on the front part of the plaintiff's leg was not a cut but only a bruise, (Dr. Clawson, Tr. 80, 81). No surgery or treatment of any kind was necessary or given. On the back of the leg was a cut about $\frac{1}{2}$ inch long and not deep, (Dr. Clawson, Tr. 79). White saw Dr. Clawson the next day after the accident at the latter's office and drove his own truck from East Mill Creek to Salt Lake City to do so, (Tr. 18-20). Within the next week or ten days, he saw the doctor twice more at the latter's office, but all medical treatment was completed about January 1st, slightly more than a week after the accident.

White continued to drive his truck and with a helper delivered his flowers. He admitted he never lost a day's work, (Tr. 19-21), following the accident but claimed to have undergone some pain and suffering.

The plaintiff is 33 years old, weighs 212 pounds, lost no weight following his mishap and his appetite remained unimpaired, (White, Tr. 44-45).

BRIEF OF ARGUMENT.

I.

The defendants were not liable for any latent defect in the mechanism of their truck of which they had no knowledge and which a reasonable inspection and maintenance did not reveal.

A. The undisputed evidence shows that the defendants had no knowledge of any such defect and that a reasonable inspection and use of the hand truck had not revealed it.

B. The plaintiff offered no evidence whatsoever that the defendants had knowledge of such a defect or that they were in any manner negligent in their inspection, maintenance or use of the hand truck.

II.

Under the pleadings and in accordance with the evidence presented on the contributory negligence of the plaintiff, the District Court was not only wholly justified but compelled to instruct the jury on that subject, particularly when the plaintiff-appellant himself requested such instructions; and the Court's instructions, so given, are entirely correct.

III.

Under the facts of this case the doctrine of *res ipsa loquitur* does not apply and the plaintiff was certainly not entitled to a peremptory instruction that the defendants were negligent as a matter of law; but in that connection the District Court went as far as possible in its Instruction No. 14 in favor of the plaintiff to the effect that the situation warranted an "inference of negligence."

ARGUMENT.

While the appellant states seven points in his brief in support of his appeal, they can be boiled down to three contentions, namely:

(a) That the District Court's instructions regarding the supposed defect in the defendants' truck which caused the wheel to become loose were erroneous.

(b) That the District Court's instructions on the subject of contributory negligence were erroneous.

(c) That under the doctrine of *res ipsa loquitur* the District Court should have granted a directed verdict for the plaintiff.

The respondent will discuss these propositions in the order just enumerated, although a different order is used in the appellant's brief.

I.

The defendants were not liable for any latent defect in the mechanism of their truck of which they had no knowledge and which a reasonable inspection and maintenance did not reveal.

A. The undisputed evidence shows that the defendants had no knowledge of any such defect and that a reasonable inspection and use of the hand truck had not revealed it.

B. The plaintiff offered no evidence whatsoever that the defendants had knowledge of such a defect or that they

were in any manner negligent in their inspection, maintenance or use of the hand truck.

(Court's Instructions Nos. 12, 13, & 14).

Before presenting the authorities on the duty of the defendants in this respect, it will be helpful to review the facts concerning it.

Neslen, the driver of the defendants' truck and his assistant, Sharp, never even knew any accident had happened until the plaintiff showed them the little wheel from the hand truck at the Dixie Inn shortly after it had struck the plaintiff. Until that time they were wholly unaware that the wheel had come off. Indeed the undisputed testimony shows that they had used the hand truck all morning and afternoon, the last time at Murray less than an hour before the accident took place—and that at all these times, the truck appeared in entirely proper working order.

Neslen testified that he had driven the International truck with the accompanying hand truck for at least a year without any trouble. Moreover, he had lubricated and inspected the wheels on the hand truck regularly once or twice a week, (T. 149), and found everything in proper order. The previous use of the hand truck on the day of the mishap showed the same result. Thus the evidence is entirely without any dispute whatsoever that the defendants had no knowledge of any defect regarding the wheels on the hand truck and although a reasonable in-

spection, made regularly, had been made, they knew of no defect whatsoever.

