

1951

## O. K. Clay v. Stephen L. Dunford et al : Reply Brief

Utah Supreme Court

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Joe P. Bosone; A. H. Hougaard; Attorneys for Plaintiff and Appellant;

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### Recommended Citation

Reply Brief, *Clay v. Dunford*, No. 7705 (Utah Supreme Court, 1951).  
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# In the Supreme Court of the State of Utah

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O. K. CLAY, Administrator of the  
Estate of ARNOLD KARTCHNER,  
also known as ARNOLD G. KART-  
CHNER, also known as ARNOLD  
GRANT KARTCHNER,

*Plaintiff and Appellant,*

vs.

STEPHEN L. DUNFORD, PAUL H.  
STEVENS, BURNS L. DUNFORD  
and L. CLAYTON DUNFORD, do-  
ing business as THE DUNFORD  
BREAD COMPANY,

*Defendants and Respondents.*

Case No. 7705

**FILED BRIEF**

OCT 16 1951

Clerk, Supreme Court, Utah

JOE P. BOSONE

A. H. HOUGAARD

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## REPLY BRIEF

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An examination of the authorities cited by respondent reflect substantially those cases where a pedestrian steps suddenly into a busy highway without adequate observation as to the conditions of traffic. This theory seems to be reflected in most of the cases cited in respondents' brief. The theory

is clearly stated in the case of DANDO vs. BROBST (Respondents' Brief, Page 31) where it is said:

"The accident occurred about one o'clock in the afternoon of a dry day, and it is not claimed that plaintiff's vision was in any way obscured. *Under these circumstances, plaintiff must inevitably have seen the car if she had looked, and if she saw nothing she could not have been looking.*"

"The duty to look rests at all times upon everyone in the use of streets \* \* \* (citations omitted) \* \* \* and when one steps into a busy street and is immediately struck by a passing vehicle which he would have seen had he looked, he is barred by his own negligence \* \* \* (citations omitted).

It is apparent that the question which divides counsel in their respective views is that appellant contends that the deceased Kartchner does not have the same duty to look for approaching traffic as the pedestrian who moves from the curb into a busy highway. Thirteenth South is not a busy highway in the sense of many highways where traffic is heavy. Plaintiff's evidence shows that there was very little traffic at the time of the accident. It is a street where automobiles are parked on each side of the highway beyond the traveled portion of the road. A reference to Page 4 of appellants' brief will give the distances between the traveled portion of the highway and the south sidewalk. The hard surfaced portion of the highway is approximately the north 40 feet in width and the distance from the north edge of the south sidewalk to the south edge of the traveled portion of the highway is eighteen feet. The deceased had a right to assume that when he was parked in this 18 foot area almost against the north

edge of the south sidewalk that he was in a position of safety insofar as alighting from his automobile. At all events, it was not negligent for him to park his automobile where he did park it and it was not negligent for him to leave his automobile from the left hand or north side. The only danger to the deceased would be if some motor vehicle should leave the main traveled part of the highway and come over into the parking area. The deceased ought not to be charged with negligence because he failed to see an automobile which left the main traveled portion of the highway, came into the parking area, and struck the deceased when he was alighting from the station wagon approximately one foot north of the left side. The respondent takes the position that the duty of the deceased man was as great in leaving his automobile as if the deceased when leaving it was immediately stepping into the line of motor vehicle traffic. We submit that such a duty of care ought not to be cast upon one who leaves his automobile when it is parked a substantial distance away from the portion of the highway and under circumstances where the driver could not reasonably anticipate that a motor vehicle would leave the traveled portion of the highway and move into an area of safety, and it was not the deceased's duty to anticipate the negligence of the defendant's truck driver.

We invite the court's attention to two additional cases, *KETCHUM v. PATTEE*, (Cal.) 98 Pac. 2(d), 1051, and *STRICKLEN v. ROSEMEYER* (Cal.), 142 Pac. 2d 953.

The Ketchum case is similar in its facts to the case at bar. The plaintiff in that case ran out of gas while driving his automobile on the highway. He testified that he parked his auto-

mobile in a position on the west shoulder of the highway with the edge of the left fenders and running board about four inches west of the west lane of the pavement at which point the traffic was light. The pavement was flanked on each side by shoulders of oiled macadam material with a dirt shoulder adjoining. He stepped out of his car to ascertain if he was out of gas. He opened the left front door and started to back out, and while his left foot was on the running board and his right foot on the floor board was struck by an on-coming truck. The Supreme Court in passing upon the question of plaintiff's contributory negligence used the following language:

