

1949

# Wilbert J. Dawson v. Board of Education of Weber County School District, Guy Elias Carr, and W. Ed Bingham : Brief of Respondent

Utah Supreme Court

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Stewart, Cannon & Hanson; E. F. Baldwin, Jr.; Attorneys for Respondent;

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

**FILED**

WILBERT J. DAWSON,  
*Appellant,*  
vs.

DEC 30 1919

CLERK, SUPREME COURT, UTAH

BOARD OF EDUCATION OF  
WEBER COUNTY SCHOOL  
DISTRICT and GUY ELIAS  
CARR,  
*Defendants,*  
W. ED BINGHAM,  
*Respondent.*

No. 7391

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**RESPONDENT'S BRIEF**

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STEWART, CANNON & HANSON  
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*Attorneys for Respondent*

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*Respondent.*

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RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant's statement of the case is somewhat incomplete as well as inaccurate, and therefore, we prefer to make a further statement.

The action was brought to recover damages for the death of a minor child, Lawrence P. Dawson, age nine

years, a third grade student (Tr. 106), who died as a result of an automobile accident May 7, 1948, about 4:30 P. M. (Tr. 35). The named defendants in the case were W. Ed Bingham, the driver of the school bus on which deceased rode to and from school, and Guy Elias Carr, who was driving his own private automobile, a 1948 Hudson club coupe. Bingham drove north on Highway U 38 (a two-lane highway with gravel shoulders, east of which were grass and brush twelve to fourteen inches high), and stopped the bus on the graveled shoulder on the southeast corner of the intersection of Highway U 38 and 4800 South, an east and west street, and had discharged several children east of the bus on the graveled shoulder.

Deceased, who lived west of the highway, left the other children (Tr. 195), started west across the highway about twelve feet in front of the bus (Tr. 118) being struck by defendant Carr's automobile at a place on the concrete northwest from the left front of the bus (Tr. 29, 43) (See Exhibit "A"). There was some conflict as to whether he was running (Tr. 254). Most of the witnesses described him as walking in a stiff-legged manner, as he often did (Tr. 96, 101, 104, 112, 119). The body came to rest sixty-three feet north of the point of impact on or near the east shoulder, (Tr. 26, 27, 57) Carr's automobile stopping twenty-five to thirty feet beyond that (Tr. 200, 254).

Defendants were sued upon the theory of joint and concurrent negligence (see paragraph five of plaintiff's complaint, Tr. 001).

Contrary to the statements of appellant, the evidence was undisputed that the bus *was stopped within a designated bus stop*, which was posted within the confines of two station signs reading, "School Bus Station". One of these signs was facing north for southbound traffic on the west side of Highway U 38, and the other was facing south (that is, facing northbound traffic) on the east side, each being about one hundred yards from where the bus was stopped (Tr. 38, 188).

Likewise, Mr. Bingham *was not stopped in the lane of traffic*. The paved portion of the highway was eighteen feet (Tr. 20-21) with three feet of asphalt or blacktop on each side, making each traveling lane about ten and a half feet wide. The bus was stopped entirely off the paved portion, the west side of the bus being according to the patrolman's measurements, eight inches east of the east edge of the asphalt (Tr. 21, 22, 37 and 39).

The evidence was therefore uncontradicted that defendant Bingham did not violate the provisions of Chapter 2, paragraph 2-2 (a) and (b) of the State Road Commission providing that:

"The bus shall not pick up or let off students except at regularly designated stops."

and

"The bus shall not be stopped in line of traffic to load or unload pupils."

The only controversy as to the defendant Bingham and only possible claim of negligence as to him was

whether he violated the terms of the following regulation, paragraph 2-2 (c) providing that:

“The driver shall require all pupils to pass behind rather than in front of the bus.”

In this connection, Mr. Bingham testified:

“At this particular corner and many points along my route, I have instructed the children to be very careful crossing the highway, to look both ways on this particular corner, and *I instructed the children to remain to the right hand side of the bus until I pulled away*. Out to the right hand side of the bus and *remain there until I had pulled on down the highway*. I felt that gives them a better opportunity to see the highway both ways.” (Tr. 193-4.)