On the other hand, the plaintiff did not offer one word of evidence in the entire case concerning any supposed knowledge of a defect on the part of the defendants. Neither was the slightest evidence produced that the inspection regularly carried on by the defendants was either negligent or unreasonable under the circumstances. All that the record shows is that the plaintiff, while standing on the west side of a well traveled highway, was struck on the leg by a little wheel. He never saw the wheel before it struck him and never saw the defendants' truck until it was 150 to 200 feet past him going north. Later it developed that the wheel had become detached from the defendants' hand truck.

Thus the record is completely silent as to any negligent acts or omissions of duty on the part of the defendants. The respondents were and still are firmly of the opinion that, on the record, the District Court should have granted the defendants' motion for a non-suit and certainly their motion for a directed verdict.

There is now, and for many years has been, no dispute in the rule of law fixing the responsibility of the owner of a motor vehicle for defects in his machine. First we cite from the most recent texts on automobile laws:

4 Blashfield: Cyclopedia of Automobile Law and Practice, Sec. 2333, (1936):

“Save where definite statutory requirements respecting the necessary equipment of motor vehicles are not complied with, so as to make out a case of negligence per se by reason thereof, the general rule respecting injuries attributable to defects in the condition of the automobile is that a gratuitous invitee riding therein as the guest of the owner, or driver, accepts the machine of his host as he finds it, subject to the limitation that the host must not in effect set a trap by knowingly or culpably exposing invitees to the risk created by a known or obvious defect in the automobile or otherwise be guilty of active negligence in this connection contributing to the injury of guests. A trap, within the meaning of such rule, is a hidden danger lurking upon the premises, or in the automobile which is known to the host or should be known to him in the discharge of the duty for a passenger's safety which the law imposes on him and which the guest may avoid if he knows of it.

Stated differently, he is not liable for injuries suffered by guests by reason of the defective condition of the automobile, in the absence of some showing, that he knew, or, in the exercise for the safety of gratuitous passengers, should have known, of the existence of the defect, the question of whether he did have such knowledge or notice of the defect as to render him liable being one of fact.

The fact that the mechanical defect productive of the injury is one discoverable upon an inspection of the car does not show negligence on the part of the host nor authorize a recovery by the guest, and gross negligence cannot be predicted upon a failure to inspect the vehicle thoroughly before inviting another to ride; the motorist's duty in this connection, if any, being limited to the exercise of slight care. If he thinks the

automobile is in good or reasonably safe condition, although it is not, that ordinarily relieves him from any liability for defects therein.”

While the rule stated applies to passengers, it is equally pertinent to cases of injury suffered by other persons as in the present case.

3 *Huddy: Cyclopedia of Automobile Law*, (9th ed.), Sec. 71:

“Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travelers.

To this end, the owner or operator of a motor vehicle must exercise reasonable care in the inspection of the machine, and is chargeable with notice of everything that such inspection would disclose. This rule applies whether the operator is the owner of the vehicle or rents it from another, or permits another to use it, or lets it to another for hire. But, in the absence of anything to show that the appliances were defective, the owner or driver is not required to inspect them before using the car or permitting it to be used.”

Innumerable cases may be found which hold no liability on the part of the owner where an outsider has been injured by a defective mechanism which was unknown to the owner and had not been disclosed by a reasonable inspection. Only a few of the more recent cases will be cited.

Phillips v. Pickwick Stages,
(California App., 1927), 259 P. 968.

Here the plaintiff was injured as the defendant's bus struck him, when the driver was unable to stop the bus because the foot brake pedal suddenly broke. The verdict for the plaintiff was upheld because of the defendant's violation of a statute, but on the point involved here the California Court stated:

“Appellant contends that the accident was caused solely by the sudden breaking of the foot pedal, due to a latent defect therein, not known to defendant and not discoverable upon a most careful inspection, and that there was no negligence upon the part of the defendant. Concededly, if the sole proximate cause of the accident was due to the breaking of the foot pedal due to a latent defect which could not have been discovered upon a careful examination and inspection, appellant would not be liable.”

Bolin v. Corliss Company,
(Mass., 1928), 159 N. E. 612.