"Appellants next contend that plaintiff was guilty of contributory negligence because he left a place of comparative safety and entered a place of peril when he stepped out of the left door of his automobile without taking precaution for his safety, and cite numerous cases to sustain this point. However, most of these are cases involving city street collisions between automobiles and pedestrians in which the plaintiffs actually walked or ran in front of oncoming vehicles without first looking. The case at bar presents a different factual situation. While there is conflicting proof, it is this court's duty to view the evidence 'in the light most favorable to the plaintiffs, and to see if there is any substantial evidence which would take the case to the jury on the question of contributory negligence.' *Rivera v. Hasenjaeger*, 29 Cal. App. 2d 431, 432, 85 P. 2d 167. The jury may have believed from the evidence that plaintiff was not negligent in stopping his automobile on the shoulder of the highway, and that he was not yet out of the car when the collision occurred, but was partly in the car and partly on the running board. There are authorities which hold that it is not negligence per se to ride

on a running board. *Strong v. Olsen*, 74 Cal. App. 518, 519, 241 P. 107; *Yates v. J. H. Krumlinde & Co.*, 22 Cal. App. 2d 387, 391, 71 P. 2d 298. Again, the jury may have believed from the photograph in evidence showing the bent brace on the front of the truck body, which is in some distance from the right front corner of the truck bed, that the truck was traveling exceedingly close to the parked car and that a reasonable person, situated as plaintiff was, would not have anticipated that any vehicle would pass close enough to collide with him under the circumstances, in view of the proof to the effect that there was no north-bound traffic and that defendant had approximately 30 feet of paved highway and an additional 7 feet of oiled shoulder east of plaintiff's parked car on which to pass. Under the circumstances existing in this case the issue of whether or not plaintiff was negligent in stopping his car where he did stop it, or in starting to alight from it after it was parked, we think, was an issue of fact on which reasonable men might differ."

The principle of law for which the appellant contends, we think is well stated in the *Stricklen* case. In that case the plaintiff parked his automobile near the curb in front of his home with the left side of the vehicle facing the street. While the car was in this position, he opened the left front door, put his feet on the running board, and with his head and shoulders protruding, looked to the rear and saw a passenger bus approaching which was operated by defendants. At that time the bus was only 12 to 20 feet to the rear of plaintiff's car and traveling about 15 miles per hour. In this situation the plaintiff threw the door of his car farther open and prepared to alight. The rear door of the bus had been left open while the driver was collecting a fare and the door of the bus struck the door of plaintiff's car, injuring the plaintiff.



The court gave an instruction that where a person has a choice of two ways of performing an act, one of which is safe and the other of which *he knows or in the exercise of reasonable care should know* is subject to danger, and that when such person chooses the dangerous way of performing the act and as a direct proximate result thereof is injured, such person is guilty of contributory negligence and is not entitled to recover damages from another on account of his injuries so received.

The court further instructed the jury:

"The plaintiff, Charles Stricklen, is not to be charged with negligence merely because he alighted by the northerly door of his automobile. I instruct you that the standard of care required of the plaintiff in this action is ordinary care as defined in these instructions. It is the care an ordinary person of ordinary prudence would use under all of the circumstances of the situation, and if you find that the plaintiff did use ordinary care in alighting from his automobile, I instruct you that the plaintiff had a right to alight therefrom by the northerly door."

The court in construing these instructions says that the first instruction above set forth was but a generalization of a well settled rule, and that its application to the facts of the case was carefully tied in by the admonition that the use of the left front door was not in itself negligence but that the plaintiff "had a right to alight therefrom" and could be charged with negligence by reason of the act *only* if the jury found that he had not used "ordinary care as defined in these instructions."

The case at bar is much stronger in its application to the foregoing rule than the Stricklen case because in the Stricklen case it appeared from the evidence that the plaintiff *did* know the proximity of the bus to his automobile when he alighted therefrom and the instruction itself places the application of the safe course rule to situations where the person against whom the rule is sought to be enforced knew of the danger or in the exercise of reasonable care should have known of the danger.

The facts, circumstances, and legal consequences which are indicated in the Savas case (Appellants' Brief, Page 20-21) seem reasonably applicable to the case at bar. The deceased Kartchner, as in the Savas case, was in a position in the parking area where he had a right to be and should have been; at said time all the remainder of the road lying north of where the deceased parked and left his car was open to the defendants and if the driver of defendants' truck had looked ahead as was his duty to do, there was nothing to prevent his seeing the deceased and his automobile in time to avoid the collision, and it was, as said in the Savas case, his duty to so look ahead in the exercise of reasonable care. The law presumes under the circumstances in this case that the deceased was in the exercise of due care, and the burden was on the defendants to rebut this presumption.

Again the language in the Reagan case (Appellants' Brief, page 21-22) also seems clearly applicable in the facts to the case at bar. There the court said that if there was a plainly visible obstruction in the street, a person taking position on or immediately in front of it, would be in a position of

safety and might be relieved from the duty of observing traffic as he would be if he remained on the sidewalk. The standing automobile was a clearly visible obstruction in the course of the on-coming truck.

Respectfully submitted,

JOE P. BOSONE

A. H. HOUGAARD