He repeated these instructions almost every night (Tr. 130, 235, 239).

There was testimony that the children had not previously passed in front of the bus (Tr. 195, 203), but stood clear until the bus pulled away (Tr. 145). Deceased had ridden the bus two years, since September of 1947 (Tr. 101).

There was no particular place within the bus stop area designated to stop the bus (Tr. 188). While Bingham sometimes stopped on the north side of 4800 South, east of the intersection, when he took the alternate route to deliver three children living in the Cozydale area, when these children were not present, he remained on U 38, ordinarily stopping where he did on this occasion (Tr.

186, 187, 227, 234, 238), although he occasionally stopped north of the intersection (Tr. 238). This latter position, however, was less convenient to the children because of the brush and willows along the entire side of the bus (Tr. 37, 46, 143, 216). On the southeast corner, there was wet grass and weeds twelve to fourteen inches high (Tr. 25, 34, 37). To avoid these, the bus was so stopped that the front end extended into the south portion of 4800 South, so that the children coming out of the bus door had a clear place to alight on the gravel just north of the brush (Tr. 36, 46) and there was a little strip of clear space between the east side of the bus and the brush (Tr. 39, 40) through which the children could pass to the rear of the bus, or they could have gone through the weeds and grass (Tr. 139), or waited till the bus pulled away.

As to defendant Carr, the evidence showed that as he, Carr, drove north, he had a *clear view* of the school bus, a large bus yellow in color, with "School Bus" printed on the rear (Tr. 30, 38, 68). He saw the school bus station (Tr. 246-7), knew it was a school bus stop (Tr. 263), and anticipated there would be a bus there (Tr. 247). He expected children from the bus might be crossing the highway or dart out from the bus (Tr. 262). It was undisputed that he did not sound his horn (Tr. 191, 255). There was substantial evidence of speed at twenty-five to thirty miles per hour in a twenty mile zone (Section 57-7-113(1) (Tr. 193). The physical facts confirmed a higher rate of speed, because if he had been going



fourteen to sixteen miles per hour as testified to by him, he could have stopped in thirty feet (Tr. 108-109).

The jury returned a verdict in the amount of \$5,000 against the defendant Carr, and a verdict of no cause of action against the defendant, W. Ed Bingham (Tr. 346).

The judgment against the defendant Carr was not resisted, and the judgment, including costs against said defendant Carr, was paid in full and a satisfaction of judgment duly entered (Tr. 0028). (See also appellant's acknowledgment thereof, page 3 Appellant's Brief, and stipulation filed herein in connection with respondent's motion to dismiss the appeal.)

## QUESTIONS ON APPEAL

The only errors claimed by appellant are those relating to the court's instructions. By our motion to dismiss, we have added a further question for consideration by the court, which if well taken, makes unnecessary passing on the merits.

### *Questions*

We have separated the issues as follows:

I. As to respondent's motion to dismiss, does payment of the judgment *in full* by the defendant Carr extinguish the alleged cause of action against the defendant Bingham?

II. Did the court commit reversible error in its instructions to the jury, or in refusing certain requested instructions of plaintiff?

## I.

ARGUMENT AND AUTHORITIES ON MOTION  
TO DISMISS APPEAL

This court has held that where it appears that any further prosecution of the matter involved in the appeal would be "fictitious and fruitless," the appeal will be dismissed.

*American Cement & Plaster Co. v. Epperson*,  
79 Utah 63, 77 Pac. 2nd 581.

See also:

*Colman v. New York Life*, (Okla.) 44 Pac.  
(2d) 880;  
*Svenska etc. v. Weber*, (Cal.) 51 Pac. (2d) 65;  
*Lane v. Insurance Co.*, (Kans.) 8 Pac. (2d)  
403.