The tire and rim of the defendant's car became detached from the wheel and, after rolling across the street, struck the plaintiff. Under facts which the opinion states, the Supreme Judicial Court of Massachusetts determined there was no liability.

“The second count is to the effect that it was the defendant's duty before permitting the use of the automobile upon the public highways to have the automobile in reasonably safe condition; that ‘the defendant negligently permitted said

automobile to go out upon the highway in such a defective and dangerous condition that a tire and rim came off and seriously injured the plaintiff.' There was nothing to show that, at the time the defendant gave permission to Casper to use the automobile, it had any knowledge the machine was then defective or unsafe for use on the public highways; and no evidence to support the plaintiff's contention that at that time the rim or tire was defective, or, even if it were defective, that reasonable inspection would have disclosed its condition. Assuming that the defendant *would be liable in permitting Casper to use a defective automobile when it knew of the defect or, as a reasonably prudent person, could have discovered it*, the plaintiff did not show that the defendant possessed such knowledge or that the defect, if it then existed, might reasonably have been discovered.'" (Italics ours.)

Westlund v. Iverson,
(Minn., 1922), 191 N. W. 253.

While driving along a road the left rear wheel of the defendant's automobile became detached, rolled onto an adjacent foot path and struck the plaintiff. There was no evidence of previous knowledge of any defective condition or of faulty inspection by the defendant. The Supreme Court of Minnesota sustained a directed verdict in favor of the defendant.

Flores v. Sullivan,
(Texas, 1937), 112 S. W. (2d) 321.

The defendant taxi cab driver had a spare wheel securely fastened on the rear of his cab. A negligent driver

of another car struck the cab and broke the spare wheel loose. It rolled into the street and struck the plaintiff. It was held that in the absence of any proof that the spare tire was not fastened securely, the plaintiff could not recover, such a remote contingency as actually occurred not being reasonably foreseeable.

Cherry Lake Farms v. Taylor,
(1939), 98 F. (2d) 571;

Phillips v. Britannia Laundry Co.,
(England, 1923), 12 B. R. C. 418, 437.

See also the numerous cases cited in foot notes by Blashfield and Huddy, quoted above.

The appellant complains that the District Court erred in its instructions on the question of the defendants' actual knowledge and negligent inspection. To support his argument he plucks out part of the last sentence of Instruction 13 and places a far fetched interpretation on it—wholly inconsistent with the actual context itself. Actually the Court gave three full instructions on this subject—No. 12, No. 13, and No. 14. A reading of all these three instructions taken together—as they must be—shows that the District Court fully and clearly told the jury what the law was—all in accordance with the well established rules discussed above.

The appellant's contention as to this point is wholly without merit.

II.

Under the pleadings and in accordance with the evidence presented on the contributory negligence of the plaintiff, the District Court was not only wholly justified but compelled to instruct the jury on that subject, particularly when the plaintiff-appellant himself requested such instructions; and the Court's instructions, so given, are entirely correct.

(Instructions Nos. 7, 8, 9 and 10.)

The answer of the defendants contains the following affirmative defense of contributory negligence, (A. 11-12) :

“Further answering the complaint of plaintiff and by way of an affirmative defense thereto the defendants allege that on the 23rd day of December, A. D. 1938, the plaintiff was standing on the travelled portion of the highway at about 2330 South Highland Drive in Salt Lake City, Utah, and while being so then and there, and immediately prior to and at the time of the accident alleged in the complaint, the plaintiff acted in a negligent, careless, imprudent manner in this: that at said time and place the plaintiff failed to observe any lookout for vehicles passing the point where he was standing and took no precautions whatsoever to protect himself against being injured in any manner by said vehicles so passing while the plaintiff was then and there standing in the travelled portion of the said highway; that if a small wheel from the hand-truck attached to the defendant's truck did become detached therefrom and strike the plaintiff's leg, then such accident and collision was the sole proximate result of the

negligence and carelessness of the plaintiff as hereinabove set forth and was not caused proximately or at all by any negligent act or omission on the part of the defendants or either of them.”

Under this defense the defendants offered a substantial amount of evidence showing the plaintiff to be guilty of contributory negligence, both by their own witnesses and by cross examination of the plaintiff’s witnesses.

The Court should bear these facts in mind: The scene of the accident was two blocks south of the tremendously busy Sugar House business district on Highland Drive. The time was two days before Christmas when the traffic was unusually heavy. Highland Drive at this point is a busy thoroughfare much travelled by motor vehicles. The plaintiff drove over the scene of the accident four or five times a week and personally knew of the heavy traffic. The plaintiff was standing in the street—in the travelled portion of the highway and not on the sidewalk.

Surely under such conditions a person is required to take some measures to protect himself. Yet the plaintiff admitted on cross examination that he did absolutely nothing to save himself from any traffic injury. Let him speak for himself, (T. 28-30) :

Q. “You were conversant with the condition of traffic on that street?

A. I stopped at that address—

Q. I mean in general?

A. (Continued). Approximately four or five times a week.

Q. And have done for some time?

A. Yes.

Q. You also knew that on two days before Christmas there would be more traffic than usual there, at 4:30 in the afternoon, didn't you? That is a busy time of the day on that street, isn't it?

A. If there is any busy time that is when it would be.

Q. There is a lot of traffic—you know that—on Highland Drive just below 21st South?

A. Yes sir.

Q. Isn't that so?

A. Yes.

Q. You testified to this jury that you never looked toward the east at all, you were standing there with some flowers in your hand, as I understood your testimony, and you hadn't looked around towards the east at all before this thing hit you?

A. I wasn't contemplating going across.

Q. I didn't ask you that. I asked you if you looked towards the east at all, while you were standing there?

A. I was looking at my customer.

Q. Answer my question. You didn't look towards the east at all before this thing hit you, did you?

A. No.

Q. Did you look down the street to see if any cars were coming at all?

A. Not until I was hit.

Q. But you didn't before?

A. No.

Q. You didn't even see the truck which you say was involved in this accident until it had passed you, you say, one hundred fifty to two hundred feet?

A. That is right.

Q. You didn't look to see if a truck was going by?

A. I had no occasion.

Q. Did you or didn't you, now?

A. No.

Q. Yet, standing there, two days before Christmas, on this street, with heavy traffic, knowing that cars were going back and forth all the time, both ways, you never even looked toward the east to see if there was any danger coming to you at all, did you?

A. If—

Q. Did you? Answer that 'Yes' or 'No'.

A. No. . . . "

Surely the foregoing testimony, considered in the light of the surrounding circumstances, constitutes substantial evidence on the question of the plaintiff's contributory negligence. Consequently, the District Court was required to submit such evidence to the jury with proper instructions.

It is also perfectly apparent that the proof adduced comes clearly within the scope of the defendant's answer

setting up the affirmative defense of contributory negligence. Hence the case of *Lockhead v. Jensen*, 42 Utah 99, 129 P. 347, cited in Appellant's brief, p. 19, has no application in the present case.

Any person occupying the travelled portion of a busy highway is required to take some measures of precaution to protect himself. He cannot simply do nothing in the way of self-protection and depend entirely on the drivers of passing vehicles to save him from injury. The kind and amount of precautionary measures he must exercise depends on surrounding circumstances. The test is whether he did that to protect himself which a reasonable, prudent man would have done under the same or similar circumstances. The situation, therefore, varies in the case of a pedestrian, a workman or other person occupying the travelled portion of the street. The plaintiff here was not a workman in the sense that he was employed by someone else to perform labor in the street. Neither was he strictly speaking a pedestrian merely moving in the street. In fact he was standing in a dangerous situation in the travelled part of the street on his own business. That certainly did not relieve him from exercising any precautions whatsoever for his own safety.