There can be no dispute as to the facts relating to the motion to dismiss. Defendants were charged in the complaint as joint tort feasons, for in paragraph five (Tr. 001) it is alleged:

"That by reason of the joint and concurrent negligent operation of the school bus by the defendant W. Ed Bingham, together with his negligence in permitting said child Lawrence P. Dawson to go around the front of said school bus into and upon said highway, contrary to law and to the rules and regulations of the State of Utah, and the negligent operation of said automobile by the defendant Guy Elias Carr, and as the proximate result thereof, injuries were inflicted upon the said child Lawrence P. Dawson, deceased, of

such a character as to cause and which did cause his death on the 8th day of May, 1948.”

The verdicts against defendant Carr and in favor of defendant Bingham speak for themselves (Tr. 0014-0015), as does also the satisfaction of judgment (Tr. 0028). On the face of the record, the appellant has no right whatever to prosecute this action further, or to maintain any action, against respondent Bingham.

Payment of a judgment by one of two joint defendants operates as a satisfaction and extinguishment of the judgment as to all, regardless of the intention of the parties to the transaction, and even where the judgment is against joint tort feasons. 34 C. J. 689.

In *Eberle v. Sinclair Prairie Oil Co.*, 120 Fed. (2d) 746, 135 A. L. R. 1494, the action was to recover for the death of the plaintiff's intestate, who was killed while in the employ of a pipe line service company, while repairing a gas pipe line owned by the defendant. It appeared that plaintiff had previously brought an action against the deceased's employer, and in that action had executed a contract compromising the claim against such employer upon payment to her of a stipulated sum and releasing such employer from all liability. The settlement agreement contained a provision that the plaintiff was asserting a claim for the death of the intestate against the defendant oil company which was a joint tort feason with the defendant in the case in which the settlement was made, but that such settlement was made in the former case without prejudice to plaintiff's rights

to proceed against the oil company as a joint tortfeasor. The judgment which was entered upon the compromise agreement was paid in full, and the court held that such payment extinguished the plaintiff's rights and cause of action, and that the court had no power to reserve any so-called rights of the plaintiff to prosecute the present suit. The court in its opinion remarked:

“A person injured by a joint tort has a single and indivisible cause of action. He may proceed against the wrongdoers either jointly or severally and may recover a judgment or judgments against all, but he can have but one satisfaction of his single cause of action. Neither may he split his cause of action. The administratrix might have entered into a compromise with McGeorge, dismissed her action against him, released McGeorge or covenanted not to sue McGeorge and reserved her right to sue Sinclair and Gray.

“Instead of following that course, the administratrix elected to enter into the contract compromising and settling her two single causes of action, received the sum stipulated in satisfaction thereof, and submitted the compromise to the court for its approval. The court by its judgment approved the compromise and the settlement of the two causes of action and dismissed the action with prejudice. The judgment had the same effect as though it had been entered in favor of the administratrix for the stipulated amount and had then been satisfied upon the payment of that amount. *Johnstone v. Chapman*, 79 Ore. 674, 156 Pac. 286, 288.

“The effect of the settlement and compromise of the causes of action, the receipt of the sum

stipulated, the judgment approving the compromise of the causes of action and dismissing the action with prejudice was an extinguishment of the two single causes of action. The causes of action having been extinguished, the District Court of Seminole County, Oklahoma, was powerless to reserve the right in the administratrix to prosecute another suit on the same causes of action against Sinclair and Gray.”

In *Cain v. Quannah Light & Ice Co.*, (Okla.) 267 Pac. 641, the court declares:

“In the instant case, plaintiff procured a prior judgment and obtained full satisfaction thereof, which satisfaction operates not only as a release to the Gypsum Company, but *as a complete settlement of the cause of action*. In the cases cited by plaintiff, the claims were not reduced to judgment and settlement and release were made prior to judgment. *There was no settlement of the cause of action.* \* \* \* The plaintiff having no legal right to split her cause of action, the court by its judgment could not legally grant such right.”