So far as the respondents are advised the latest pronouncement of the Supreme Court of Utah on this subject is *Reid v. Owens*, (Utah, Aug. 31, 1939), 93 P. (2d) 680, 682-3:

“The rule that one working on the highway is not held to so high a degree of care as a pe-

pedestrian has been applied to workmen crossing a street as a part of their work. The circumstances may be such in a particular case that a workman crossing a street in the line of his work, though he be carrying nothing and doing nothing except crossing, would not be required to exercise the same degree of watchfulness as a pedestrian if barriers or signs have been placed or there is other evidence of work being prosecuted on or in the immediate vicinity of the street; but such a workman cannot be said to act as a reasonably prudent person under the circumstances if he is altogether indifferent to traffic hazards. What is due care depends on all the surrounding facts and circumstances. A workman actively laboring in the street must exercise due care. But that care must be determined from a different standpoint than the care to be exercised by a pedestrian on the same street. The former must devote some attention to the prosecution of his work; the latter is free of any duty which would interfere with keeping a vigilant lookout. A driver of a vehicle being warned by barriers, signs, or other evidences of the presence of workmen in the street must in the exercise of due care be cognizant of the fact that such workmen may not constantly attend to traffic, and his conduct should be in the light of such knowledge. He may not in case of injury to such a workman point to the latter's attention to his work as negligence on the latter's part. But a pedestrian devoting so much of his attention to other than the traffic as the workman devoted to his work may well be guilty of contributory negligence. A workman merely crossing a street should doubtless be required to be more watchful than one sweeping streets, shoveling dirt, repairing rails, or filling holes, whose duty not only compels him to be in the highway but also to devote a very large part of his attention to his work. Thus, in *Ellis v. Whitmeyer*, supra,

where the workman merely crossed the bridge as ordered by his foreman he looked for traffic before proceeding and left ample margin for cars traveling as warned by danger signs. Indeed, the court observed, although applying the rule of highway workers, that the plaintiff used such care as would have been absence of contributory negligence in a pedestrian. The jury's award was upheld against a claim of contributory negligence as a matter of law."

The instructions of the District Court in the present case state this rule accurately and precisely, especially in Instruction No. 9, (A. 46-47).

It is interesting to note that the appellant in his brief has no particular complaint to make that the District Court's instructions on contributory negligence incorrectly state the law, but only that the Court should not have instructed the jury on that subject at all.

This position becomes altogether incomprehensible and ludicrous when it is considered that the plaintiff-appellant himself requested the Court to instruct the jury on the subject of contributory negligence. This is found in Plaintiff's Requested Instruction No. 7, (T. 29):

"If you shall find or believe from the evidence that on the 23rd day of December, 1938, in the 2300 block on Highland Drive, the Defendant was standing behind his truck and that he was struck by a wheel which became detached from a hand truck hanging on the side of the truck being operated by the Defendant Neslen, then you are instructed that the test for determining whether the Plaintiff was contributorily negligent is what a

reasonable person would have done under the circumstances, and you are instructed that negligence is not imputable to a person failing to look for danger if under the surrounding circumstances he had no cause to apprehend any.”

This request by the plaintiff was given by the District Court, and thereupon the Court was required to give full instructions on the subject of contributory negligence.

How can the appellant, having specifically requested and received from the District Court his own instructions on contributory negligence, now assign as error the fact that the Court followed his own request and instructed the jury on that subject? Some strange Assignments of Error no doubt come before the Supreme Court from time to time, but the writer confesses he has never yet seen anything so naive as this.

On the question of contributory negligence, therefore, no merit exists in the appeal because, first, there was substantial, tangible evidence of the plaintiff's contributory negligence, properly presented under the pleadings; second, the District Court was compelled to submit this evidence to the jury; and third, in so doing the Court gave proper and correct instructions on the subject, including one request made by the plaintiff himself.

III.

Under the facts of this case the doctrine of *res ipsa loquitur* does not apply and the plaintiff was certainly not

entitled to a peremptory instruction that the defendants were negligent as a matter of law; but in that connection the District Court went as far as possible in its Instruction No. 14 in favor of the plaintiff to the effect that the situation warranted an “inference of negligence.”

(Instruction No. 14).

Before arguing the legal principles involved in this point it is well again to remind this Court of the facts in the present case, because cases which rely upon the doctrine of *res ipsa loquitur* are always decided under their own specific facts.