In *Vattani v. Domiano*, (N. J.) 153 Atl. 841, the action was for the death of plaintiff’s intestate while riding in an automobile which collided with a railroad train. It appeared that a judgment had been obtained against the railroad company in another action arising out of the same accident and had been satisfied, which judgment had been entered before a jury in open court by consent and stipulation. The judgment contained a provision that satisfaction thereof should be without preju-

dice to the right of the plaintiff to maintain an action against any other joint or several tort feorsors for damages resulting because of the death of plaintiff's intestate. The New Jersey court used this language:

“Where here we have the case where it appears that the parties did not intend that the judgment should be satisfaction, we are met with the conclusion of law that the judgment is in fact a determination that the liability is satisfied. It seems to me, therefore, that the reservation contained in the judgment is nugatory, as it would in fact nullify the judgment itself.”

In *Wetumka v. Cromwell Franklin Oil Co.*, (Okla.) 43 Pac. (2d) 434, the municipality brought a suit against a number of oil and gas companies for pollution of its water supply, and a judgment was entered against some of the defendants for \$65,000.00, but the case was not disposed of as to the appellee, Cromwell Franklin Oil Company. A journal entry, however, provided:

“Plaintiff be, and it hereby is allowed to further prosecute its cause of action against all defendants named in this action, except those named and listed hereinabove, and such right is hereby reserved to said plaintiff.”

The defendants against whom the judgment was rendered satisfied it, and the court held that by such satisfaction, the cause of action was extinguished and the Cromwell Frankin Oil Company was released from its joint liability with the defendants who paid the judgment.

We are not unmindful of Title 47, Utah Code Anno-

tated 1943, relating to joint obligations, and particularly Section 47-0-4, which provides:

“47-0-4. Release of Coobligor—Reservation of Rights.

Subject to the provisions of section 47-0-3, the obligee's release or discharge of one or more of several obligors, or of one or more of joint or of joint and several obligors, shall not discharge coobligors against whom the obligee in writing and as part of the same transaction as the release or discharge expressly reserves his rights; and in the absence of such a reservation of rights shall discharge coobligors only to the extent provided in section 47-0-5.”

However, this statute must be construed with reference to other elements or factors which are not specifically mentioned therein. The fact that the statute is specific that

“Release or discharge of one or more several obligors, or one or more joint or several obligors shall not discharge coobligors against whom the obligee in writing and as part of the same transaction as the release or discharge expressly reserves his rights.”

should not be construed to prevent the full and complete operation of such a release as to all joint tortfeasors, if a plaintiff has been fully compensated for his injury by one of the joint tortfeasors. This court has declared that:

“There can be but one satisfaction for injuries sustained in one wrong.” *Green v. Lang*,  
——— Utah ———, 206 Pac. (2d) 626.



and it quotes with approval *Greenhalch vs Shell Oil Co.*, 78 Fed. (2d) 942.

In the *Greenhalch* case, the Circuit Court of Appeals for the Tenth Circuit comments quite at length upon the Utah statute, refers to its uncertainties and emphasizes that the reservation in a release of a right to proceed against other tort feasons can only operate "if full compensation has not been received," and it interprets Section 47-0-3 to mean that "no cause of action remains if full compensation for the injury is received."

In *American Law Institute Restatement, Torts*, Vol. 4, Sec. 886, it is said:

"The discharge or satisfaction of a judgment against one of several persons, each of whom is liable for a single harm, discharges each of the others from liability therefor."

and in the comment upon this section, it is said:

"This is true where no judgment has been obtained against the other tort feasons, where judgments have been obtained against the other tort feasons, even for the same amount or for larger amounts in separate actions, and where judgments have been obtained against the others in the same action. The rule applies where the tort was the act of one of them, for which the others were liable, where all acted in concert, and where the act of each was merely a contributing factor to the whole. It is immaterial whether the one paying was, with reference to the one who has not paid, primarily or secondarily liable."

In *McTigue v. Levy*, 23 N. Y. S. (2d) 114, it is held



that the receipt of payment by the judgment creditor on a judgment was held to discharge all tort feasons who might be liable to the plaintiff for the same tort, and the effect of the satisfied judgment, operating as a discharge of the others, was not altered by the execution of an instrument which purported to release the wrongdoer against whom plaintiff had obtained satisfaction, but expressly reserved her right to proceed against the other. The New York statute provides:

“The recovery of a judgment without satisfaction is not a bar to the institution of an action against others who are jointly liable,”

which is the law in this State without express enactment, and where the judgment is satisfied, such satisfaction extinguishes the cause of action as to all joint tort feasons, even though the statute contains no such express provision.