The plaintiff offered not one word of evidence that the defendants had any knowledge of any defect in their truck or that their inspection of it had been at all negligent or unreasonable. On the other hand the defendants presented proof which was not disputed that they not only did not know of any defect but on the contrary their use of the hand truck the very day of the accident and up to one hour before it showed it to be in good working order and furthermore that they lubricated and inspected the hand truck once or twice a week. Does this set of facts fit into the doctrine of *res ipsa loquitur*?

The Supreme Court of Utah has in numerous cases discussed the doctrine of *res ipsa loquitur*. The respondents here quote only from a few of them.

Zocolillio v. Oregon Short Line R. R., (Utah, 1918), 53 Utah 39, 61-64; 177 P. 201.

In that case the Utah Supreme Court reviews all of the previous Utah cases on the subject.

“For the purposes of this decision we shall assume that the maxim *res ipsa loquitur* applies to the heating of cars. If, however, that fact be assumed, yet the application of the maxim does not shift the burden of proof under any circumstances, and, so far as we are aware, the courts have uniformly declared to the contrary. In a very recent case (*Williamson v. Salt Lake & O. Ry. Co.*, 52 Utah 84, 172 Pac. 680) we pointed out that the burden of proof does not shift and cited authority to that effect. In an exhaustive note to the case of *Hughes v. Atlantic City, etc., Rd. Co.*, L. R. A. 1916A, commencing at page 930, a very large number of cases are cited, in all of which the doctrine is laid down that the burden of proof does not shift to the defendant. The foregoing case originated in the New Jersey Court of Errors and Appeals, and is reported in 85 N. J. Law, 212, 89 Atl. 769, L. R. A. 1916a, 927. We shall later refer to this case more particularly. It may therefore be confidently asserted that the instruction in question was erroneous in charging the jury that the burden of proof shifted to the defendant.

The proposition respecting the presumption of negligence is argued with much force by counsel for both parties in their respective briefs. Defendant's counsel in effect contend that the maxim of *res ipsa loquitur*, when applicable, is evidentiary, and merely raises an inference of fact authorizing, but not compelling, a finding of negligence, and that such is its effect in all cases whether the occurrence of the accident is explained by the defendant or not explained. Upon the other hand, counsel for plaintiff insist that, where the maxim applies, all that the plaintiff is required to prove is that he was injured through

a derailment of a railroad train on which he was riding as a passenger, or by reason of a collision between two of defendant's trains, and that after making such proof the presumption arises which, if unexplained, compels a finding of negligence. In other words, plaintiff's counsel contend that, under the circumstances just stated, the court should direct the jury that the defendant was guilty of actionable negligence as a matter of law. It will thus be seen that if the contention of plaintiff's counsel is correct, then the question of burden of proof in most cases is academic merely, while if the defendant's counsel are right the ultimate fact of negligence is for the jury, in view of all the facts and circumstances, whatever those may be. In the recent case referred to, namely, *Williamson v. Salt Lake & O. Ry. Co.*, supra, we held to the doctrine contended for by defendant's counsel, following the case of *Sweeney v. Erving*, 228 U. S. 240, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905. Counsel for plaintiff both in their brief and in the oral argument, criticize the rulings both in the *Williamson Case* and in the *Sweeney Case*. If that were admitted, however, in view of the fact that the *Sweeney Case* emanates from the Supreme Court of the United States, the court of last resort, and the *Irving Case*, just referred to, emanates from the Court of appeals, the *Sweeney Case* would control; but an examination of the *Irving Case* will disclose that that case follows, and does not contradict, the *Sweeney Case*. It is there said, quoting from one of the decisions of the Supreme Court with respect to the doctrine of *res ipsa loquitur*:

“* * * When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things,

does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care.''

What is there in this quotation which is contrary to the Sweeney Case? If it affords merely reasonable evidence that simply amounts to an inference of fact that negligence existed. In other words, from the occurrence the jury may infer the ultimate fact of negligence. That is all that is decided in the Williamson Case. That is all that is contended for in the Sweeney Case.

Counsel, in effect, contend that the court must direct a verdict as matter of law in case no explanation is made. Counsel, however, also insist that the holding in the Williamson Case is contrary to former holdings of this court. With due respect for counsel's opinion, we, nevertheless, are of a contrary opinion. So far as the writer is aware, this court has considered the probative or evidentiary effect of the maxim of *res ipsa loquitur* in two, and only two, cases, namely *Christensen vs. Railroad*, 35 Utah, 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159, and *Furkovich vs. Bingham Coal & Lumber Co.*, 45 Utah 89, 143 Pac. 121, L. R. A. 1915B, 426. In both of those cases we clearly indicate that the effect of the maxim is evidentiary, and that where it applies negligence, which is the ultimate fact to be established, may be inferred from a particular occurrence or accident. In the *Christensen Case* we followed the rule laid down by the Court of Appeals of New York in the case of *Griffen v. Manice*, 177 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630. In view of counsel's vigorous insistence that the doctrine laid down in the Williamson Case is unsound, we have taken special pains to again examine into

the subject. No one, even though he has examined the decisions upon the subject merely cursorily, can, we think, arrive at any other conclusion than that the decisions are utterly irreconcilable. Moreover, it is just as apparent to any one who is at all conversant with the subject that most any one can find something to criticize in at least most of the decisions. *Under such circumstances, the only reasonable, the only logical, course to pursue is to keep in mind fundamental principles when called upon to decide between the conflicting opinions. It is fundamental that negligence is neither inferred nor presumed merely because a passenger was injured. Nor is negligence presumed as a matter of law.* In that regard negligence which constitutes a wrong, like fraud, must be established. It may, however, always be inferred from other facts and particularly in cases between carrier and passenger, where a collision or derailment has occurred. It may be inferred from such occurrence, and where no explanation is offered in such a case the inference may be so strong as not only to justify, but to compel, a finding of negligence, which is the ultimate fact to be established. The circumstances surrounding the happenings of an accident, even on a railroad, may, however, easily be such that, while they may justify a finding of negligence, yet may not compel such a finding. In that regard there is no difference in principle between a case where the maxim of *res ipsa loquitur* applies and where it does not; that is, an inference may arise from one or from a series of facts in any kind of a case which, if unexplained, may not only justify, but may also require, a finding of the ultimate fact of negligence. The only difference between an ordinary case and a case between carrier and passenger consists in the quantum of proof the plaintiff must adduce in order to make a *prima facie* case. True, courts in applying the maxim of *res ipsa loquitur* very frequently speak of the

presumption which arises, etc. *By reading the decision it, however, becomes clear that at least most writers refer to the presumption so called merely as an inference of fact, and not as a presumption requiring the court to direct a verdict, even though no explanation is offered.*" (Italics ours).

In connection with the Utah cases, this court should keep in mind the District Court's Instruction No. 14 in the present case which reads, (A. 49):

"You are instructed that if you should find from a preponderance of the evidence that the "dolly" wheel was thrown or projected from defendants' truck as it passed the place where plaintiff was standing and struck plaintiff inflicting the injuries complained of, such finding is alone sufficient to raise an inference of negligence on the part of the defendants which you may, but need not apply. Unless you should find that such inference of negligence is overcome from all the evidence in the case you should find for the plaintiff."

Angerman Co. v. Edgerman,
(Utah, 1930), 290 P. 169, 171.

"In the case of *Zoccolillio v. Oregon Short Line R. Co.*, 53 Utah 39, 177 P. 201, 210, this court expounds the doctrine of *res ipsa loquitur* and refers to the previous cases in this court where the subject has been discussed. The rule which is quoted with approval in that case, taken from the case of *Sweeney v. Erving*, 228 U. S. 240, 33 S. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905, is as follows:

"When a thing which causes injury, without fault of the injured person, is

shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care."

It is further made to appear in that case that "the effect of the maxim is evidentiary, and that where it applies negligence, which is the ultimate fact to be established, may be inferred from a particular occurrence or accident." In some cases the inference may be so strong, where no explanation is offered, as not only to justify, but to compel, a finding of negligence; but ordinarily all that is meant by the maxim is that proof of the facts embraced within the statement of the rule affords reasonable evidence from which the jury, or the court, if the case be tried without a jury, may, in the absence of explanation by the defendant, infer that the injury arose from the defendant's want of cares."