Now, the question here is: Has the plaintiff been fully compensated?

In the trial of this cause, the measure of damages recoverable is defined in Instruction 29 (Tr. 008) to which instruction the appellant has taken no exception. If the jury had found against respondent, it would have been controlled in the fixing of damages by said instruction the same as it was controlled in its verdict against Carr. In other words, Carr and Bingham being charged as joint tort feasons whose “joint and concurrent” negligence is alleged to have been the proximate cause of the injuries complained of, it must be assumed that \$5,000.00

was the maximum amount which the jury considered to represent the compensatory damages to which the plaintiff was entitled, and this is true even though the jury found that Bingham was not liable. It, of course, cannot be assumed that under the same instruction as to the measure of damages, the jury would or could hold Bingham for any greater liability than Carr, for the measure of damage is not affected by the quality of the act of either defendant. The rule as to such measure of damage is applicable no matter what the alleged acts of negligence of either or both defendants, and when the plaintiff accepted payment of such compensation, it was in full of his claim and extinguished his cause of action as against both tort feorsors.

The Motion to Dismiss the appeal should be granted.

## II

### BRIEF ON THE MERITS

Appellant assigns as error, the trial court's refusal to give appellant's requested instructions numbered 13, 14, 19, 27, 28, 31, 32 and 33 (Br. pp. 3-6), and that he erred in giving instructions numbered 12, 13, 14 and 15 (Br. pp. 6-7).

#### *Appellant's Requested Instructions Refused*

Requested instruction No. 13 (Appellant's Brief p. 3) (Tr. 003) is erroneous because it would require the jury to find in favor of the plaintiff and against defen-

dant Bingham, merely on the basis of Bingham's negligence, whether or not such negligence was the proximate cause of the injuries to the Dawson boy. Negligence alone is not sufficient upon which to predicate liability. It must be a proximate cause of the injury, and the requested instruction was fatally defective. *Beyerle v. Clift*, (Cal.) Hearing denied by Supreme Court, 209 Pac 1014; *LaRue v. Powell* (Cal.) Hearing denied by Supreme Court, 42 Pac. (2d) 1063.

Furthermore, the court did by its instructions numbered 14 (Tr. 093 and 325) and 21 (Tr. 0001 and 327) instruct the jury in substance as requested by plaintiff. The instructions given were in the particular complained of even more favorable to appellant than requested since the court's instruction No. 14 read:

"You are instructed that it was the duty of the defendant, Ed Bingham, to stop his bus in such a position and at such a place to require the children to pass behind rather than in front of his bus. If you find from the evidence that said defendant did not do so, then you will find that he was negligent."

The court's instruction No. 21 was substantially the same.

Requested instruction No. 14 (App. Brief p. 3; Tr. 034) is erroneous in several particulars. The request reads:

"You are instructed that if you find from the evidence that the defendant, W. Ed Bingham, did

not require the deceased child, Lawrence P. Dawson, to pass behind rather in front of the bus, that said defendant was guilty of misconduct as a matter of law. Upon such a finding by you, you are further instructed that that misconduct on the part of said defendant overcomes any question of contributory negligence on the part of the deceased child, Lawrence P. Dawson, and you will then give no consideration whatever to any question of contributory negligence on the part of said child."

This request is not only an improper application of Section 57-7-177 of the Utah Code, but in effect would make the bus driver absolute insurer of the safety of the children after they were out of his control, away from the bus and irrespective of the independent intervening negligent act of a responsible third party. The term "misconduct" as used by counsel is misleading in that it was never the intention of the Legislature to abolish the rule or principal on contributory negligence as to which in this case the court with proper qualifications as to the duty of a young boy very clearly instructed the jury in its instructions Nos. IX, X, XI, XVI and XXIII (Tr. 091, 0003) and with respect to which appellant has assigned no error.

Hereafter answering the arguments of counsel, we further discuss this requested instruction.

### *Instructions Given by the Court*

As to the instructions given, of which complaint is made, may we say:

Instruction No. 12 (p. 6 App. Brief; Tr. 324, 903) was improper because there was no evidence that respondent stopped his bus in a place not regularly designated as a bus stop, there was a bus stop sign where he stopped, and such had been a stopping place for years before the date on which young Dawson was injured, with approval of the School Board Superintendent (Tr. 227).

Instruction No. 13 (p. 6, App. Brief, Tr. 093, 325) was proper, because there is no evidence that respondent stopped his bus in the line of traffic.

Instruction No. 14 (p. 6 and 7, App. Brief, Tr. 093, 325) while rather unfortunately worded (the duty "to stop his bus in such a position as to require the children to pass behind rather than in front"), such wording was most favorable to appellant based upon appellant's request. The balance of the instruction is certainly free from error.

It is self-evident that instruction No. 15 is correct as a matter of law, because he had a legal right and was authorized to take the route along Highway U. 38, and in taking that route, he stopped at a designated bus stop. Furthermore, the fact that he took such alternate route was not the proximate cause of the boy being run down.

### *Appellant's Argument*

Referring now to appellant's argument, it would seem that counsel is somewhat confused. They contend in effect that Bingham's failure to direct the children, including young Dawson, to go around the rear instead

of the front of the bus was "misconduct"; that "misconduct" "is worse than any grade of negligence and implies wilful wrong, wanton, reckless conduct, or intentional violence," and that contributory negligence is no defense. While they contend that respondent's "misconduct" was *worse than negligence*, they nevertheless argue that such "misconduct" was *negligence per se*.

Appellant's reference to Section 57-7-177 (p. 8 and 12 App. Brief), is misleading and does not quote the entire section which reads:

"57-7-177. Id. Violation of Regulations—Penalty.

Any officer or employee of any school district who violates any of the regulations provided for in the next preceding section or fails to include obligation to comply with said regulations in any contract executed by them on behalf of a school district shall be guilty of misconduct and subject to removal from office of employment. Any person operating a school bus under contract with a school district who fails to comply with any said regulations shall be guilty of breach of contract and such contract shall be cancelled after notice and hearing by the responsible officers of such school district."

By this and the preceding section the Legislature was not undertaking to change the law of negligence and contributory negligence, nor was it undertaking to define under what conditions a third party could recover damages from the driver, but was obviously prescribing a

rule of discipline in the form of removal from office having application not only to the driver of a bus, but with respect to any of the numerous employees of the school district and having respect to violation of any of the numerous regulations, whether relating to the operation of a bus or otherwise. By the terms of the last sentence of the section quoted, the driver is given an opportunity for notice and hearing before the responsible officers of the school district before being found guilty of breach of his contract or misconduct.

“Misconduct” does not mean what counsel says it means. “Negligence” is in a sense a form of “misconduct” and either may vary in degree as being slight, ordinary or gross, depending upon the nature of the act. What term is used does not change the nature of the conduct. Funk and Wagnall’s dictionary defines the word “misconduct” as “Improper conduct; bad behavior. Mismanagement and improper act. Instance of misbehavior: Usually in the plural.” Of course, misconduct might be casual or flagrant. It might be mere indifference or it might be intentional wrongdoing; but no reasonable person would contend that Bingham, who, for eighteen years, had been entrusted with the transportation of children, would wilfully, wantonly and purposely fail to instruct them to exercise proper care for their safety, and the evidence shows that it was his habit and practice to do so. (Tr. 194.) Any misconduct in failing to give proper instructions, after notice and a hearing, subjected him to “removal from office,” but



such failure of duty on the particular day in question, if he did so fail, cannot be regarded as a wanton or wilful act, which contributed to young Dawson's death, especially when the boy and the group which rode the bus with him were repeatedly advised to remain on the right of the bus after alighting therefrom until the bus had moved away, which instruction was an even more effective warning and direction than to instruct them to pass around the rear, rather than the front of the bus, for if they did not move away after alighting until the bus had gone, their vision would be quite clear as to traffic in either direction.