The Angerman case was printed in 79 *A. L. R.* 40 and is followed on page 48 by an enlightening annotation on the subject.

Kendall v. Fordham,
(Utah, 1932), 9 P. (2d) 183;

Jenson v. S. H. Kress & Co.,
(Utah, 1935), 49 P. (2d) 958-960.

"Appellant contends that this case is directly controlled by the case of *Quinn v. Utah Gas & Coke Co.*, 42 Utah, 113, 129 P. 362, 43 L. R. A. (N. S.) 328. Respondent contends that the doctrine of *res ipsa loquitur* applies.

We cannot see how this case differs from the Quinn Case. In that case a bottle of ink had spilled, and plaintiff's dress was damaged by ink running upon it. In this case there was a cracked panel in the showcase and the person of plaintiff was injured. In neither case did any one know how the ink was spilled or the glass broken. In both cases the cause of the spilled ink or the broken glass may have been caused by the customer who was damaged or by another customer, or may have been caused by some representative of the company without negligence and unnoticed when it was done, or, in both cases, it may have been caused by the negligence of the company through a servant. The difficulty is that it is in the realm of speculation, and under such circumstances the doctrine of *res ipsa loquitur* cannot apply. It applies where the thing from or by which the apparent negligence speaks is shown to be under the control or the management of the store and the accident is such as, in the ordinary course of things, does not or would not happen if those who had the management used the proper care. Where the way in which the accident happened warrants an inference of negligence then the mere happening speaks for itself. Even then it is only evidence from which the jury may infer negligence. It is not negligence in law. See *Williamson v. Salt Lake & Ogden R. Co.*, 52 Utah 84, 172 P. 680, L. R. A. 1918F, 588. If the circumstances are equally consistent with a cause which would not be attributable to negligence, then the doctrine does not apply. The stage is set for the happening of the accident as the victim walks upon it. If, from the set stage as it was before the accident happened, it can be inferred from the setting itself that there was an omission or commission of the management amounting to negligence, then the thing itself speaks."

Such are the recent Utah cases on the doctrine of *res ipsa loquitur*. In view of what they hold, it is perfectly clear that the District Court's Instruction No. 14 exactly complied with their views. Even though an "inference of negligence" under that instruction arose, yet the positive evidence of the defendants that no knowledge of a defect or negligence in ascertaining it existed, coupled with a complete lack of proof of negligence by the plaintiff—yet the "inference" was overcome and the entire question could be resolved by the jury.

In the light of the Utah cases quoted above and particularly in the light of the facts of the present cause, it is clear that the Utah coal case of *Furkovich v. Bingham Coal and Lumber Co.*, 45 Utah 89; 143 P. 121, cited on page 9 of the appellant's brief, has no application here.

It follows that the appellant's attempt to avail himself here of the doctrine of *res ipsa loquitur* is without merit, and if there were the slightest doubt about the matter it is completely resolved by the District Court's Instruction No. 14.

With great deference to the Court and to opposing counsel, the writer of this brief, after some considerable experience in appellate practice, feels constrained to say that this is the most trivial and inconsequential appeal he has yet encountered. Not only is this so because of the weakness of the appellant's legal argu-

ments but particularly because of the superficiality of the plaintiff's injuries. These facts should not be overlooked: (a) the plaintiff is an able bodied man of 32, six feet tall, weighing 212 pounds who lost no weight or appetite following the accident; (b) the front of the left leg where the wheel struck was only slightly bruised, and required no surgical aid and was not even bandaged; (c) the slight $\frac{1}{2}$ inch cut on the back of the leg was treated only with an antiseptic; (d) the plaintiff saw his doctor only three times; (e) he never lost a single day's work after the accident but continued to drive his truck every day. Small wonder that the jury promptly brought in a verdict of "no cause of action".

The respondents urge this Honorable Court to affirm the judgment.

Respectfully submitted,

GARDNER & LATIMER,

Attorneys for Respondents.