As before stated, while counsel seemed to contend that Bingham's alleged "misconduct" in failing to instruct the children to go around the rear rather than the front of the bus, was an act "far beyond negligence in scope," (Br. p. 12) they do not say just what "misconduct" is that "negligence" is *not*, as a basis for liability, and they cite *Peterson v. Standard Oil Co.*, (Ore.) 106 Pac. 337, to the effect that the violation of a statute or municipal ordinance enacted for public safety is negligence per se. Counsel might have cited authority nearer home, for this Court has held that an *affirmative act* in violation of some ordinances or statutes is *negligence per se*. (*Smith v. Mine & Smelter Supply*, 32 Utah 21, 88 Pac. 687; *Jensen v. Utah Power & Light Co.*, 42 Utah 415, 132 Pac. 8. However, we have found no case which goes so far as to make "misconduct," that is the mere omission of a bus driver to conform to a regulation that



he "require all pupils to pass behind rather than in front of the bus," negligence per se or negligence at all, when it appears from the evidence that he customarily and repeatedly gave the group of children, including young Dawson, an instruction, far more effective for their safety. The regulation does not specify when or how often the requirement must be made, and if respondent went beyond this requirement often enough so that the children should have come customarily to avoid going in front of the bus (Tr. 195), how can it be said that it was a breach of duty by Bingham that he did not happen, on one particular day, technically to instruct or require them not to pass in front of the bus. Surely the word "require" does not obligate the driver to use physical force to compel the children to pass around the rear of the bus especially after they are beyond his reach and control. The objective of the regulation is the safety of the children, and what respondent had done by way of instructions and what the children understood to be his requirement that they stand by until the bus had moved away, more than complied with the regulation. He acted as any extra careful intelligent man would ordinarily act. But if respondent's omission to "require" that the children pass around the rear of the bus (whatever that may mean) was negligence (which we deny), such negligence would not be sufficient on which to predicate liability unless it was a proximate cause of the injury, and a person charged with such negligence could, of course, interpose the defense of contributory negligence or the defense of intervening act or negligence of a re-

sponsible third party. On both the question of proximate cause and contributor negligence, the jury was properly instructed and they found in favor of respondent.

Counsel cited 38 Am. Jur. page 854, 855 that "contributory negligence is not a defence to an action based upon wilful or wanton misconduct or intentional violence." (Br. p. 15). Of course, that legal principle has no application to the facts in this case, because there is not a scintilla of proof that Bingham was guilty of any wilful or wanton misconduct, and counsel do not so allege in their complaint. They simply allege that Bingham "carelessly and negligently allowed and permitted said minor, Lawrence P. Dawson, deceased, to proceed around the front end of said bus into said highway U 38 in a westerly direction, as a result of which the deceased child, Lawrence P. Dawson, was struck etc." (Tr. 001). This is nothing more than the usual allegation of negligence, and it does not imply any wanton or wilful act, and of course, contributory negligence may always be set up as a defence against any kind of negligence, even if this were negligence per se, which we think it is not.

## CONCLUSION

Finally, it appears from the record that defendants Carr and Bingham were sued as joint tort feasors; the jury was properly instructed on proximate cause, on contributory negligence, and on the measure of damages. The jury found that for the wrong done, Carr alone was negligent, and that his negligence was the proximate

cause of the injury, and that \$5,000 was the full amount of compensation to which the paintiff was entitled according to the standard of computation fixed by the court. The amount so fixed was paid and accepted by the plaintiff, and Carr was released. Such payment and releace extinguished plaintiff's cause of action, and he cannot take his full compensation and attempt to have it duplicated. He cannot split his cause of action. If he had chosen to reject the jury's award, he might then have come to this Court on appeal from the judgment, and he might then have assigned error with respect to the basis of each verdict, but having but one cause of action and having accepted the awarded compensation for the alleged wrong and compensated in full he cannot now pursue respondent to recover again. We invite attention to the authorities submitted on the motion to dismiss the appeal in support of our contention. In any event, the judgment should be affirmed.

Respectfully submitted.

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